DOCKET

No. 07-562

Title: Altria Group, Inc., et al., Petitioners

v.

Stephanie Good, et al.

Docketed: October 29, 2007

Lower Ct: United States Court of Appeals for the First Circuit

Case Nos.: (06-1965)

Decision Date: August 31, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 26 2007	Petition for a writ of certiorari filed. (Response due November 28, 2007)
Nov 16 2007	Order extending time to file response to petition to and including December 28, 2007.
Nov 20 2007	Consent to the filing of amicus briefs in support of either party or of neither party, received from counsel for the petitioners.
Nov 26 2007	Consent to the filing of amicus briefs in support of either party,or neither party, received from counsel for respondents.
Nov 28 2007	Brief amicus curiae of R.J. Reynolds Tobacco Company filed.
Nov 28 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Dec 28 2007	Brief of respondents Stephanie Good, et al. in opposition filed. (Distributed).
Jan 2 2008	DISTRIBUTED for Conference of January 18, 2008.
Jan 2 2008	Reply of petitioners Philip Morris USA Inc., and Altria Group, Inc. filed. (Distributed)
Jan 18 2008	Petition GRANTED. The brief of petitioners is to be filed on or before Monday, February 25, 2008. The brief of respondents is to be filed on or before Monday, March 24, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 12 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including March 31, 2008.
Mar 3 2008	The time within which to file respondents' brief on the merits is extended to and including June 11, 2008.
Mar 21 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the petitioners.
Mar 25 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the respondents.
Mar 31 2008	Joint appendix filed. (3 volumes.) Statement of costs received.
Mar 31 2008	Brief of petitioners Altria Group, Inc., et al. filed.
Apr 7 2008	Brief amici curiae of Former Commissioners and Senior Staff of the

	Federal Trade Commission filed.
Apr 7 2008	Letter proposing a lodging consisting of various documents received from counsel for amici FTC Former Commissioners and Senior Staff.
Apr 7 2008	Brief amicus curiae of Washington Legal Foundation filed.
Apr 7 2008	Brief amicus curiae of National Association of Manufacturers filed.
Apr 7 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Apr 7 2008	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Jun 9 2008	SET OR ARGUMENT ON Monday, October 6, 2008.
Jun 11 2008	Brief of respondents Stephanie Good, Lori A. Spellman, and Allain L. Thibodeau filed.
Jun 17 2008	Brief amici curiae of Tobacco Control Legal Consortium, et al. filed.
Jun 18 2008	Application (07A1009) of petitioners for an extension of time within which to file petitioners' reply brief on the merits, submitted to Justice Souter.
Jun 18 2008	Brief amicus curiae of United States filed.
Jun 18 2008	Brief amici curiae of American Medical Association, et al. filed.
Jun 18 2008	Brief amici curiae of Allan M Brandt, et al. filed.
Jun 18 2008	Brief amici curiae of Maine, et al. filed.
Jun 18 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 18 2008	Brief amicus curiae of Constitutional and Administrative Law Scholars filed.
Jun 18 2008	Brief amici curiae of Maryland Consumer Rights Coalition, et al. filed.
Jun 18 2008	Brief amici curiae of Former Commissioners of the Federal Trade Commission filed.
Jun 23 2008	Application (07A1009) for an extension of time within which to file petitioners' reply brief on the merits extended to and including August 11, 2008 by Justice Souter
Jul 3 2008	CIRCULATED
Jul 8 2008	Letter from the Acting Solicitor General received and distributed.
Aug 5 2008	Record received from the U.S.C.A. for the First Circuit. (1 box)
Aug 7 2008	Record received from th U.S.D.C. for the District of Maine. (1 box)
Aug 11 2008	Reply of petitioners Altria Group, Inc., et al. filed. (Distributed)
Aug 18 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 6 2008	Argued. For petitioners: Theodore B. Olson, Washington, D.C. For respondents: David C. Frederick, Washington, D.C.; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
07-562 OCT 26 2007
OFFICE OF THE CLERK

(1)

No.

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To ensure that interstate commerce is "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations," Congress has precluded the States from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes," and has authorized the Federal Trade Commission to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. §§ 1331, 1334, 1336. Based on studies suggesting that cigarettes with comparatively lower tar and nicotine yields may present fewer health risks, the FTC requires tobacco companies to disclose those yields as measured using an FTC-mandated test, and has authorized tobacco companies to advertise cigarettes using "descriptors," such as "light," as shorthand references to the numerical test results. Respondents in this case contend that such descriptors are misleading, in violation of a state deceptive trade practices statute.

The question presented is whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Lori A. Spellman and Allain L. Thibodeau were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Altria Group, Inc., is the parent company of Philip Morris USA Inc. and that no other publicly held company owns 10% or more of its stock. Altria Group, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc. (PMUSA) and Altria Group, Inc. (Altria) respectfully submit this petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-62a) is not yet published but is electronically reported at 2007 WL 2460039. The opinion of the district court (App., *infra*, 63a-106a) is published at 436 F. Supp. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, provides in relevant part:

§ 1334. Preemption

. . . .

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

---

[1] Altria is a holding company that is not subject to personal jurisdiction in Maine, where respondents filed this suit. *See* App., *infra*, 2a n.1, 65a n.4.

STATEMENT

Respondents, on behalf of a putative class of cigarette purchasers, allege that PMUSA violated a state-law prohibition on deceptive trade practices by using tar and nicotine "descriptors" in marketing cigarettes. PMUSA uses terms such as "light" to describe certain cigarette brands that have lower yields of tar and nicotine than other brands when measured using a standardized government test.

On summary judgment, the district court ruled that respondents' state-law challenges to PMUSA's use of tar and nicotine descriptors in its advertising are expressly preempted by the Federal Cigarette Labeling and Advertising Act (Labeling Act), which precludes the States from imposing requirements or prohibitions with respect to cigarette advertising that are "based on smoking and health." 15 U.S.C. § 1334(b). The court of appeals reversed, concluding that respondents' claims are neither expressly nor impliedly preempted. In so doing, the First Circuit explicitly "disagree[d]" with *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), which held that the Labeling Act preempts substantively identical state-law fraud claims challenging the same statements. App., *infra*, 35a.

A. Statutory and Regulatory Background

For decades, the Federal Trade Commission (FTC) has encouraged smokers to switch to cigarettes with lower tar and nicotine yields, based on studies showing that such cigarettes may present fewer health risks than cigarettes with comparatively higher yields. To accomplish this federal objective, the government has *required* tobacco companies to disclose tar and nicotine yields measured by a government-mandated methodology and has *author-*

ized them to use descriptors, such as "light" or "lower tar and nicotine," as shorthand references to those numerical test results. This FTC policy, which is based on smoking and health, is one component of the uniform federal scheme of cigarette advertising and promotion policed by the FTC pursuant to congressional directive.

1. In 1964, the Surgeon General issued a report that concluded that smoking causes lung cancer. Congress responded the following year by enacting the Labeling Act, which "establish[ed] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The Labeling Act mandated that all cigarette packages carry a prominent warning label so that "the public may be adequately informed about any adverse health effects of cigarette smoking." *Ibid.* As amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, the Labeling Act's preemption provision precludes States from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes labeled in conformity with the statute's requirements. 15 U.S.C. § 1334(b). Congress enacted the preemption provision to ensure that "commerce and the national economy" were "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.* § 1331.

In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that certain state-law claims against tobacco companies are preempted by the amended version of the Labeling Act. A majority of the *Cipollone* Court agreed that common-law tort claims constitute "requirement[s] or prohibition[s]"

within the meaning of the statute. 505 U.S. at 521 (plurality opinion); *see also id.* at 548 (opinion of Scalia, J.). Although three Justices dissented from this conclusion (*id.* at 543 (opinion of Blackmun, J.)), it has since been reaffirmed by this Court. *See Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

The *Cipollone* plaintiff had "allege[d] two theories of fraudulent misrepresentation." 505 U.S. at 527 (plurality opinion). As described by the district court, one theory "allege[d] that respondents had willfully, 'through their advertising, attempted to neutralize the [federally mandated] warnin[g]' labels"; the other theory alleged "'false representation of a material fact.'" *Id.* at 510, 528 (alterations in original). The six Justices who agreed that the Labeling Act preempts common-law tort claims could not reach agreement as to *which* of those two fraud claims were preempted. *See Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 547 (2001) (acknowledging this "debate[ ]").

A four-Justice plurality endorsed a claim-by-claim preemption analysis that inquires "in each case . . . whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" 505 U.S. at 523-24 (quoting 15 U.S.C. § 1334(b) (first alteration added)). The plurality concluded that the plaintiff's "warning neutralization" fraud claim was preempted because "[s]uch a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," and thus is "based on smoking and health" within the meaning of the Labeling Act. *Id.* at 527. In contrast, the plurality

concluded that fraudulent misrepresentation "claims based on allegedly false statements of material fact made in advertisements" for cigarettes are not preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528-29. According to the plurality, "state-law proscriptions on intentional fraud rely on a single, uniform standard: falsity." *Id.* at 529.

Justice Scalia, joined by Justice Thomas, concluded that the test for determining whether a claim was "based on smoking and health" was one of "proximate application," *i.e.*, whether the claim "impose[d] an obligation in this case because of the effect of smoking upon health." 505 U.S. at 554. Applying this broader standard, these Justices would have held both of the *Cipollone* plaintiff's fraud claims to be preempted. *Id.* at 544, 554.

2. "[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising," the Labeling Act "vested that authority in the" FTC. *Reilly*, 533 U.S. at 548; *see also* 15 U.S.C. § 1336 (expressly preserving the FTC's authority to police deceptive cigarette advertising). Section 5 of the Federal Trade Commission Act (FTCA) authorizes the FTC to prevent unfair or deceptive trade practices (15 U.S.C. § 45(a)(1)), and the FTC has repeatedly brought that regulatory authority to bear on the tobacco industry, particularly with regard to tobacco companies' advertising and promotional statements about the tar and nicotine yields of their cigarettes. In so doing, the FTC has attempted to encourage smokers to switch from cigarettes with high tar and nicotine yields to brands with comparatively lower yields by providing standardized tar and nicotine information about different brands.

The FTC requires tobacco companies to disclose cigarettes' tar and nicotine yields, as measured by a government-mandated test known as the "FTC Method," in their print advertising. C.A. App. 218-20, ¶¶ 98-101; *see also In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). The FTC has also authorized tobacco companies to use descriptors—such as "light" and "lowered tar and nicotine"—in advertising and promoting their cigarettes. *See* C.A. App. 250 ¶ 162 (FTC policy stating that it "would not challenge statements or representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the" FTC). The descriptors provide a shorthand means of informing consumers that certain brands yield less tar and nicotine than other brands, as measured under the FTC Method.

B. Proceedings Below

PMUSA introduced Marlboro Lights in 1971 and Cambridge Lights in 1986, and marketed its Marlboro Lights as having "lowered tar and nicotine." The packaging of both brands has always borne the Labeling Act-mandated health warning labels, and their print advertising has always included a legend required by the FTC disclosing tar and nicotine yields under the FTC Method.

Respondents filed this putative class action under the Maine Unfair Trade Practices Act, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. tit. 5, § 207. They allege that PMUSA deceived consumers by using the descriptors "light" and "lowered tar and nicotine" in its marketing of Marlboro Lights

and Cambridge Lights. App., *infra*, 4a. Respondents did not dispute that these brands have lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes as measured using the FTC Method. Compl. ¶ 23. They nevertheless alleged that the use of these descriptors is deceptive because smokers may compensate for the lower tar and nicotine yields by taking deeper puffs, holding the smoke in their lungs longer, or smoking more cigarettes, and therefore may not actually receive lower amounts of tar and nicotine than smokers of regular cigarettes. App., *infra*, 4a. Respondents alleged that PMUSA "intentionally marketed" Marlboro Lights and Cambridge Lights "in this manner with the intention of communicating to consumers that [these brands] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes." Compl. ¶¶ 15, 17.

The district court held that respondents' claims were expressly preempted by the Labeling Act and granted summary judgment to PMUSA. App., *infra*, 106a. Acknowledging that "[t]his precise question, express pre-emption of claims of deception regarding 'lights' cigarettes, has generated controversy across this country," the court analyzed respondents' allegations under the *Cipollone* plurality's claim-by-claim preemption framework. *Id.* at 89a. The court concluded that respondents had "made a valiant attempt to tailor their claims to fit within the *Cipollone* exception for violations of the duty not to deceive" but that, ultimately, they had "failed" because "the gist of [respondents'] cause of action runs to what [PMUSA] actually said about Lights and what [respondents] claim [it] should have said." *Id.* at 101a, 103a. "To respond to [respondents'] concerns," the court continued, PMUSA "would have to tell the pub-

lic that the FTC Method test, though accurate in the laboratory, was inaccurate in real life." *Id.* at 104a-05a. Such claims, the district court held, are expressly preempted by the Labeling Act. *Id.* at 106a.

The First Circuit reversed. The court of appeals held that respondents' allegations escaped the Labeling Act's preemptive reach because "the substance of [their] claim[s] is that [PMUSA] has falsely represented certain of its brands as 'light' or having 'lower tar and nicotine.'" App., *infra*, 16a. The First Circuit therefore concluded that respondents' allegations were not "based on smoking and health" within the meaning of the Labeling Act, but were instead based on the "duty not to deceive." In so holding, the First Circuit expressly "disagree[d]" with the Fifth Circuit's conclusion in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), "that the [Labeling Act] preempts fraud theories arising out of 'light' and 'lower tar and nicotine' because those statements"—which are substantiated by testing under the FTC Method—"are not 'inherently deceptive or untrue,'" and thus give rise to preempted claims "based on smoking and health." App., *infra*, 35a. In concluding that respondents' claims were not expressly preempted, the First Circuit directly "acknowledge[d] that the Fifth Circuit came to the opposite conclusion in *Brown*." *Id.* at 31a.

The First Circuit further rejected PMUSA's argument that respondents' state-law claims were impliedly preempted because they conflicted with the FTC's longstanding policy of encouraging consumers to switch to cigarettes with comparatively lower tar and nicotine yields by requiring tobacco companies to disseminate standardized tar and nicotine information. App., *infra*, 55a. The First Circuit based its conclusion on the absence of a formal FTC rule regu-

lating the use of tar and nicotine descriptors (*id.* at 46a), and on its inability to identify a "coherent federal policy on low-tar claims." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The Court should grant review to resolve the profoundly important—and sharply disputed—question whether state-law challenges to tar and nicotine descriptors in cigarette advertising are preempted by federal law. A definitive answer to this question will significantly impact the outcome of dozens of pending lawsuits in which the plaintiffs are alleging billions of dollars in potential liability. Today, a defendant sued in the Fifth Circuit has a preemption defense unavailable to a defendant sued in the First Circuit; conversely, a plaintiff who resides in the Fifth Circuit has fewer avenues of potential redress than a plaintiff who resides in the First Circuit. These divergent results obliterate the Labeling Act's objective of establishing national uniformity in the regulation of cigarette advertising and promotion. 15 U.S.C. § 1331. This case, which arises from a factual record that, for purposes of summary judgment, is undisputed, and in which both express and implied preemption were argued to and decided by the court of appeals, presents the ideal vehicle for resolving the intractable conflict of authority that has developed on this significant question of federal law.

I. THE LOWER COURTS HAVE REACHED CONFLICTING DECISIONS ON WHETHER CLAIMS LIKE THESE ARE PREEMPTED BY FEDERAL LAW

In erroneously holding that the Labeling Act does not expressly preempt respondents' claims, the First Circuit explicitly rejected the Fifth Circuit's holding in *Brown* v. *Brown & Williamson Tobacco*

Corp., 479 F.3d 383 (5th Cir. 2007), that state-law consumer fraud claims challenging the use of tar and nicotine descriptors are preempted by the Labeling Act. That clear circuit split exacerbates an existing conflict of lower-court decisions on the preemptive effect of the Labeling Act. The First Circuit's conclusion also cannot be reconciled with the express preemption framework established by the plurality in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), or with the implied preemption analysis of cases such as *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000).

A. The Lower Courts Are Divided On The Scope Of Express Preemption

The First Circuit's erroneous holding that the Labeling Act does not preempt state-law fraud claims challenging the use of tar and nicotine descriptors in cigarette marketing creates a direct conflict with the Fifth Circuit's contrary conclusion in *Brown*, as the First Circuit itself acknowledged, and deepens an existing decisional split.

The state-law challenges to descriptors in *Brown* were substantively identical to those in this case. The plaintiffs in *Brown* alleged that "they were deceived by [PMUSA's] marketing into believing that smokers of light cigarettes consume lower tar and nicotine" than smokers of regular cigarettes. 479 F.3d at 386. Like the plaintiffs in *Brown*, respondents in this case allege that PMUSA "has falsely represented certain of its brands as 'light' or having 'lower tar and nicotine' although they deliver the same quantities of these ingredients to a smoker as do" regular cigarettes. App., *infra*, 16a.

Although the underlying claims were the same, the First and Fifth Circuits reached diametrically opposite results on preemption: The *Brown* court

correctly held that the claims fell within the Labeling Act's express preemption provision, while the court below erroneously held that the claims were not preempted. This conflict creates precisely the "diverse, nonuniform, and confusing" regulatory regime that Congress sought to eliminate in enacting the Labeling Act. 15 U.S.C. § 1331. Review is warranted to secure uniformity of decision and conformity with the congressional design.

1. The flatly inconsistent results reached by the First and Fifth Circuits reflect the lower courts' divergent understandings of the preemption framework established by the *Cipollone* plurality. Under that framework, state-law claims are expressly preempted by the Labeling Act if they "require a showing that [the defendant's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," or are "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." 505 U.S. at 524, 527. Such claims, the *Cipollone* plurality explained, seek to impose state-law advertising and promotional requirements "based on smoking and health" within the meaning of the Labeling Act.

The plaintiff in *Cipollone* had pleaded two separate theories of fraud. One alleged that the defendants had deliberately created "false impression[s]" that cigarettes are safe by using "statements" or imagery in marketing that misleadingly "downplay[ed] the dangers of smoking" and thus "minimize[d]" or otherwise "neutralized the effect of [the] federally mandated warning labels." 505 U.S. at 527-28 (plurality opinion). The plurality determined that the Labeling Act preempted this claim because it sought to impose state-law advertising and promotional re-

quirements "based on smoking and health." *Id.* at 528. In contrast, the plurality concluded that the plaintiff's other fraud claim—which was based on "'false representation of a material fact'"—was not preempted by the Labeling Act because it was based on the "duty not to deceive." *Ibid.*

The *Cipollone* plurality explained that it is inherent "falsity" that distinguishes state-law requirements based on the "duty not to deceive" from state-law requirements "based on smoking and health." 505 U.S. at 529. The plurality reasoned that this distinction between inherently false statements and statements that might create a false impression "is wholly consistent with the" Labeling Act's goal of establishing regulatory uniformity because, "[u]nlike state-law obligations concerning the warning necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Ibid.*[2]

The Fifth Circuit in *Brown* recognized and applied the *Cipollone* plurality's distinction between these two types of fraud claims. As the *Brown* court explained, "claims based on 'fraud by intentional

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[2] The distinction between inherently false statements and statements that are false only by implication is essentially the same distinction that the Court uses to determine the level of First Amendment protection afforded to commercial speech. *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). For example, "inherently misleading" advertising "may be prohibited entirely," while "potentially misleading information" warrants "not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *In re R.M.J.*, 455 U.S. 191, 203 (1982). If this were a commercial speech case, tar and nicotine descriptors (as they are characterized by respondents) would clearly fall into the second category.

misstatement' are not pre-empted because Congress did not intend to 'insulate' manufacturers from state liability for affirmative lies." 479 F.3d at 391-92 (citation omitted). On the other hand, the court recognized that "the Labeling Act pre-empts . . . 'implied misrepresentation' claims, which arise from statements or imagery in marketing that misleadingly downplay the dangers of smoking, and thus minimize or otherwise neutralize the effect of the federal mandated safety warnings." *Id.* at 392 (citation omitted).

Applying this framework to claims like respondents', the Fifth Circuit recognized that "the use of FTC-approved descriptors cannot constitute fraud" because "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement"—the FTC Method. *Brown*, 479 F.3d at 392. The Fifth Circuit explained that, because PMUSA's use of descriptors was not inherently false, it could not support a misrepresentation claim based on the "duty not to deceive" under the framework established by the *Cipollone* plurality. *Ibid.*

The First Circuit, in contrast, flatly rejected the distinction drawn by the Fifth Circuit. "The 'express' or 'implied' nature of an allegedly fraudulent misrepresentation," the First Circuit reasoned, "does not determine whether it is preempted by the [Labeling Act] under the *Cipollone* approach." App., *infra*, 26a; *see also id.* at 35a ("we do not see how the statements' falsity . . . bears on the preemption analysis").

By eschewing the distinction between inherently false statements and potentially misleading statements that was applied by the *Cipollone* plurality and by the Fifth Circuit in *Brown*, the First Circuit

in this case adopted a preemption methodology that has no mooring in the Labeling Act or this Court's precedent. And as the divergent results in *Brown* and this case dramatically illustrate, the choice of preemption methodology will often, if not always, prove outcome-determinative. The sharp and express disagreement between the Fifth and the First Circuits regarding the mode of preemption analysis required under the Labeling Act, as construed by the *Cipollone* plurality, should be resolved by this Court.[3]

2. It is beyond dispute that the *Cipollone* plurality held that one fraud claim was preempted and another one was not. 505 U.S. at 527-29. The Fifth Circuit understood the distinction between the two to be that the preempted claim alleged false impressions while the non-preempted claim alleged inherent falsity. *Brown*, 479 F.3d at 391-92. The First

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[3] The First and Fifth Circuits also disagreed as to whether respondents' claims were in substance "failure to warn" claims, which the *Cipollone* plurality indicated were generally preempted. 505 U.S. at 524. The Fifth Circuit explained "that to impose state liability on the basis of [PMUSA's] use of the FTC mandated terms is necessarily to impose a state requirement or prohibition on cigarette advertising as it relates to the relationship between cigarettes and health" because "the gravamen of Plaintiffs' Light claim is that the warnings mandated by Congress are inadequate with respect to Light cigarettes" and should be accompanied by "an additional warning on the packages to the effect that Light cigarettes can be more hazardous than regular cigarettes due to smoker compensation." *Brown*, 479 F.3d at 393 (internal quotation marks omitted). The First Circuit explicitly rejected the Fifth Circuit's reasoning. App., *infra*, at 28a. According to the First Circuit, the "fact that these alleged misrepresentations were unaccompanied by additional statements in the nature of a warning" did "not transform the claimed fraud into failure to warn." *Ibid.*

Circuit expressly rejected that distinction. App., *infra*, 26a. While that conflict alone would warrant this Court's review, the patent error in the First Circuit's approach reinforces the appropriateness of granting review in *this* case.[4]

Respondents do not allege that PMUSA's tar and nicotine descriptors are inherently false and do not dispute that they provide an accurate shorthand means of conveying tar and nicotine testing results to consumers. Compl. ¶ 23. They instead contend that PMUSA is liable under state law because descriptors could be potentially misleading to smokers who are not aware that such representations are based on standardized machine testing and because PMUSA allegedly used tar and nicotine descriptors to allay smokers' health concerns. *Id.* ¶¶ 18, 25-27. According to respondents, PMUSA marketed Marlboro Lights and Cambridge Lights "with the intention of communicating to consumers that [these brands] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes." *Id.* ¶¶ 15, 17. These allegations are unambiguously "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Cipollone*, 505 U.S. at 527 (plurality opinion).

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[4] It is PMUSA's position that the decision below erroneously applied the preemption framework articulated by the *Cipollone* plurality and should be reversed on that basis alone. But even assuming, *arguendo*, that the First Circuit correctly concluded that respondents' claims may proceed under that framework, then the Court should reconsider the *Cipollone* plurality's approach to Labeling Act preemption because it not only would conflict with the subsequent decision in *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 547 (2001), but would render the express preemption provision essentially meaningless.

The First Circuit nevertheless held that respondents' claims are not preempted because they are based on the "duty not to deceive" created by the Maine Unfair Trade Practices Act. While acknowledging that descriptors "could support a warning neutralization claim, *i.e.*, by suggesting that those brands of cigarettes do not pose the same grave threats to health announced in the accompanying warning label," the First Circuit contended that "those statements [could] also support a different theory of recovery, including one that falls outside the preemptive reach of [the Labeling Act]." App., *infra*, 32a-33a; *see also id.* at 33a ("the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted and some of them not").

The First Circuit offered no alternative metric for distinguishing preempted fraud claims from non-preempted fraud claims under the Labeling Act. Under the First Circuit's approach, then, a fraud claim would be preempted by the Labeling Act *only* when a plaintiff used the same "warning neutralization" label used by the plaintiff in *Cipollone* (which, needless to say, few if any plaintiffs will do). It is well-established, however, that it is the substance of the claim, not its label, that determines whether a claim is preempted. "[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them," this Court has warned, "would elevate form over substance and allow parties to evade the pre-emptive scope of [a statute] simply by relabeling their . . . claims." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) (internal quotation marks omitted); *see also Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981)

("compliance with the intent of Congress cannot be avoided by mere artful pleading").

The error in the First Circuit's approach is manifest in its conclusion that—with the exception of a "warning neutralization" claim identical to the one pleaded in *Cipollone*—*no* claims brought under a state unfair trade practices statute will be preempted by the Labeling Act, because *all* such claims are based on a general "duty not to deceive." *See* App., *infra*, 20a-21a. That conclusion is directly at odds with *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), which held that the Labeling Act preempted state regulations restricting cigarette advertising promulgated pursuant to the Massachusetts Unfair Trade Practices Act. *Id.* at 550-51. *Reilly* makes clear that the Labeling Act preemption analysis turns on whether state law is employed to impose a requirement or prohibition "based on smoking and health," not on whether the underlying duty is so based. Otherwise, there could have been no preemption in *Reilly* (or, for that matter, in *Cipollone* itself). *See* 505 U.S. at 543 (opinion of Blackmun, J.).

Although the First Circuit thought that "the difference" between this case and *Reilly* "is that [the Massachusetts] regulations were themselves the 'prohibitions,' while the prohibition here is the ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act" (App., *infra*, 20a), that distinction is simply wrong. The identical general duty—a statutory directive not to engage in deceptive advertising—was at issue in both *Reilly* and in this case. Because "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996)), it is im-

material that the duty was enforced in *Reilly* by executive-branch regulation, whereas the enforcement in this case would be by judicial-branch judgment.

3. The conflict over the scope of Labeling Act preemption is not limited to the First and Fifth Circuits. To the contrary, the First Circuit placed itself at odds not only with *Brown* but also with several other decisions recognizing that fraud claims are preempted whenever they allege, in substance, that a tobacco company failed to provide additional health-related information to consumers or used marketing to create a false impression that undermined the health information contained in the warning label. *See Glassner* v. *R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 349 (6th Cir. 2000) ("claims of fraud based upon fraudulent misrepresentation . . . are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion"); *Am. Tobacco Co.* v. *Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997) (holding that a claim brought against a tobacco company under a provision of Texas law prohibiting deceptive misrepresentations was preempted because the tobacco company "allegedly made the deceptive statements . . . with the intent of diminishing the impact of the federal warnings"); *see also Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1197 (11th Cir. 2004); *Cantley* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996).

Other courts have reached results more like the First Circuit's, which in turn conflict with the Fifth Circuit's holding in *Brown*. *See, e.g.*, *Whiteley* v. *Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 838 (Ct. App. 2004) (holding that allegations that a tobacco

company told the public "half truths" are "akin to intentional misrepresentations").[5]

This split among the lower state and federal courts reflects their inability to apply consistently the preemption framework developed by the *Cipollone* plurality, which several Members of this Court accurately predicted would foster significant "difficulty" for "lower courts . . . attempting to implement [the] decision." 505 U.S. at 543-44 (opinion of Blackmun, J.); *see also id.* at 556 (opinion of Scalia, J.) (predicting that the "questions raised by today's decision will fill the lawbooks for years to come"). Just recently, for example, an Oregon trial court rejected the First Circuit's holding in the decision below in favor of the Fifth Circuit's approach in *Brown*, while "confess[ing]" that it found "the *Cipollone* rubric extremely difficult to apply." *Pearson* v. *Philip Morris*

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[5] In addition to the appellate decisions cited in the text, the lower courts' confusion regarding the application of *Cipollone* in the "lights" context is further evidenced by the conflicting trial court decisions on the express preemption issue, some of which are now on appeal. *Compare Dahl* v. *R.J. Reynolds Tobacco Co.*, 2005 WL 1172019, at *12 (Minn. Dist. Ct. 2005) (holding that the Labeling Act expressly preempted state-law consumer fraud claims challenging the marketing of "light" cigarettes), *appeal docketed*, No. A05-1359 (Minn. Ct. App. July 11, 2005), *Newton* v. *R.J. Reynolds Tobacco Co.*, No. C 02-1415 (N.D. Cal. Mar. 17, 2003) (slip op. at 11-13) (same), *and Pearson* v. *Philip Morris Inc.*, 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 21) (same), *with Aspinall* v. *Philip Morris Cos., Inc.*, 2006 WL 2971490, at *11 (Mass. Super. Ct. 2006) (rejecting express preemption of such claims under the Labeling Act), *appeal docketed*, No. SJC-09981 (Mass. Mar. 9, 2007), *and Mulford* v. *Altria Group, Inc.*, _ F. Supp. 2d _, 2007 WL 1969734, at *19 (D.N.M. 2007) (holding that some such claims were preempted and others were not).

Inc., 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 19).

The conflict among the lower courts over the scope of express preemption—as exemplified by the flatly inconsistent holdings in *Brown* and this case—warrants this Court's review.

B. The Lower Courts Are Divided On The Scope Of Implied Preemption

State law is impliedly preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or a federal agency. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). The Court has repeatedly applied that principle to preempt state laws that interfere with agency regulation of an industry. *See*, *e.g.*, *Geier*, 529 U.S. at 866; *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 159 (1982).

The First Circuit's rejection of PMUSA's implied preemption defense rested on the conclusion that there is no "coherent federal policy on low-tar claims." App., *infra*, 54a. That conclusion is directly at odds with decisions recognizing that the FTC pursued a decades-long policy of requiring tobacco companies to provide standardized tar and nicotine information to consumers and encouraging tobacco companies to develop low-tar cigarettes. *See*, *e.g.*, *Watson* v. *Philip Morris Cos., Inc.*, 420 F.3d 852, 859, 860 (8th Cir. 2005) ("The FTC involved itself in the tobacco industry to an unprecedented extent," including by "compell[ing] the tobacco industry to advertise the tar and nicotine ratings as determined by the [FTC] Method"), *rev'd on other grounds*, 127 S. Ct. 2301 (2007). Indeed, the undisputed record establishes a coherent and consistent regulatory policy by the FTC.

The FTC has long supported the efforts of public-health officials to reduce the risks posed by smoking. *See* 29 Fed. Reg. 530, 532 (Jan. 22, 1964) ("it is the Federal Trade Commission's policy to encourage the development of less hazardous cigarettes"). Shortly after the Surgeon General's 1964 report on smoking and health, the U.S. Public Health Service issued a report concluding that the "preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." C.A. App. 301 Ex. 172. In light of such reports, the FTC has pursued a regulatory policy designed to provide consumers with a standardized means of comparing different brands' tar and nicotine yields and to encourage the development of lower-yield cigarettes.

To that end, the FTC designated the FTC Method as the exclusive means of measuring tar and nicotine yields (C.A. App. 301 Ex. 97), and required the tobacco industry to disclose tar and nicotine yields, measured pursuant to the FTC Method, in all cigarette print advertisements. *Id.* at 218-20 ¶¶ 98-101; *see also In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). It also authorized tobacco companies to use tar and nicotine descriptors as a shorthand means of communicating tar and nicotine information to consumers, as long as those descriptors accurately reflect testing results under the FTC Method. C.A. App. 249-50 ¶¶ 161-63; *see also In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971) (a tobacco company may "advertis[e] that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," so long as tar and nicotine yields, as measured by the FTC Method, are disclosed in print advertising).

The FTC has been well aware of the inherent limitations of the FTC Method since it first designated the test as the standardized methodology for measuring tar and nicotine yields, and has repeatedly reevaluated the propriety of this testing procedure. *See* 48 Fed. Reg. 15,953 (Apr. 13, 1983); 62 Fed. Reg. 48,158 (Sept. 12, 1997). In so doing, it has considered at length the FTC Method's inability to replicate the variability of human smoking behavior, which constitutes the basis for the plaintiffs' claims in this and similar lawsuits, and has acknowledged that "[n]o test can precisely duplicate conditions of actual human smoking." C.A. App. 301 Ex. 107. Notwithstanding these known limitations, the FTC has retained the testing method for four decades because "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." *Id.* at 301 Ex. 203, at 5.

Respondents' suit seeks to impose state-law liability on PMUSA for using FTC-authorized descriptors that reflect the results of tar and nicotine testing under the FTC Method. Thus, respondents are seeking to second-guess the FTC's determination that it is in the public interest to convey tar and nicotine information to the public using descriptors substantiated by the FTC Method. *See Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 378 (2000) (a state "statute conflicts with federal law" where it "penaliz[es] individuals and conduct that Congress has explicitly exempted or excluded from sanctions").

The First Circuit did not dispute that the FTC has historically regulated the tobacco industry's tar and nicotine claims through agreements, advisory opinions, consent decrees, and policy statements. The First Circuit held, however, that these regula-

tory activities cannot impliedly preempt state-law claims that impede the FTC's regulatory objectives because the FTC "has never issued a formal rule specifically defining which cigarette advertising practices violate the" FTCA. App., *infra*, 46a. In so holding, however, the First Circuit conceded that "[o]ther courts . . . have held that an agency can preempt state law through action short of formal rulemaking." *Id.*

Indeed, a number of courts have reached the opposite conclusion than that adopted by the First Circuit. In *General Motors Corp.* v. *Abrams*, 897 F.2d 34 (2d Cir. 1990), for example, the Second Circuit held that "a consent order reflecting a reasonable policy choice of a federal agency and issued pursuant to a congressional grant of authority may preempt state legislation." *Id.* at 39; *see also Feikema* v. *Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994) (holding that an Environmental Protection Agency consent order preempted state common-law claims regarding the same environmental conditions addressed in the order); *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 31 (Cal. 2004) (affording preemptive effect to an advisory letter of the Food and Drug Administration).

The First Circuit's holding that the FTC cannot preempt state law without promulgating a trade regulation rule—no matter the extent to which state requirements stand as an obstacle—squarely conflicts with the holdings of the Second and Fourth Circuits and the California Supreme Court, and deepens an existing conflict. *See also Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (labeling the Second Circuit's holding in *Abrams* that an FTC consent order can have preemptive effect "hard to understand");

State v. *Amoco Oil Co.*, 293 N.W.2d 487, 496 (Wis. 1980) (FTC industry guides do not have preemptive effect). These cases, and the decision below, are squarely at odds with this Court's recognition in *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), that even an agency's decision *not* to engage in regulation can have preemptive effect. *Id.* at 64.

Imposing state-law liability on PMUSA for conduct authorized—and encouraged—by the FTC would stand "as an obstacle to the accomplishment and execution of the important means-related federal objectives" embodied in the FTC's longstanding and comprehensive regulation of tar and nicotine claims (*Geier*, 529 U.S. at 881 (internal quotation marks omitted)), and replace the FTC's expert regulatory judgment with a patchwork of conflicting state-law advertising obligations with which PMUSA and other tobacco companies—which do business nationwide—would be required to comply. *See Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (holding that state-law fraud-on-the-FDA claims were impliedly preempted because "complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing" medical device manufacturers).

II. THE PREEMPTION ISSUE THAT HAS DIVIDED THE LOWER COURTS IS RECURRING AND EXCEPTIONALLY IMPORTANT

The preemption issue raised in this petition has profound practical and jurisprudential implications. There are currently more than 30 cases, most brought as class actions, pending in state and federal courts across the country in which the plaintiffs are pursuing similar state-law challenges to tobacco

companies' use of tar and nicotine descriptors in their marketing.[6] Together, the plaintiffs in these cases are alleging *billions* of dollars in liability. *See, e.g., Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005) (overturning a $10.1 billion verdict in a "lights"

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[6] *See, e.g., Mulford* v. *Altria Group, Inc.*, No. 05-659 MV/RHS (D.N.M. filed June 9, 2005); *Miner* v. *Philip Morris USA Inc.*, No. CV-2004-176 (Ark. Cir. Ct. filed Dec. 29, 2004); *Holmes* v. *Philip Morris USA Inc.*, No. 03C-08-167 (Del. Super. Ct. filed Aug. 18, 2003); *Rivera* v. *Brown & Williamson Tobacco Corp.*, No. 05002779 (Fla. Cir. Ct. filed Feb. 18, 2005); *Rios* v. *R.J. Reynolds Tobacco Co.*, No. 02-01391 (Fla. Cir. Ct. filed Feb. 1, 2002); *Hines* v. *Philip Morris Cos., Inc.*, No. CA 01-1882 AF (Fla. Cir. Ct. filed Feb. 21, 2001); *Kelly* v. *Martin & Bayley Inc.*, No. 05L000123 (Ill. Cir. Ct. filed Feb. 7, 2005); *Mills* v. *Martin & Bayley Inc.*, No. 04L001270 (Ill. Cir. Ct. filed Nov. 15, 2004); *Arnold* v. *Philip Morris USA Inc.*, No. 2003 L 000570 (Ill. Cir. Ct. filed May 2, 2003); *Howard* v. *Brown & Williamson Tobacco Corp.*, No. 00L000136 (Ill. Cir. Ct. filed Feb. 14, 2000); *Turner* v. *R.J. Reynolds Tobacco Co.*, No. 00-L-113 (Ill. Cir. Ct. filed Feb. 10, 2000); *Aspinall* v. *Philip Morris Cos., Inc.*, No. 98-6002 (Mass. Super. Ct. filed Nov. 24, 1998); *Thompson* v. *R.J. Reynolds Tobacco Co.*, MC 05-2389 (Minn. Dist. Ct. filed Feb. 15, 2005); *Curtis* v. *Philip Morris Cos., Inc.*, No. PI 01-18042 (Minn. Dist. Ct. filed Nov. 28, 2001); *Black* v. *Brown & Williamson Tobacco Corp.*, No. 002-08526-01 (Mo. Cir. Ct. filed Dec. 11, 2000); *Collora* v. *R.J. Reynolds Tobacco Co.*, No. 002-00732 (Mo. Cir. Ct. filed Mar. 17, 2000); *Craft* v. *Philip Morris Cos., Inc.*, No. ED 85142 (Mo. Cir. Ct. filed Feb. 29, 2000); *Peters* v. *Philip Morris USA, Inc.*, No. 02-C-398 (N.H. Super. Ct. filed Apr. 20, 2002); *Stern* v. *Philip Morris Cos., Inc.*, No. L-2584-03 (N.J. Super. Ct. filed Apr. 4, 2003); *Phillips* v. *Philip Morris Cos., Inc.*, No. 01-CIV-0413 (Ohio Ct. C.P. filed May 4, 2001); *Marrone* v. *Philip Morris USA Inc.*, No. 99 CIV 0954 (Ohio Ct. C.P. filed Nov. 8, 1999); *Pearson* v. *Philip Morris Inc.*, No. 0211-11819 (Or. Cir. Ct. filed Oct. 8, 2002); *McClure* v. *Philip Morris Cos., Inc.*, No. Civ. A. 99C148 (Tenn. Cir. Ct. filed Jan. 19, 1999); *Moore* v. *Philip Morris Cos., Inc.*, No. 01-C-125K (W. Va. Cir. Ct. filed Sept. 17, 2001).

class action). These staggering financial stakes provide a compelling reason for this Court to resolve the question of federal preemption presented in this petition. *See Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari").

Moreover, PMUSA and the other major tobacco companies do business, and thus are subject to suit, throughout the United States. Plaintiffs and defendants alike in these actions, and the judges presiding over them, have a strong interest in securing this Court's review because a definitive resolution of the preemption question will enable litigants to proceed under a uniform and predictable legal framework, and will allow courts to apply a uniform rule of decision on an important federal issue in these dozens of similar cases. Indeed, respondents themselves have acknowledged that a decision from this Court on the preemption issue would benefit all parties to the litigation. *See* Tr. 9/21/07 pg. 6, ll. 16-17 ("We think all parties would benefit from hearing from the Supreme Court one way or the other").

Congress included the express preemption provision in the Labeling Act to make clear which state laws can, and which cannot, be applied to tobacco companies in connection with their advertising and promotion of cigarettes. *See Reilly*, 533 U.S. at 541. The Court's fractured decision in *Cipollone* has failed to produce the needed clarity. *See Nichols* v. *United States*, 511 U.S. 738, 746 (1994) ("confusion following a splintered decision [of this Court] is itself a reason for reexamining that decision"). Where, as here, Congress has enacted a specific statute to cover a

particular situation—the displacement of state laws as they pertain to cigarette advertising and promotion—it is simply intolerable that different rules apply depending on the geographical location in which the lawsuit is filed. Indeed, this Court regularly grants certiorari to resolve conflicts on the scope of express preemption. *See, e.g., Riegel* v. *Medtronic, Inc.*, No. 06-179 (cert. granted June 25, 2007).

The scope of implied preemption in this context also warrants this Court's attention. It is beyond dispute that the FTC has for decades pursued a policy of requiring tobacco companies to provide consumers with standardized tar and nicotine information measured by the FTC Method. *Watson*, 420 F.3d at 860. The FTC itself has recognized the adverse legal and commercial implications of superimposing divergent state-law standards on these federal disclosure requirements. *See* C.A. App. 301 Ex. 42, at 8 ("if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that the disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict"). The claims in this case, if allowed to proceed, would require PMUSA and other tobacco companies to simultaneously comply with both the FTC's regulatory requirements *and* the divergent laws of 50 States. This is precisely the situation that the doctrine of federal preemption is designed to avoid.

The question presented by this petition—whether state-law challenges to tar and nicotine descriptors are preempted by federal law—will not resolve itself. It has already generated a division among the circuits, and that split in authority will only grow more pronounced with time. At some

point, this Court will have to resolve the conflict. It should do so sooner rather than later, so that litigants and courts do not continue to spend substantial resources grappling with an issue that, ultimately, must be decided by this Court. This case presents the ideal vehicle to settle the question of federal preemption, because the pertinent facts are undisputed and the preemption issue was both presented to and actually decided by the courts below. The Court should grant plenary review to answer this important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 26, 2007

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 06-1965

STEPHANIE GOOD, LORI A. SPELLMAN
and ALLAIN L. THIBODEAU,
individually and on behalf of all others similarly situated,

Plaintiffs, Appellants,

v.

ALTRIA GROUP, INC., and PHILIP MORRIS USA INC.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. John A. Woodcock, Jr., *U.S. District Judge*]

Before

Howard, *Circuit Judge*,

Selya, *Senior Circuit Judge*,

and Shadur,* *Senior District Judge*.

Todd S. Heyman, with whom *Thomas V. Urmy, Jr.*, *Shapiro Haber & Urmy, LLP*, *Gerard V. Mantese*, *Mark C. Rossman*, *Mantese and Associates, P.C.*, *Samuel W. Lanham* and *Cuddy & Lanham*, were on brief, for appellants.

Kenneth J. Parsigian, with whom *Goodwin Procter LLP*, *H. Peter Del Bianco, Jr.*, *Lambert Coffin*, *Guy Miller Struve* and *Davis Polk & Wardwell*, were on brief, for appellees.

August 31, 2007

HOWARD, *Circuit Judge*. The plaintiffs appeal from the entry of summary judgment for the defendants, Philip Morris USA Inc. and its parent company (collectively, "Philip Morris"), on state-law claims based on the marketing of "Light" cigarettes.[1]

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* Of the Northern District of Illinois, sitting by designation.

[1] The parent company, Altria Group, Inc., did not join in the summary judgment motion, seeking to preserve a defense based on lack of personal jurisdiction. Nevertheless, the district court observed that "the parties acknowledged as a practical matter that the Court's ruling would be equally applicable to Altria."

The district court ruled that these claims were preempted by the Federal Cigarette Labeling and Advertising Act (the "FCLAA"), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (1998). Because we find that the claims are not preempted, and because Philip Morris's alternative arguments for affirmance are also unavailing, we vacate the decision of the district court and remand for further proceedings.

I.

The plaintiffs, who say they have smoked Marlboro Lights for at least fifteen years, claim that Philip Morris has employed unfair and deceptive practices in "designing, manufacturing, promoting, marketing and selling Marlboro Lights and Cambridge Lights purporting to be 'light' and having 'Lowered Tar and Nicotine,' all while [it] knew those cigarettes would not deliver less tar or nicotine to the consumer."[2] These brands have rings of ventilation holes in their filters, causing air to mix with the smoke as the smoker draws on the cigarette. As a

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[Footnote continued from previous page]

436 F. Supp. 2d 132, 134 n.4 (D. Me. 2006). Judgment was therefore entered in favor of both Altria and Philip Morris, without objection from either side.

[2] Philip Morris's expert witness, in his affidavit submitted in support of its motion for summary judgment, explained that "[t]he terms 'light[s]' and 'low tar' are generally viewed as interchangeable" and that, since the early 1970s, "light" has been "associated with both lighter taste and low tar."

result, "Lights" register lower levels of tar and nicotine than their so-called "full-flavor" counterparts under a test known as the "Cambridge Filter Method." This test uses a machine to "smoke" a cigarette, collecting the resulting tar and nicotine in a filter for weighing.

The plaintiffs allege that a person smoking "light" cigarettes, however, engages in unconscious behaviors that essentially negate the ventilation effect, such as taking more frequent, voluminous, or longer puffs, covering the air holes with the lips or the fingers, or smoking additional cigarettes. Due to such "compensation," which the plaintiffs attribute to the addictive nature of nicotine, they assert that a smoker consumes the same quantities of tar and nicotine from light cigarettes as from full-flavored ones. The plaintiffs explain that the relative levels of these substances bear on a reasonable consumer's decision on which cigarette to purchase because consumers understand that reducing the quantities of tar and nicotine in cigarettes reduces their adverse health effects. Thus, the plaintiffs allege that Philip Morris has misrepresented material facts by describing its "Lights" as such or as having "lower tar and nicotine," and that Philip Morris—which was aware of the "compensation" phenomenon before it began marketing its "Lights" brands—did so with the intent to deceive.

The plaintiffs claim that these misrepresentations amount to unfair or deceptive acts or practices in violation of the Maine Unfair Trade Practices Act.[3] Me. Rev. Stat. Ann. tit. 5, § 207 (2002). This

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[3] The amended complaint also alleges that Philip Morris manipulated the design of its light cigarettes "to register Lowered

statute entitles any person who suffers a loss of money or property as a result of such acts or practices to sue for "actual damages, restitution and for . . . other equitable relief." *Id.* § 213(1). The plaintiffs have expressly disclaimed any "damages for personal injuries," but they do seek other relief, including the return of the sums they paid to purchase Marlboro Lights and Cambridge Lights, in addition to punitive damages and the attorneys' fees as authorized by the Act.[4] The plaintiffs also seek to certify a class of all purchasers of Marlboro Lights or Cambridge Lights in Maine through November 2002.

In response to the plaintiffs' amended complaint, Philip Morris promptly moved for summary judgment. Philip Morris argued that the plaintiffs' claims were (1) expressly preempted by the FCLAA, (2) implicitly preempted by "the efforts of Congress and the [Federal Trade Commission] for 40 years to implement a national, uniform policy of informing the public about the health risks of smoking," and (3) for similar reasons, not cognizable under the Maine Unfair Trade Practices Act, which does not apply to "[t]ransactions or actions otherwise permitted under laws as administered by any regulatory board or offi-

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Tar and Nicotine levels under machine testing conditions while actually delivering higher levels of these compounds when smoked by consumers . . . ." The plaintiffs have not advanced this theory on appeal, however, so we do not consider it.

[4] In addition to their claim under the Maine Unfair Trade Practices Act, the plaintiffs' amended complaint also asserts a second count for unjust enrichment. Because neither side argues that the two claims require different preemption analyses, we do not separately discuss the unjust enrichment count.

cer acting under the statutory authority of the . . . United States." Me. Rev. Stat. Ann. tit. 5, § 208(1).

Each of these arguments relied to some degree on what Philip Morris described as "the FTC's comprehensive, nationwide program regulating the disclosure of tar and nicotine yields." In 1959, the then-seven major American cigarette manufacturers had agreed to delete all tar and nicotine claims from their advertising. The FTC subsequently advised them, however, "that a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation . . . of any of the provisions of law administered by [the FTC]," provided the statement was "supported by adequate records of tests conducted in accordance with the Cambridge Filter Method." Press Release, Fed. Trade Comm'n (Mar. 25, 1966). But this advice did not extend to "collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) . . . expressly or by implication, as to reduction or elimination of health hazards." *Id.*

Then, in 1967, the FTC itself began using the Cambridge Filter Method to test, *inter alia*, all cigarette "brands for which any tar or nicotine statement appears on the label or in the advertising . . . to determine the accuracy of such statement." 32 Fed. Reg. 11,178 (Aug. 1, 1967). Though the FTC understood at the time that this method could not "determine the amount of tar and nicotine inhaled by any human smoker," it was nevertheless adopted to produce results "based on a reasonable standardized method" which were "capable of being presented to the public in a manner that is readily understandable." Press Release, Fed. Trade Comm'n, FTC to Begin Cigarette Testing (Aug. 1, 1967). The FTC

agreed to report the test results to Congress periodically in order to ensure their dissemination to the smoking public, and made the first such report in late 1967.

The FTC subsequently proposed a rule requiring cigarette manufacturers "to disclose, clearly and prominently, in all advertising[,] the tar and nicotine content of the advertised variety . . . based on the most recently published [FTC] test results." 35 Fed. Reg. 12,671 (Aug. 8, 1970). But the rulemaking process was suspended when a consortium of cigarette manufacturers, including Philip Morris, reached an agreement with the FTC on a "voluntary program" to like effect. Letter from Horace R. Kornegay, President, The Tobacco Institute, Inc., to Fed. Trade Comm'n (Dec. 17, 1970). By agreeing to the program, however, the manufacturers did not "admit that the failure affirmatively to disclose" the test results in their advertising "constitutes a violation of law," or even that the FTC had the authority to enact the proposed rule. *Id.* The FTC, for its part, took the position that it "retained the unconditional right to reschedule the . . . Rule proceeding and to take any other action relating to this subject at any time . . . ." 36 Fed. Reg. 784 (Jan. 16, 1971).

Since then, the FTC has neither resumed the rulemaking proceedings suspended by its agreement with the cigarette manufacturers, nor promulgated any formal rule requiring them to disclose the tar or nicotine content of their products. In 1987, the FTC stopped conducting its own tests of cigarettes. The testing continued, however, under the auspices of the Tobacco Institute Testing Laboratory, operated by

the major American cigarette manufacturers.[5] The manufacturers agreed to allow the FTC to monitor the lab's procedures, which included the use of the Cambridge Filter Method. The FTC has obtained the test results from the individual manufacturers through its compulsory process authority, *see* 15 U.S.C. § 46(b), and reported those results to Congress for each year through 1998.[6]

Based on this regime, Philip Morris characterized the lawsuit as "a challenge to the FTC's regulatory scheme," because "terms like 'light' and 'lowered tar' . . . convey precisely the same comparative information" as the tar and nicotine measurements derived from testing under the Cambridge Filter Method. The district court agreed, reasoning that

> To respond to Plaintiffs' claims, Philip Morris would have to tell the public that the FTC Method test, though accurate in the laboratory, was inaccurate in real life, and that light cigarette smokers . . . infused greater amounts of nicotine and tar than the desig-

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[5] Most of these manufacturers belonged to the Tobacco Institute, an industry group that was disbanded in 1999 pursuant to the master settlement agreement between a number of states and cigarette companies. The testing has since continued at the Tobacco Industry Testing Laboratory, a similar facility.

[6] The FTC continued to collect the test results, at least through 2002, but has stopped reporting them, for reasons that are unclear from the record. The FTC has, however, made the results for the years 1999 through 2002 available in response to requests under the Freedom of Information Act, 5 U.S.C. § 552 (2007). Fed. Trade Comm'n, Cigarette Tar, Nicotine and Carbon Monoxide Yields Produced by Cigarette Manufacturers for the Years 1999-2002, *available at* http://www.ftc.gov/foia/frequentrequest.shtm.

> nation 'Lights' and 'Lowered Tar and Nicotine' would imply. But, this information, if conveyed through a form of advertising, would run head first into . . . the comprehensive federal scheme governing the advertising and promotion of cigarettes.

436 F. Supp. 2d at 152 (internal quotation marks omitted). Finding the plaintiffs' claims thus "grounded on Philip Morris's 'advertising or promotion of . . . cigarettes labeled in conformity with the provisions of federal law and regulation," the district court concluded that they were expressly preempted by the FCLAA. *Id.* at 153 (quoting 15 U.S.C. § 1334 (b)). The court did not decide Philip Morris's alternative arguments for summary judgment.[7] *Id.* at 133 n.1. This appeal followed.

II.

The plaintiffs challenge the ruling below as at odds with *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), where a plurality of the Supreme Court held that some—but not all—actions for damages under state law are expressly preempted by the FCLAA. *Id.* at 523-24. In response, Philip Morris argues that the district court correctly found the plaintiffs' claims preempted under *Cipollone*. Philip Morris simultaneously urges us to affirm the entry of summary judgment in its favor on the alternative grounds not reached below, namely, that the plain-

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[7] Each side also asked the district court to strike certain evidentiary materials or statements of fact submitted in connection with the motion for summary judgment. Some of these requests were denied and some were granted, but none of the district court's rulings in this regard have been questioned on appeal.

tiffs' claims are implicitly preempted by federal law or that they complain of "actions otherwise permitted under laws" and therefore cannot serve as the basis for liability under the Maine Unfair Trade Practices Act. We review these arguments de novo. *See Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 (1st Cir. 1997).

A.

"A fundamental tenet of our federalist system is that constitutionally enacted federal law is supreme to state law. As a result, federal law sometimes preempts state law either expressly or by implication." *N.H. Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 74 (1st Cir. 2006) (citation omitted), *cert. granted*, 127 S. Ct. 3037 (2007). Preemption questions ultimately turn on congressional intent, *e.g.*, *Cipollone*, 505 U.S. at 516, and the primary indicator of that intent is the text of the congressional act claimed to have preemptive effect, *e.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). But "[t]he text of the preemption provision must be viewed in context, with proper attention paid to the history, structure, and purpose of the legislative scheme in which it appears." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001).

1.

As noted at the outset, the FCLAA's preemption clause states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Those provisions mandate that the packages of all cigarettes sold in the United States—and, in general, their advertisements—bear

one of a rotating series of labels warning about the adverse health effects of smoking.[8] *Id.* §§ 1333(a), (c). But no additional "statement relating to smoking and health . . . shall be required on any cigarette package." *Id.* § 1334(a). The FCLAA also bans cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission," *id.* § 1335, and preserves the authority of the FTC over "unfair or deceptive acts or practices in the advertising of cigarettes," *id.* § 1336.

These provisions were added to the FCLAA through the Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87-90, enacted as the restrictions on cigarette advertising contained in the prior version of the FCLAA were set to expire. Pub. L. 89-92 § 10, 79 Stat. 282, 285 (1965). As the expiration date approached, both federal and state authorities prepared to resume their efforts to regulate cigarette advertising. *See Cipollone*, 505 U.S. at 514-15. Thus, Congress amended the FCLAA

> to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

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[8] These labels are the now-familiar "Surgeon General's Warning" statements, *e.g.*, "Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy."

> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

With these purposes in mind, the *Cipollone* Court considered whether the FCLAA's preemption clause barred a state-law suit for damages brought by a smoker who had allegedly developed lung cancer from the defendants' cigarettes. 505 U.S. at 509-10. The smoker asserted a number of common law causes of action, including strict liability, negligent failure to warn, breach of express warranty, fraudulent misrepresentation, and civil conspiracy. *Id.* The court of appeals held that, while § 1334(b) did not expressly preempt common law claims, the FCLAA's labeling requirement "revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health." *Id.* at 517. Accordingly, the court of appeals ruled that the plaintiff's claims "challenging the adequacy of the warnings on labels or in advertising or the propriety of [the defendants'] advertising and promotional activities" were implicitly preempted. *Id.*

A plurality of the Court disagreed with this analysis, holding that "the pre-emptive scope of the [FCLAA] is governed entirely by the express language in [§ 1334(b)]," *id.*, which did, in fact, reach some common law actions. *Id.* at 521-23. But because "[f]or purposes of [§ 1334(b)], the common law is not of a piece," the plurality explained that it had

to "look to each of [the smoker's] common-law claims to determine whether it is in fact pre-empted." *Id.* at 523 (footnote omitted). This approach required the plurality to

> ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking or health ... imposed under State law with respect to advertising or promotion, giving that clause a fair but narrow reading .... [E]ach phrase within that clause limits the universe of common-law claims pre-empted by the statute.

Id. at 524 (quoting 15 U.S.C. § 1334 (b)). Employing this analysis, the plurality determined that the FCLAA preempted the claim, pleaded as a failure to warn, that the defendants' "advertising and promotions should have included additional, or more clearly stated warnings," because it relied on "a state-law 'requirement or prohibition ... with respect to ... advertising or promotion.'" *Id.* (quoting 15 U.S.C. § 1334(b)).

The plurality proceeded to consider the smoker's two theories of fraudulent misrepresentation. The first, that the defendants, "through their advertising, neutralized the effect of federally mandated warning labels," was preempted by the FCLAA. *Id.* at 527. As the plurality explained, this theory was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards of smoking," which is itself "merely the converse of a state-law *requirement* that warnings be included in [such] materials." *Id.* This fraudulent misrepresentation claim, then, was "inextricably related to" the failure-to-warn claim

and therefore also premised on a "requirement or prohibition based on smoking and health" imposed by state law. *Id.* at 528.

But the plurality reached a different conclusion as to the smoker's second fraudulent misrepresentation theory: "intentional fraud and false misrepresentation both by false misrepresentation of a material fact and by concealment of a material fact." *Id.* (internal quotation marks and bracketing omitted). First, the plurality held that the FCLAA does not preempt fraudulent concealment claims that "rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion," *e.g.*, in the case of a state law requiring cigarette manufacturers "to disclose material facts about smoking and health to an administrative agency." *Id.* Second, the plurality held that

> fraudulent-misrepresentation claims that do arise with respect to advertising and promotion (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by [§ 1334(b)]. Such claims are predicated not on a duty "based on smoking and health" but rather on a more general obligation—the duty not to deceive.

Id. at 528-29. The plurality saw this result as consistent with the text, structure, and purpose of the FCLAA. *Id.* at 529. First, the FCLAA "offered no sign that [Congress] wished to insulate manufacturers from longstanding rules governing fraud"—in fact, the Act "explicitly reserved the FTC's authority to identify and punish deceptive advertising practices . . . ." *Id.* Second, reading § 1334(b) to exclude fraud claims would not frustrate the FCLAA's stated

goal of protecting commerce from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health," 15 U.S.C. § 1331(2), because "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." 505 U.S. at 529.

This analysis of the FCLAA's effect on the smoker's claims held sway with only four of the Court's nine Justices. Two others joined Justice Blackmun's opinion that the FCLAA did not preempt *any* common law claims for damages, *id.* at 531, while another joined Justice Scalia's opinion that § 1334(b) preempted *all* of the smoker's common law theories. *Id.* at 548. Most lower courts have nevertheless treated the plurality opinion as controlling, *see Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 389 (5th Cir. 2007) (collecting cases), as have the parties here, both on appeal and in the district court, 436 F. Supp. 2d at 142. We therefore do the same.[9] *Cf. Harshbarger*, 122 F.3d at 69-77 (reconciling opinions of plurality and Justice Scalia in *Cipollone* insofar as possible but following the plurality opinion in case of disagreement between them).

2.

The parties agree that whether the FCLAA expressly preempts the plaintiffs' claims depends on how best to categorize them by analogy to the various causes of action considered in *Cipollone*. In do-

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[9] From this point on, then, we will refer to the plurality opinion as simply "*Cipollone*," except when necessary to contrast the views of the dissenting opinion with those of the plurality.

ing so, as the district court recognized, 436 F. Supp. 2d at 151, we must look beyond the plaintiffs' own classification of their claims and to their actual substance. *See Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1043 (7th Cir. 1999); *accord Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 5 (1st Cir. 1999) (endorsing the same approach in deciding whether ERISA preempts particular state-law claims).

The plaintiffs seek relief under the Maine Unfair Trade Practices Act, which, in relevant part, outlaws "unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. Ann. tit. 5, § 207. Though this prohibition encompasses various kinds of behavior, including "a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances," *Maine v. Weinschenk*, 868 A.2d 200, 206 (Me. 2005), the substance of the plaintiffs' claim is that Philip Morris has falsely represented certain of its brands as "light" or having "lower tar and nicotine" although they deliver the same quantities of these ingredients to a smoker as do "full-flavored" cigarettes. So, under the functional approach, we consider how this particular theory—as opposed to a more generalized claim under the Maine Unfair Trade Practices Act—resembles the various common-law causes of action considered in *Cippolone*. If, as the plaintiffs argue, they have indeed alleged fraudulent misrepresentation claims, the claims are not preempted because, as *Cipollone* explains, they are not premised on a state-law duty based on smoking and health. But if, as Philip Morris argues, the plaintiffs have in reality alleged failure-to-warn or warning neutralization claims, the claims are preempted.

While the district court stopped short of assigning a specific label to the plaintiffs' claims, its reasoning suggests that it considered them analogous to the failure-to-warn theory held preempted by *Cipollone*. The court opined that the plaintiffs had failed in their "valiant attempt to tailor their claims to fit within the *Cipollone* exception for violations of the duty not to deceive . . . ." 436 F. Supp. 2d at 151. Instead, the district court identified "the gist of the Plaintiffs' cause of action" as dependent on "what Philip Morris actually said about Lights and what the Plaintiffs claim [it] *should have said.*" *Id.* (emphasis added). And what Philip Morris "should have said," the court understood the plaintiffs to assert, was that Marlboro Lights and Cambridge Lights deliver more tar and nicotine to an actual smoker than "the designation 'Lights' and 'Lowered Tar and Nicotine' would imply." *Id.* at 152. Because doing so would require Philip Morris to alter its advertising or promotion of its cigarettes, the district court concluded, the plaintiffs' claims were expressly preempted by the FCLAA as construed by *Cipollone*.

We differ with the district court's view of the fit between the plaintiffs' theory and the *Cipollone* taxonomy and, more fundamentally, of *Cipollone* itself. To start, we do not read *Cipollone* to hold that the FCLAA preempts claims "grounded on [a defendant's] 'advertising or promotion of . . . cigarettes labeled in conformity with the provisions of' federal law and regulation," as the district court ultimately explained its conclusion. 436 F. Supp. 2d at 153 (quoting 15 U.S.C. § 1334(b)). *Cipollone* reasoned that "each phrase" in § 1334(b)—not just the phrase "with respect to the advertising or promotion of any cigarettes"—"limits the universe of common-law claims pre-empted by the statute." 505 U.S. at 524.

So "[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising and promotion." *Id.* at 525. A claim is not preempted, then, merely because it is "grounded on" the advertising or promotion of cigarettes with FCLAA-compliant labels.

Nor is a claim preempted merely because it arises out of the adverse health consequences of such cigarettes, as both the reasoning and the result in *Cipollone* make clear. There, in fact, all of the plaintiff's claims were "based on smoking and health" in the sense that they "alleged that [she] developed lung cancer because she smoked cigarettes," 505 U.S. at 509, yet the Court held that the FCLAA preempted only some of them.[10] And the fate of each claim depended on "whether the legal duty that is the predicate of the common-law damages action"—not the claim itself—met the criteria of § 1334(b). *Id.* at 524. Thus, for example, while the theory that the defendants in *Cipollone* "had expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences," *id.* at 509 (internal quotation marks omitted), was clearly based on smoking and health, it was not preempted because "it [did] not rest on a duty imposed under state law," but on the defen-

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[10] In doing so, the Court also overturned the ruling of the court of appeals that the FCLAA, which "revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health," preempted all of the smoker's claims. 505 U.S. at 517.

dants' own "contractual commitment voluntarily undertaken," *i.e.*, the warranty. *Id.* at 526. Accordingly, the FCLAA preempts only those claims based on a "*requirement or prohibition* based on smoking and health under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in accordance with" the FCLAA. 15 U.S.C. § 1334(b) (emphasis added). It does not preempt claims because *they* are "based on smoking and health."[11]

Furthermore, unlike Philip Morris, we do not read the Court's subsequent decision in *Reilly* to suggest that the statute's preemptive effect on a claim depends on the claim's connection with "smoking and health." In *Reilly*, the Court held that § 1334(b) preempted regulations on tobacco advertising promulgated by the Massachusetts Attorney General pursuant to his authority under that state's counterpart to the Maine Unfair Trade Practices Act,

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[11] Indeed, this was one of the primary points of disagreement between the *Cipollone* plurality and Justice Scalia, who argued in dissent that questions of FCLAA preemption "must focus not upon the ultimate source of the duty (*e.g.*, the common law) but upon its proximate application." 505 U.S. at 553. This "'proximate application' methodology for determining whether [claims] invoke duties 'based on smoking and health' . . . would ask . . . whether, whatever the source of the duty, it imposes an obligation *in this case* because of the effect of smoking upon health." *Id.* at 554 (emphasis added). While conceding the "theoretical attraction" of this argument, the plurality rejected it as at odds with "a fair understanding of [the] congressional purpose" behind the FCLAA. *Id.* at 529 n.27. This exchange further solidifies our view that the FCLAA preempts claims predicated on a state-law duty, with respect to advertising and promotion, which is itself based on smoking and health—not "claims based on smoking and health."

Mass. Gen. Laws ch. 93A. 533 U.S. at 533. Though their stated purpose was "to address the incidence of cigarette smoking . . . by children under legal age," *id.* (internal quotation marks omitted), the Court rejected the notion that the regulations were "not 'based on smoking and health' because they do not involve health-related content in cigarette advertising but instead target youth exposure to cigarette advertising." *Id.* at 547. Noting that the FCLAA "prohibited state cigarette advertising regulations motivated by concerns about smoking and health," the Court reasoned that "[a]t bottom, the concern about youth cigarette advertising is intertwined with" such concerns, bringing the regulations within the preemptive sweep of the FCLAA. *Id.* at 548.

Philip Morris urges us to draw an analogy between the regulations found preempted in *Reilly* and the claims of the plaintiffs here, arguing that, in either case, a state consumer protection act is used "to create requirements or prohibitions regarding advertisements and promotions that are intertwined with the concern about cigarette smoking and health" (internal quotation marks omitted). But this argument again confuses the claim at hand with its predicate state-law duty as the relevant "requirement or prohibition" under § 1334(b). The plaintiffs' claims are indeed "intertwined with the concern about cigarette smoking and health," just as surely as the regulations in *Reilly* were; the difference, however, is that those regulations were themselves the "prohibitions," while the prohibition here is the ban on "unfair or deceptive acts or practices in the conduct of any trade or commerce" under the Maine Unfair Trade Practices Act. And *Cipollone*, as we have noted, treats a state-law "duty not to deceive" as broader than a "duty 'based on smoking and health'" and

therefore beyond the reach of FCLAA preemption. 505 U.S. at 529-30 (quoting 15 U.S.C. § 1334(b)).

We see nothing in *Reilly* suggesting any intent to disturb this aspect of the *Cipollone* plurality holding.[12] Nor do we see any internal inconsistency in the view that the phrase "based on smoking and health" includes state-law prohibitions on cigarette ads targeting youths, *Reilly*, 533 U.S. at 448, but excludes state prohibitions on cigarette ads making false statements of material fact, *Cippolone*, 505 U.S. at 524. Accordingly, we agree with those courts that have rejected the notion that the FCLAA preempts claims "intertwined with the concern about smoking and health" but nevertheless premised on a state-law duty that is broader in scope. *See Mulford v. Altria Group, Inc.*, No. 05-659, 2007 WL 1969734, at *18 (D.N.M. Mar. 16, 2007); *Gerrity v. R.J. Reynolds Tobacco Co.*, 399 F. Supp. 2d 87, 95 (D. Conn. 2005).[13]

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[12] Indeed, *Reilly* notes that "Members of this Court have debated the precise meaning of 'based on smoking and health,'" citing to the footnote in *Cipollone*—referenced here at note 11, *supra*—where the plurality rejects the views of the concurring and dissenting opinions on that point. 546 U.S. at 547. But *Reilly* does not purport to resolve the debate and, aside from its holding that the phrase embraces regulations directed at youth exposure to cigarette advertising, does not explore the issue any further. *See id.*

[13] Philip Morris relies on a recent decision of the California Supreme Court, *In re Tobacco Cases II*, __ Cal. Rptr. 3d __, No. S129522, 2007 WL 2199006 (Cal. Aug. 2, 2007), for the proposition that "If the theory is based on smoking and health, the claim is preempted." Though the decision arguably contains some language to that effect, its holding is simply that § 1334(b) preempts the claim that Philip Morris violated California's unfair competition law by targeting minors with its advertising—a holding, as the court noted, that was ordained by *Reilly*. *Id.* at

Because the state-law "duty not to deceive" is one such "more general obligation," it falls within *Cipollone*'s express holding that "claims based on allegedly false statements of material fact made in advertisements" survive FCLAA preemption. 505 U.S. at 528-29. In line with this holding, courts have routinely (though not uniformly) concluded that the FCLAA does not preempt fraudulent misrepresentation claims arising out of false statements made in advertising or promoting cigarettes. *See, e.g., Spain v. Brown & Williamson Tobacco Co.*, 363 F.3d 1183, 1202 (11th Cir 2004); *Mulford*, 2007 WL 1969734, at *16; *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 216 & 264-65 (E.D.N.Y. 2000), *aff'd in relevant part*, 344 F.3d 211, 222 (2d Cir. 2003); *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194, 203 (D. Mass. 2000); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 175 (D. Conn. 2000); *Hyde v. Philip Morris, Inc.*, No. 97-0359, 1998 WL 656074, at *6 (D.R.I. May 1, 1998); *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 842 (Cal. Ct. App. 2004); *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 33 (Ill. 2005); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593,

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*9. Again, we do not perceive any tension between this result and our understanding of *Cipollone*. Indeed, the California Supreme Court observed that the FCLAA would *not* preempt a state unfair competition claim "that sought to impose only content-neutral restrictions on cigarette advertising—such as a requirement that the advertising not contain false statements of fact—that were unrelated to smoking and health." *Id. In re Tobacco Cases II*, then, ultimately does not support Philip Morris's position. And to the extent that the case might arguably be read more broadly, we respectfully disagree with it for the reasons set forth at length in the text of this opinion.

603-604 (N.Y. App. Div. 1998); *Est. of Schwarz v. Philip Morris Inc.*, 135 P.3d 409, 421 (Or. Ct. App. 2006) (en banc); *but see In re Tobacco Cases II*, No. JCCP 4042, 2004 WL 2445337, at *19-*22 (Cal. Super. Ct. Aug. 4, 2004), *aff'd sub nom. In re Tobacco II Cases*, 47 Cal. Rptr. 3d 917 (Cal. Ct. App.), *rev. granted*, 146 P.3d 1250 (Cal. 2006)[14]; *Dahl v. R.J. Reynolds Tobacco Co.*, No. 03-5582, 2005 WL 1172019, at *10-*12 (Minn. Dist. Ct. May 11, 2005); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997). A number of these decisions, in fact, hold that the FCLAA does not preempt the very theory the plaintiffs advance here—that a cigarette manufacturer has perpetrated fraud by stating that its light brand offers lower tar and nicotine than its full-flavored one. *See Mulford*, 2007 WL 1969734, at *19; *Price*, 848 N.E.2d at 33; *Est. of Schwarz*, 135 P.3d at 421; *but see Brown*, 479 F.3d at 391-93; *Clinton v. Brown & Williamson Tobacco Co.*, ___ F. Supp. 2d ___, No. 05 Civ. 9907, 2007 WL 2181896, at *11 (S.D.N.Y. July 23, 2007); *In re Tobacco Cases II*, 2004 WL 2445337, at *19-*21; *Dahl*, 2005 WL 117290, at *11.

The district court saw the plaintiffs' case differently, observing that "[o]ther than these descriptors" (*i.e.*, the "light" and "lower tar and nicotine" claims) "the record here is devoid of any *affirmative* misstatement." 436 F. Supp. 2d at 152 (footnote omitted). Based on this reasoning, Philip Morris argues that the district court properly treated the plaintiffs' claims as "based on *implied* misrepresentations

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14 We note that these proceedings—which we henceforth refer to as "*In re Tobacco Cases II*"—are not the same as the *In re Tobacco Cases II* discussed in note 13, *supra*.

about health," which qualify as preempted failure-to-warn or warning neutralization claims, rather than non-preempted fraudulent misrepresentation claims, which arise out of only "express" misrepresentations. We disagree.

First, we question the conclusion that, although the descriptors are themselves characterized as affirmative misstatements, they cannot ground a fraudulent misrepresentation claim left unscathed by *Cipollone*'s reading of the FCLAA. The district court appears to have based its conclusion on its understanding that, despite the popularity of the terms "light" and "lower tar and nicotine" in cigarette advertising, "Congress and the FTC never acted to restrict the tobacco companies from using these general descriptors." 436 F. Supp. 2d at 152; *see also Clinton*, slip op. at 22 (finding fraudulent misrepresentation claim arising out of descriptors expressly preempted because "the FTC has declined to *disallow* those terms despite several invitations to do so"). But whatever support this might lend to an argument for *implied* preemption of state law—and we consider that question in detail *infra*—it provides little guidance in applying the *express* preemption provision of the FCLAA, the scope of which "is governed entirely by the express language in" § 1334(b).[15] *Cipollone*, 505 U.S. at 517. *Cipollone* read this language to preserve state-law claims based on allegedly fraudulent statements in advertising and promotion, without regard to whether Congress or the FTC had

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15 Philip Morris questions the vitality of this holding in light of subsequent Supreme Court cases on the preemptive effect of other federal statutory provisions. In Part II.B, *infra*, we consider, and reject, this argument.

separately acted to prohibit particular examples of them.

Cipollone arrived at this interpretation in part because, in the FCLAA, "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* at 529. So if its inaction since has any significance—and we usually hesitate to make much ado about congressional nothing, *see, e.g., Estey v. Comm'r, Me. Dep't of Human Servs.*, 21 F.3d 1198, 1206 (1st Cir. 1994)—it could just as likely be that Congress chose not to regulate the descriptors because it believed the generalized state-law prohibitions on fraud left in place under the FCLAA adequately protected smokers against false claims to lower tar and nicotine, and not because it viewed such claims as permissible. But, in either case, what Congress thinks of "light" and "lower tar and nicotine" advertisements in general simply does not speak to whether, in enacting the FCLAA, Congress intended to preempt state lawsuits challenging them. The answer to that question, as *Cipollone* makes clear, lies in § 1334(b).

Second, *Cipollone* does not appear to treat claims based on "implied" as opposed to "express" misrepresentations differently for purposes of FCLAA preemption. Under general principles of tort law, either an express or an implied statement can give rise to a claim for fraudulent misrepresentation. *See Restatement (Second) of Torts* § 526(c) (1977); *accord Est. of Whitlock*, 615 A.2d 1173, 1176 (Me. 1992). And *Cipollone* flatly holds that "fraudulent-misrepresentation claims that do arise with respect to advertising and promotion (most notably claims based on allegedly false statements of material fact made in advertisements)" are not preempted, without drawing any distinction between the express and

the implied. 505 U.S. at 528-29. Indeed, in either case, the claim is "predicated not on a duty 'based on smoking and health' but on a more general obligation—the duty not to deceive." *Id.* The "express" or "implied" nature of an allegedly fraudulent misrepresentation, then, does not determine whether it is preempted by the FCLAA under the *Cipollone* approach. *See Mulford*, 2007 WL 1969734, at *17 (rejecting distinction, for purposes of FCLAA preemption, between fraud claim arising out of statements "light" and "Lowered Tar and Nicotine," and statement "Smoking cures cancer," which Philip Morris had proffered as a counterexample of "express," as opposed to "implied," misrepresentation).

Cipollone does set up a dichotomy between fraud "by false representation of a material fact," on one hand, and "by concealment of a material fact," on the other. 505 U.S. at 528 (internal quotation marks and bracketing omitted). As just discussed, the FCLAA does not preempt claims of the former; *Cipollone* holds that claims for the latter also survive preemption "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion," such as, for example, a state-law duty "to disclose such facts to an administrative agency." *Id.* We need not concern ourselves with *Cipollone*'s holding on the reach of § 1334(b) over fraudulent concealment claims, however, because the plaintiffs have not brought any.[16] Instead, they allege that Philip Morris made

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[16] While the amended complaint includes allegations of fraudulent concealment, we read them to assert a basis for tolling the statute of limitations on the plaintiffs' claims for relief, not a theory of recovery in their own right. Philip Morris does

material statements of fact that it knew to be false—"that Marlboro Lights and Cambridge Lights cigarettes are 'light' or have 'lower tar and nicotine'"—to encourage smokers to purchase its products, and that smokers did so in reliance on those statements. These allegations state a claim for fraudulent misrepresentation. *See Restatement (Second) of Torts* § 525 (1977); *accord, e.g., St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995, 1003-04 (Me. 2003). Unlike the district court, then, we do not see the plaintiffs' claims as arising out of what Philip Morris "should have said," but rather, what it did in fact say: that Marlboro Lights and Cambridge Lights have "lower tar and nicotine" than their full-flavored counterparts.

Philip Morris nevertheless insists that this theory amounts to a preempted failure-to-warn claim, "[b]ecause any false impression that the descriptors allegedly created would have been eliminated if [Philip Morris] had provided additional health information regarding compensation," that is, a smoker's tendency to take in the same harmful quantities of tar and nicotine from light cigarettes as from regular ones. We accept, for present purposes, that the plaintiffs could not claim to have been defrauded by the statements "light" and "lower tar and nicotine" in Philip Morris's advertising and promotion if they were accompanied by a specific warning about compensation. And we agree that, if the plaintiffs

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not argue that, to the extent § 1334(b) preempts fraudulent concealment claims, it also forecloses the use of that doctrine to toll the limitations period on a state-law claim that is otherwise not preempted, so we do not consider any such argument.

were claiming that the failure to give such a warning through those media was a breach of Philip Morris's duty under Maine law, the FCLAA would preempt that claim as "rely[ing] on a state-law requirement or prohibition with respect to advertising or promotion." *Cipollone*, 505 U.S. at 524 (internal quotation marks and ellipses omitted). But that is not the plaintiffs' claim. Again, they allege that Philip Morris made fraudulent misrepresentations in derogation of "a more general obligation—the duty not to deceive." *Id.* at 528-29.

The fact that these alleged misrepresentations were unaccompanied by additional statements in the nature of a warning does not transform the claimed fraud into failure to warn. Indeed, we have trouble imagining any misrepresentation claim wholly independent of what else the defendant said or did not say, given the "well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 364 (3d Cir. 1993) (adopting "bespeaks caution" doctrine in federal securities fraud context); *accord, e.g., Rodi v. S. New Eng. Sch. of Law*, 389 F.3d 5, 16-17 (1st Cir. 2004) (considering effect of disclaimer on plaintiff's ability to show reasonable reliance on false statement). Accepting Philip Morris's argument, then, would extend the preemptive reach of the FCLAA to virtually all fraudulent misrepresentation claims, doing violence to *Cipollone*'s explicit holding that those claims survive preemption.[17]

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[17] While Justice Scalia agreed with the plurality's conclusion that § 1334(b) preempts failure-to-warn claims unless they are

Moreover, *Cipollone* itself conceived of failure-to-warn claims much more narrowly than Philip Morris does, describing them to "*require a showing* that . . . advertising or promotions should have included additional, or more clearly stated warnings." *Id.* 524 (emphasis added). Because the plaintiffs' chosen theory of recovery requires no such showing, theirs is not a preempted failure-to-warn claim, as a number

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based on a duty to make disclosures outside of advertising or promotion, he disagreed with the implication that the FCLAA's preemptive effect extends to state laws only insofar as they specify that warnings be provided through advertising or promotion. 505 U.S. at 554-55. Instead, Justice Scalia posited that " [t]he test for pre-emption in this setting should be one of practical compulsion, *i.e.*, whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly." *Id.* at 555. Under this test, § 1334(b) would preempt state law that "requires manufacturers to advise consumers of their products' dangers, but . . . is indifferent to *how* that requirement is met," because, as a practical matter, such a law will compel tobacco companies to include those warnings in its advertisements or promotions. *Id.* at 554-55. Courts that have treated fraud claims arising out of the statements "light" and "lower tar and nicotine" as failure-to-warn claims—including the district court here—tend to rely on a form of Justice Scalia's "practical compulsion" test. *See, e.g.*, 436 F. Supp. 2d at 152 (reasoning that any warning about compensation, "if conveyed through a form of advertising, would run head first into what *Reilly* describes as the comprehensive federal scheme governing the advertising and promotion of cigarettes") (internal quotation marks omitted); *see also Brown*, 489 F.3d at 392-93; *In re Tobacco Cases II*, 2004 WL 2445337, at *21; *Dahl*, 2005 WL 1172019, at *11. But because the *Cipollone* plurality did not adopt Justice Scalia's method of analyzing failure-to-warn claims, 505 U.S. at 524-25, that a lawsuit might compel a manufacturer to alter its advertising does not mean the suit is preempted by the FCLAA.

of courts have concluded in rejecting similar arguments. *See Mulford*, 2007 WL 1969734, at *17; *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1294-95 (E.D.N.Y. 2006), *pet. for rev. of class certification granted sub nom. McLaughlin v. Philip Morris USA, Inc.*, No. 06-4666 (2d Cir. Nov. 16, 2006); *Izzarelli*, 117 F. Supp. 2d at 175; *Price*, 848 N.E.2d at 33; *Est. of Schwarz*, 135 P.3d at 421.

For the same reason, we do not see the plaintiffs' claims as embracing a preempted warning neutralization theory. Warning neutralization is a species of products liability claim based on conduct by the manufacturer tending to dilute what might otherwise serve as an effective warning of the dangers of its product. *See, e.g., McNeil v. Wyeth*, 462 F.3d 364, 368 n.4 (5th Cir. 2006); *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 514-15 (3d Cir. 1987); 2 Louis R. Frumer & Melvin I. Friedman, *Products Liability* § 12.03[2][e], at 12-61–12-62 (1960 & 2003 supp.). As an example, *Cipollone* cited "advertising that 'associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness,'" noting the FTC's 1964 conclusion that "'[t]o avoid giving the false impression that cigarette smoking is innocuous,'" such advertising "'must also disclose the serious risks to life that smoking involves.'" 505 U.S. at 527 (quoting 29 Fed. Reg. 8356 (1964)). In light of this "relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements," *id.*, *Cipollone* considered the plaintiff's warning neutralization claim "inextricably related to [her] failure-to-warn claim" and likewise preempted. *Id.* at 528.

The plaintiffs here, however, do not allege that the statements "light" and "lower tar and nicotine"

diluted the warnings on Philip Morris's packaging or advertising so as to make its cigarettes unreasonably dangerous or otherwise defective. Instead, the plaintiffs allege that the statements deceived them into purchasing Marlboro Lights and Cambridge Lights. The presence of the warnings may have some bearing on the materiality of these statements, as just discussed, but that possibility does not change the plaintiffs' case from one about the statements into *one* about the warnings. As one court has put it, because "[a]ny statement, even affirmatively false misrepresentations about the health effects of smoking, may have some neutralizing effect on the package warning . . . , the concept of neutralization could preempt virtually all affirmative fraud claims" if viewed as expansively as Philip Morris urges. *Whiteley*, 11 Cal. Rptr. 3d at 837. We, too, reject that expansive view as irreconcilable with the different treatment *Cipollone* accords warning neutralization claims, on one hand, and fraudulent misrepresentation claims, on the other. *See also Mulford*, 2007 WL 1969734, at *17; *Izzarelli*, 177 F. Supp. 2d at 175; *Price*, 848 N.E.2d at 33; *DaSilva v. Am. Tobacco Co.*, 667 N.Y.S.2d 653, 656 (N.Y. Sup. Ct. 1997); *Est. of Schwarz*, 135 P.3d at 421.

We acknowledge that the Fifth Circuit came to the opposite conclusion in *Brown*, ruling that fraudulent misrepresentation claims arising out of the statements "light" and "Lowered Tar and Nicotine" are in effect warning neutralization claims preempted by § 1334(b). 479 F.3d at 392-93; *accord In re Tobacco Cases II*, 2004 WL 2445337, at *21; *Dahl*, 2005 WL 1172019, at *7-*8. Taking the plaintiffs there to allege that "the descriptors, though accurate under the FTC method, are misleading because they suggest that Lights are less harmful than full-

flavored cigarettes," the *Brown* court reasoned that the FCLAA "pre-empts these 'implied misrepresentation' claims, which arise from statements or imagery in marketing that misleadingly downplay the dangers of smoking, and thus minimize or otherwise neutralize the effect of the federal mandated safety warnings." 479 F.3d at 392 (citing *Cipollone*, 505 U.S. at 527).

In line with our earlier discussion, however, we do not see anything in *Cipollone*'s discussion of warning neutralization claims that equates them with "implied misrepresentation" claims as *Brown* does.[18] We appreciate that the statements "light" and "lower tar and nicotine" could support a warning neutralization claim, *i.e.*, by suggesting that those brands of cigarettes do not pose the same grave threats to health announced in the accompanying warning label. *See, e.g.*, *Maize v. Atl. Ref. Co.*, 41 A.2d 850, 852 (Pa. 1945) (upholding plaintiff's verdict in products liability suit on the theory that calling cleanser "Safety-Kleen" could cause accompanying warnings to "seem of comparatively minor import"). But, as just discussed, it does not follow that those statements cannot also support a different theory of recovery, including one that falls outside the preemp-

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[18] Furthermore, we reiterate our views that *Cipollone* does not differentiate between "express" and "implied" misrepresentations, and that such a dichotomy is impossible to square with its holding that fraudulent misrepresentation claims escape preemption because they "are predicated not on a duty 'based on smoking and health,' but rather on a more general duty—the duty not to deceive." 505 U.S. at 528-29. As we have observed, that reasoning applies with the same force regardless of whether a defendant allegedly made false statements of material fact expressly or by implication.

tive reach of FCLAA.[19] Indeed, that is the central teaching of *Cipollone*: the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted and some of them not. 505 U.S. at 523-24. Though, again, plaintiffs cannot dodge § 1334(b) by slapping a non-preempted label on a preempted theory, they otherwise remain free to choose from among these potential claims in framing their complaints. *See* 5 Frumer & Friedman, *supra*, § 56.05[3], at 56-75 ("Plaintiffs suing the tobacco companies must, of necessity, assert a broad range of causes of action in order to avoid the pitfalls of preemption"); *accord Mulford*, 2007 WL 1969734, at *17 (refusing "to convert [a] claim into something that it is not" in deciding whether the FCLAA preempts it).

Of course, plaintiffs who elect to proceed on a non-preempted fraudulent misrepresentation theory must eventually prove each of the elements of that cause of action if they are to prevail, including that the challenged representations are indeed false. But, unlike the court in *Brown*, we do not believe that a plaintiff's chance of proving his claim plays any role in determining whether it is preempted by the FCLAA. In rejecting the plaintiffs' characterization

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[19] In reaching the opposite conclusion, *Brown* adopted the reasoning of other courts, including the district court here, that fraud claims arising out of the statements "light" and "lower tar and nicotine" are preempted because the alleged "'deception . . . could easily be corrected by requiring an additional warning on the packages . . . .'" 479 F.3d at 393 (quoting *In re Tobacco Cases II*, 2004 WL 2445337, at *21). This reasoning tracks Justice Scalia's "practical compulsion" test, which, as we have noted, does not reflect the views of the *Cipollone* plurality. *See* note 17, *supra*.

of their claim as sounding in fraud, *Brown* concluded that "[t]he terms 'light' and 'Lowered Tar and Nicotine' cannot . . . be inherently deceptive or untrue," because the cigarettes in question "do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement," *i.e.*, the Cambridge Filter Method. 479 F.3d at 392; *see also Clinton*, 2007 WL 2181896, at *11. This reality, in *Brown*'s eyes, foreclosed any fraudulent misrepresentation claim, leaving the plaintiffs to argue that the challenged statements served to neutralize the warnings—a theory preempted by *Cipollone*'s construction of the FCLAA. 497 F.3d at 392.

We think this approach puts the cart before the horse. The assertion that Marlboro Lights and Cambridge Lights rate lower in tar and nicotine than their full-flavored cousins according to the Cambridge Filter Method may ultimately affect whether the plaintiffs can show that the challenged statements are false. *Cf. Schwab*, 449 F. Supp. 2d at 1090-91 ("evidence that the FTC approved defendants' representations [as to tar and nicotine content] might tend to disprove the existence of a scheme to defraud"). We do not resolve the issue, however, because Philip Morris did not seek summary judgment on that ground. Instead, Philip Morris argued that the plaintiffs' claims—as set forth in their amended complaint—were (1) expressly preempted, (2) implicitly preempted, or (3) exempt from the reach of the Maine Unfair Trade Practices Act. We consider the effect of the descriptors' claimed accuracy on the second and third points *infra*, but we do not believe that the issue has any relevance in deciding the express preemption question.

Under *Cipollone*, whether § 1334(b) expressly preempts a particular claim depends on "whether the

legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking or health . . . imposed under State law with respect to advertising or promotion," 505 U.S. at 524, not on whether the action itself can ultimately succeed as a matter of substantive law. So we do not see how the statements' falsity—or, for that matter, their materiality, or whether Philip Morris made them with the requisite scienter—bears on the preemption analysis. Such issues "go[] to the merits of the fraud claim, not to the threshold question of preemption." *Price*, 848 N.E.2d at 36-37; *see also Mulford*, 2007 WL 1969734, at *17 ("Courts do not determine whether a plaintiff can succeed on the merits of the fraud claim before determining whether the fraud claim itself is preempted."); *cf. Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 349-54 (6th Cir. 2000) (considering whether FCLAA preempted fraud claim before considering whether plaintiff had stated elements of fraud cause of action). We disagree, then, with *Brown*'s view that the FCLAA preempts fraud theories arising out of "light" and "lower tar and nicotine" because those statements are not "inherently deceptive or untrue." 479 F.3d at 392.

Finally, Philip Morris argues that, because "the standards for finding liability under consumer protection acts around the country vary widely," allowing the plaintiffs' claims to survive preemption will undermine the FCLAA's goal of protecting manufacturers from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2). This is not an imaginary concern. As we have explained, however, fraudulent misrepresentation claims, even if brought under the aegis of a state consumer protection act,

are not premised on "regulations with respect to any relationship between smoking and health." They are premised on "longstanding rules governing fraud," which themselves arise not from any duty based on smoking and health, but on a duty not to deceive. *Cipollone*, 505 U.S. at 528-29. So, as *Cipollone* holds, neither the text of the FCLAA's statement of purpose nor the preemption provision itself fairly evinces the intent to displace all potentially inconsistent state cigarette advertising regulations, only such regulations that are "based on smoking and health." *Id.*

Of course, *Cipollone* further reasoned that § 1334(b) does not encompass fraudulent misrepresentation claims because they "rely only on a single, uniform standard: falsity" and therefore "do not create diverse, nonuniform and confusing standards." *Id.* at 529 (internal quotation marks omitted). Seizing on this language, Philip Morris notes that some of the elements of consumer protection violations, such as reliance and actual damages, vary from state to state. Yet the same can be said of the elements of common-law fraud,[20] *see generally* Peter A. Alces, *The Law of Fraudulent Transactions* § 2:3 (1989 & 2006 supp.) (discussing how states differ in articulating the elements of the tort), and *Cipollone* nevertheless concluded that reading the FCLAA not to preempt such claims was consistent with its text, context, and purpose. 505 U.S. at 528-29. Bound by *Cipollone*, as the parties agree we are, we reject the

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[20] In fact, Justice Scalia brought this very point to the plurality's attention, asserting that "it is not true that the States' laws governing fraud and misrepresentation impose identical legal standards." 505 U.S. at 553. The plurality, however, was not swayed. *See id.* at 529 n.21.

argument that the potential for varying standards of liability under different states' consumer protection acts means that the plaintiffs' claims are preempted by the FCLAA. They are not. The district court's ruling was in error.

B.

Philip Morris also challenges the plaintiffs' claims as impliedly preempted by federal law. Even in the absence of express preemptive language—which the FCLAA contains, but which we have concluded does not reach the claims in this case—federal law can preempt state law by implication in two other ways. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989). First, "Congress implicitly may indicate an intent to occupy an entire field to the exclusion of state law." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). "Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *ARC Am. Corp.*, 490 U.S. at 100-01; *see also, e.g., United States v. Locke*, 529 U.S. 89, 109-11 (2000). And, whether through field or conflict preemption, "state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

Philip Morris does not argue that either Congress or the FTC has evinced an intent to occupy the entire field of cigarette advertising, or even the narrower field of low-tar cigarette advertising. Nor does Philip Morris protest that complying with both the

state law the plaintiffs say has been violated and some contrary federal law would be impossible. Instead, Philip Morris maintains that the "[p]laintiffs' claims conflict with the FTC's 40-year history of regulation and control over the development, testing and marketing of low tar cigarettes, as well as the reporting of tar and nicotine measurements pursuant to the FTC Method and the use of descriptors substantiated by those measurements." Because Philip Morris has limited its implied preemption argument to the so-called "frustration-of-purpose" theory, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (collecting cases), it cannot prevail unless "the rule of law for which [the plaintiffs] contend [stands] 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives" at stake. *Id.* at 881 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In identifying those objectives, Philip Morris argues that "Congress and the FTC have both sought *uniform*, national standards for cigarette advertising with respect to smoking and health. And State-law actions like this one would create a different standard of deceptiveness that would plainly conflict with these goals." At the outset, we reject the notion that the plaintiffs' claims would interfere with any congressional designs on cigarette advertising.[21] It is

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21 Philip Morris claims that these "arguments do *not* rely on the FCLAA" (emphasis added), but does not identify any other congressional action supporting them. Looking past this contradiction, we nonetheless consider whether the FCLAA can serve as a source of implied preemption. And insofar as Philip Morris's implied preemption theory relies on what it perceives as the FTC's desire for uniform national standards of cigarette

true that, in the FCLAA, "Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health." *Reilly*, 533 U.S. at 548. By the same token, however, "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud," which are not so motivated. *Cipollone*, 505 U.S. at 529. As we have taken pains to elucidate, the plaintiffs' claims seek to enforce state-law prohibitions on fraud, not state-law prohibitions on cigarette advertising based on smoking and health. So their asserted rule of law—that the statements "light" and "lower tar and nicotine" constitute fraud—does not interfere with the goals of the FCLAA, which do not include establishing any national "standard of deceptiveness" for cigarette advertising.

In any event, both the Supreme Court and this one have squarely held that the FCLAA has no preemptive force beyond the language of § 1334(b) itself. *Cipollone*, as we have noted, overturned the ruling of the court of appeals "that Congress had impliedly pre-empted [the plaintiff's] claims challenging the adequacy of warnings on labels or in advertising or the propriety of [the defendants'] advertising and promotional activities," holding instead that "the pre-emptive scope of the [FCLAA] is governed entirely by the express language in [§ 1334(b)]." 505 U.S. at 517. Relying on *Cipollone*, we decided in *Harshbarger* that the FCLAA could not sustain an implied preemption challenge to a Massachusetts law requiring, *inter alia*, cigarette manufacturers to pro-

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advertising, as we explain *infra*, we do not even think that the FTC *itself* has enforced a uniform standard in this area.

vide the state health department with nicotine yield ratings for each of their brands "'which shall accurately predict nicotine intake for average consumers.'" 122 F.3d at 62 (quoting Mass. Gen. Laws ch. 94, § 307B (1996)).

In declining to imply a preemptive effect from the FCLAA, *Cipollone* reasoned that "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." 505 U.S. at 517 (internal quotation marks and citation omitted). Philip Morris argues that this reasoning has lost its force in light of subsequent Supreme Court decisions teaching that an express "preemption provision, by itself, does not foreclose (through negative implication) 'any possibility of implied conflict preemption.'" *Geier*, 529 U.S. at 869 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (bracketing by the Court and further citation omitted)); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). Philip Morris maintains that *Cipollone* and *Harshbarger* thus pose no obstacle to its implied preemption claim.

By the time we decided *Harshbarger*, however, the Supreme Court had already made clear in *Freightliner* that "[a]t best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." 514 U.S. at 289. Yet we did not read *Freightliner*—which considered the preemptive effect of a safety standard for trucks promulgated under the National Traffic and Motor Vehicle Act of 1966 ("NTMVSA"),

514 U.S. at 283-86—to cast doubt on *Cipollone*'s view that the presence of an express preemption clause *in the FCLAA* rules out expanding its preemptive reach through implied preemption principles.[22] *Harshbarger*, 122 F.3d at 78. Moreover, *Freightliner* explained that the *Cipollone* Court had, notwithstanding that view, nevertheless "engaged in a conflict preemption analysis of the [FCLAA], and found 'no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions.'" 514 U.S. at 288-89 (quoting *Cipollone*, 505 U.S. at 518).

Given this alternative basis for *Cipollone*'s holding that the FCLAA does not implicitly preempt state-law claims arising out of cigarette advertisements or promotions, it remains good law regardless of what the Court has since said, in other contexts, about the effect of express preemption clauses on implied preemption. Furthermore, we see nothing in either *Geier* or *Sprietsma*—which, like *Freightliner*, did not consider the preemptive effect of the FCLAA, but other federal statutes with express preemption provisions—suggesting that the *Cipollone* Court was wrong to draw an inference against implied preemption of state-law challenges to cigarette advertising

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22 We nevertheless declined to forego implied preemption analysis altogether in reliance on *Cipollone*, because the state disclosure requirements had been challenged in part on the basis of amendments to the FCLAA which *Cipollone* had not considered. 122 F.3d at 78. These amendments, effectuated through the Comprehensive Smoking Health Education Act of 1984, Pub. L. 98-474, 98 Stat. 2200, did not change the FCLAA in any manner relevant to our analysis here, and neither side has argued to the contrary.

from the presence of an express preemption provision *in the FCLAA*, as opposed to those other statutes. Just as in *Harshbarger*, then, "[w]e are bound by the *Cipollone* majority's holding that § 1334(b) governs the preemptive scope of the FCLAA" and, therefore, "we are not at liberty to address any implied preemption theories" premised on the statute. 122 F.3d at 78.

Philip Morris also founds its implied preemption claim on the FTC's oversight of cigarette advertising under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* (1997). We agree that neither *Cipollone* nor *Harshbarger* bars this argument, because those cases considered the preemptive effect of only the FCLAA, which did not "limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practice in the advertising of cigarettes." 15 U.S.C. § 1336. But we do not agree that the FTC's exercise of its authority in this area has preempted state-law damages actions, like this one, alleging that a cigarette manufacturer has engaged in such acts or practices through its use of the terms "light" and "lower tar and nicotine."

In brief, the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a), and empowers the Commission both to define and enforce that prohibition in a number of ways relevant here. The Commission may prescribe either informal "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices," *id.* § 57a(a)(1)(A), or, pursuant to notice-and-comment procedures, *see id.* §§ 57a(b)-(e), formal rules which define those acts and practices "with specificity," *id.* § 57a(a)(1)(B). In addition, the Commission may issue cease-and-desist or-

ders against those engaged in violations of the Act. *Id.* § 45(b). The FTC may enforce such orders—as well as its formal rules—by suing violators for either civil penalties, *id.* § 45(m), or "such relief as the court finds necessary to redress injuries to consumers" or other injured parties, *id.* §§ 57b(a), (b).

The FTC has regularly trained these powers on tar and nicotine claims in cigarette advertising; as the district court observed, "the tobacco industry is hardly unregulated in what it says to consumers about its products, including light cigarettes." 436 F. Supp. 2d at 151. But we reject the suggestion—and we describe it that way because, as we have noted, Philip Morris does not purport to make a field preemption argument—that the degree of federal regulation over a particular industry, no matter how "comprehensive" or "detailed," can itself displace state law.[23] As the Supreme Court has cautioned, to

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[23] In support of this point, Philip Morris's brief relies heavily on the Eighth Circuit's decision in *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005), *rev'd*, 127 S. Ct. 2301 (2007), which held that the FTC's detailed supervision of the cigarette testing process gave rise to federal removal jurisdiction over a lawsuit similar to this one on the theory that it was an action against a party "acting under" a federal officer pursuant to 28 U.S.C. § 1442(a)(1) (2006). This decision, however, was recently reversed by the Supreme Court; Philip Morris now says that the Court's "holding regarding [§] 1442(a)(1) removal has little to do with the issues" before us. We agree, and think that the same was true of the Eighth Circuit's holding to begin with. Philip Morris also makes much of the fact that the "Supreme Court had no problem 'assuming' the regulatory facts" underlying the implied preemption argument here, but we consider many of the same facts *infra* and find them insufficient to support Philip Morris's position. We see no need, then, to discuss

"infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state imbalance embodied in our Supremacy Clause jurisprudence." *Hillsborough County*, 471 U.S. at 717. Instead, under the established rules of conflict preemption we have recited, we must determine whether the FTC's oversight of tar and nicotine claims manifests a federal policy intended to displace conflicting state law.

As we have discussed, the FTC advised the tobacco industry in 1966 that it could make "factual statements" of tar and nicotine content, so long as they "were supported by adequate records of tests conducted in accordance with the Cambridge Filter Method." Press Release, Fed. Trade Comm'n (Mar. 25, 1966). The FTC soon began to assess such claims by conducting its own tests of cigarettes under the method, and proposed a formal rule requiring cigarette manufacturers to disclose the results of those tests in their advertisements. The proposal was put on hold, however, when the manufacturers agreed to make those disclosures voluntarily.

Before entering into this agreement, the FTC had sought a cease-and-desist order against The American Tobacco Company, charging that ads for certain brands of its cigarettes deceitfully created the impression that they were "low in tar" when they in fact contained more tar than the average brand per

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either the Supreme Court's or the Eighth Circuit's *Watson* decision further.

then-current FTC test results. This charge was resolved through a 1971 consent order forbidding American from "advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette." *In re Am. Brands, Inc.*, 79 F.T.C. 255, 258 (1971) (internal formatting omitted). For purposes of the order, "tar and nicotine content" was defined as "determined by the [FTC] in its testing," *i.e.*, per the Cambridge Filter Method.[24] *Id.* at 259.

Based principally on these exercises of authority over tar and nicotine claims, Philip Morris argues that the FTC has expressed a "policy of allowing their use so long as substantiated with the FTC Method numerical results and requiring publication of those results in all brand advertisements." Because the plaintiffs' claims "stand[] as an obstacle" to this policy, Philip Morris continues, they are implicitly preempted. Like the plaintiffs, we see a number of problems with this argument.

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[24] As the result of a subsequent cease-and-desist action against American, the company entered into another consent order with the FTC. *In re American Tobacco Co.*, 119 F.T.C. 3 (1995). While this order limited American's ability to make certain kinds of tar and nicotine claims, *see infra* note 26, the order also allowed the company, subject to certain restrictions, to compare the tar and nicotine ratings of its brands to those of other brands "with or without an express or implied representation that [its] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine." *Id.* at 11 (parentheses omitted).

First, since its 1969 agreement with the tobacco companies, the FTC has never issued a formal rule specifically defining which cigarette advertising practices violate the Act and which do not. As the plaintiffs point out, there is some authority for the proposition that "[s]tate prohibitions of unfair and deceptive practices are not preempted unless they conflict with an express FTC rule." *United States v. Philip Morris, Inc.*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003) (emphasis omitted); *see also Katharine Gibbs Sch., Inc. v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979); *Wisconsin v. Amoco Oil Co.*, 293 N.W.2d 487, 496 (Wis. 1980); *accord Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (declining to give preemptive effect to agency action taken without regard to formal rulemaking procedures); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 196 (3d Cir. 1995) (Nygaard, J., dissenting). Other courts, however, have held that an agency can preempt state law through action short of formal rulemaking. *See, e.g., Elizabeth Blackwell Health Ctr.*, 61 F.3d at 182-83 (HHS interpretive rule); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1418 (4th Cir. 1994) (EPA consent order); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (FTC consent order); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 9-10 (Cal. 2004) (FDA letters to drug manufacturers).

Unlike many other exercises of agency authority, formal rulemaking comes with a host of procedural protections under the Administrative Procedure Act ("APA"), such as notice of the proposed rule, an opportunity for interested parties to participate, a statement of the basis and purpose of any rule adopted, and its publication in the Federal Register. 5 U.S.C. § 533 (2007). Limiting the preemptive

power of federal agencies to exercises of formal rulemaking authority, then, ensures that the states will have enjoyed these protections before suffering the displacement of their laws. *See, e.g., Wabash Valley Power Ass'n*, 903 F.2d at 453-54; Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism and Administrative Law*, 46 U. Pitt. L. Rev. 607, 664-65 (1985). This reasoning has particular force in the case of the FTC Act, which imposes procedural requirements on the Commission's rulemaking powers that exceed those of the APA. 15 U.S.C. §§ 57(c)-(e). Indeed, courts and commentators have understood these additional safeguards to reflect a congressional concern—well-documented in their legislative history—over the preemptive effect of FTC regulation on state consumer protection law. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 989-90 & n.41 (D.C. Cir. 1985); *Katharine Gibbs*, 617 F.2d at 677; Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 243 (1976); Pierce, *supra*, at 638-40.

Second, apart from the likely import of its rulemaking provisions, the FTC Act raises an additional hurdle to Philip Morris's implied preemption theory, at least insofar as that theory relies on the 1971 and 1995 consent orders. The Act states that "[r]emedies provided in [15 U.S.C. § 57b] are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b(e). And § 57b, as we have observed, empowers the Commission to sue for relief on behalf of consumers against those who violate its cease-and-desist orders against unfair or deceptive acts or practices. We do not think it a stretch, then, to say that when the FTC merely issues such an order, but never uses it as the basis for a subsequent lawsuit, the order

does not supplant state-law rights of action any more than the lawsuit would have. A number of authorities have reached the same conclusion, though not necessarily by way of the same rationale. *See California v. Am. Stores Co.*, 872 F.2d 837, 843-44 (9th Cir.), *rev'd on other grounds*, 495 U.S. 916 (1989); *Louisiana ex rel. Guste v. Fedders Corp.*, 543 F. Supp. 1022, 1024 (M.D. La. 1982); *Arvin Indus. v. Maremont Corp.*, 1973-1 Trade Cases ¶ 74,416, 1973 WL 784, at *3 (S.D. Ind. Mar. 9, 1973); 1 Stephanie W. Kanwit, *Federal Trade Commission* § 12:6 (2006); *but see Gen. Motors Corp.*, 897 F.2d at 39 (holding that an FTC "consent order reflecting a reasonable policy choice and issued pursuant to a congressional grant of authority may preempt state legislation").

Relying on the Supreme Court's decision in *Geier*, Philip Morris argues that § 57b(e), which it calls a "savings clause," "does *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. *Geier* held that the savings clause of the NTMVSA, which provides that "'[c]ompliance with' a federal safety standard 'does not exempt any person from liability under common law,'" *id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988)), did not preserve "state-law tort actions that conflict with federal regulations." *Id.* at 869. The Court reasoned that "[t]he words 'compliance' and 'does not exempt' sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one." *Id.* (citation omitted). Thus, the Court explained, the federal standard would displace conflicting state law in the former case, but not the latter, where a plaintiff remains free to argue for a

higher state-law standard as envisioned by the savings clause. *Id.* at 870.

But unlike the savings clause of the NTMVSA, § 57b(e) does not speak of compliance with a federal standard as a defense to a state-law claim, leaving open the possibility of a preemptive conflict between the standard and the claim. Instead, § 57b(e) specifically provides that state-law rights of action survive the FTC's efforts at judicial enforcement of its own federal standards: in other words, that those efforts are "in addition to, and not in lieu of" other available remedies. We can think of no other purpose for this clause other than to allow further relief from unfair or deceptive acts or practices under state law even after the Commission has already challenged them through litigation under the FTC Act, and Philip Morris does not suggest any. *Cf. Geier*, 529 U.S. at 870 (noting that Court's reading of the NTMVSA's savings clause did not "conflict with the purpose of the saving provision, say, by rendering it ineffectual").

This reading of § 57b(e), moreover, does nothing to diminish the FTC's power to preempt state law through other assertions of its authority. After entering into a consent order, for example, the Commission remains free to adopt its terms as a formal rule, 15 U.S.C. § 57a(b)(1); as we have discussed, this process affords states and other interested parties with the kinds of procedural protections usually deemed essential to regulatory preemption. *See, e.g.*, *Wabash Valley Power Ass'n*, 903 F.3d at 454. We acknowledge, as Philip Morris points out, that an agency often prefers to formulate policy through case-by-case adjudication, rather than rulemaking, and that adjudicated cases "generally provide a guide to action that the agency may be expected to take in

future cases." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 756-66 (1969) (plurality opinion). "But this is far from saying . . . that commands, decisions, or policies announced in adjudications are 'rules' in the sense that they must, without more, be obeyed by the affected public." *Id.* Indeed, the FTC Act itself reflects this distinction, at least with regard to consent orders: it specifically provides that the Commission cannot enforce them against non-parties.[25] 15 U.S.C. § 45(m)(1)(B). So we do not believe that the FTC can preempt state-law actions arising out of particular practices simply by entering into a consent order allowing them to continue. *See Am. Stores*, 872 F.2d at 843 (ruling that consent decree, which resolved FTC's challenge to corporate merger under FTC Act by requiring partial asset divestiture, did not bar challenge to merger by state, which "may have different interests than does the FTC in protecting its citizens from antitrust violations").

Third, as the one court squarely holding that FTC consent orders can preempt state law has recognized, the mere entry of such an order dealing with a particular practice "is insufficient to preclude supplemental state regulation." *Gen. Motors Corp.*, 897 F.2d at 39. Thus, even if we were to agree that FTC action short of formal rulemaking—including consent orders—can implicitly preempt state law in some cases, we do not think that this is one of them, because the plaintiffs' state-law claims do not pose a threat to any federal regulatory objectives apparent

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25 Similarly, when seeking relief on behalf of consumers for violation of a consent order, the FTC may proceed against the parties to the order only. 15 U.S.C. § 57b(a)(2).

in the FTC's approach to tar and nicotine claims in cigarette advertising.

Though Philip Morris argues that FTC policy permits a manufacturer to make such claims so long as they are consistent with the results of testing under the Cambridge Filter Method and those results are disclosed in the manufacturer's advertising, the Commission has on occasion challenged statements about the tar or nicotine content of a particular brand even though they were supported by such testing. In 1982, for example, the FTC told a cigarette manufacturer that it could not rely on the Cambridge Filter Method to substantiate claims that one of its brands had only 1 milligram of tar, because the method did not accurately measure the tar and nicotine content of that brand due to its unusual filter design. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985). The FTC has also challenged a manufacturer's advertisements "that consumers will get less tar by smoking ten packs of [its] brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads," since the claim was based on "ratings obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking." *In re Am. Tobacco Co.*, 119 F.T.C. at 4.[26]

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[26] In the consent order resolving this charge, American agreed to refrain from representing, through certain comparisons of the tar ratings of any of its brands to those of other brands, "that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar." 119 F.T.C. at 10. But the order pre-

The FTC, then, has not invariably allowed tar and nicotine claims that are supported by the Cambridge Filter Method, but has recognized that such claims may nevertheless amount to unfair or deceptive acts or practices in certain circumstances. We acknowledge that the claim at issue here—that Marlboro and Cambridge Lights have "lower tar and nicotine" than their full-flavored versions—differs from those the FTC has challenged in the past, but our task is not to decide whether the FTC would view a particular kind of tar and nicotine claim as a violation of the FTC Act.[27] Instead, we must determine whether the FTC's oversight of such claims "convey[s] an authoritative message of a federal policy" jeopardized by the plaintiffs' common-law damages action. *Sprietsma*, 537 U.S. at 67. Because the only policy we perceive is that certain tar and nicotine

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served American's ability otherwise to compare the tar and nicotine ratings of its brands to those of other brands, provided "such representation is true and, at the time of making [it], [American] possesses and relies upon reliable scientific evidence that substantiates the representation." *Id.* at 10-11. Philip Morris characterizes this part of the order as permitting tar and nicotine claims so long as they are substantiated by the Cambridge Filter Method. If this is the case, we wonder why the FTC did not simply identify the method by name instead of calling it "reliable scientific evidence," but, in any event, the interpretation of this particular aspect of the 1995 consent order does not affect our conclusion that the FTC's decision to challenge American's ads in the first place shows that it has not given its blessing to all Cambridge Filter Method-supported tar and nicotine claims.

27 In Part II.C, *infra*, we consider whether the FTC "permitted" the claims at issue so as to exempt them from the coverage of the Maine Unfair Trade Practices Act.

claims consistent with Cambridge Filter Method test results can still amount to unfair or deceptive acts or practices, we think not.

We derive additional support for this conclusion from *Geier* and *Sprietsma*.[28] *Geier* ruled that a state-law tort action alleging that the defendant had negligently designed the plaintiff's 1987 car without airbags would frustrate the purpose of a federal regulation "requir[ing] auto manufacturers to equip some but not all of their 1987 vehicles with" such devices. 529 U.S. at 864-67. Based on its review of the administrative record of the regulation in question and a brief from the Solicitor General explaining the agency's position, the Court identified the federal purpose as a "policy judgment that safety would be best promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (internal quotation marks omitted). Conversely, in *Sprietsma*, the Court declined to infer that the Coast Guard's decision not to enact a rule under the Federal Boat Safety Act ("FBSA") requiring propeller guards on recreational boat engines preempted a state-law tort suit premised on the lack of such a device. 537 U.S. at 67. As the Court saw it, the Coast Guard's deci-

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28 Philip Morris intimates that the plaintiffs have waived any argument based on *Sprietsma* because they did not rely on it below. Though the plaintiffs did not cite the case to the district court, they did argue that "no federal purpose or objective would be frustrated by a finding of liability against Defendants in this case." In taking up this argument on appeal, then, we are free to consider *Sprietsma*—which, after all, is binding Supreme Court authority. *See, e.g., Air Line Pilots Ass'n, Int'l v. Guilford Transp. Indus., Inc.*, 399 F. 3d 89, 100 n.7 (1st Cir. 2005).

sion did not reflect "a federal policy against propeller guards," *id.* at 67, but simply "a judgment that the available data did not meet the FBSA's 'stringent' criteria for federal regulation." *Id.* at 66. As in *Geier*, the Court based this conclusion on the agency's explanation for its decision, as well as an amicus brief from the Solicitor General explaining its position. *Id.* at 66-68.

Geier and *Sprietsma*, then, teach that it is not the fact of agency action on a particular subject alone—but the reasons for the action—that control its preemptive effect. And here, no clear rationale emerges from the history of the FTC's treatment of tar and nicotine claims; indeed, the parties point to conflicting statements by the Commission itself on whether it even has an official position on the definitions of the terms "light" and "lower tar and nicotine." *Compare, e.g.*, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997) ("There are no official definitions for these terms") *with, e.g.*, 1980 FTC *Rep. to Congress* 18 n.11 ("The FTC has not defined . . . any term related to tar level except for 'low "tar"', which the FTC defines as 15.0 mg or less 'tar.'"). Moreover, as in *Sprietsma* and in contrast to *Geier*, the Solicitor General recently filed a brief in the Supreme Court explaining that the FTC "has never promulgated definitions of terms such as 'light' and 'low tar'" and that its previous statements purporting to define them "did not reflect an official regulatory position." Br. for United States as Amicus Curiae Supporting Petitioners, *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) (No. 05-1284), 2006 WL 3694382, at *4. On this record, we cannot discern a coherent federal policy on low-tar claims, let alone one driven by the sort of "important means-related federal objectives" necessary to preempt conflicting state law. *Geier*,

529 U.S. at 881; *cf. Int'l. Paper Co. v. Ouellete*, 479 U.S. 481, 497 (1987) (finding conflict between Clean Water Act and inconsistent state law where "[i]t would be extraordinary for Congress, after devising an elaborate permit system that sets *clear standards*, to tolerate common-law suits that have the potential to undermine this regulatory structure") (emphasis added). The plaintiffs' claims are not implicitly preempted.

C.

Finally, Philip Morris argues that its challenged advertising practices constitute "[t]ransactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under the statutory authority of the United States" and, as such, are excepted from the Maine Unfair Trade Practices Act. Me. Rev. Stat. Ann. tit. 5, § 208(1). This argument, like Philip Morris's implied preemption theory, depends largely on its characterization of FTC policy to allow the use of the terms "light" and "lower tar and nicotine" when supported by testing under the Cambridge Filter Method. And, as we have explained, we disagree with that characterization: the full history of the FTC's oversight of tar and nicotine claims reveals its view that, depending on the circumstances, those claims can be unfair or deceptive notwithstanding their support in Cambridge Filter Method test results. *See, e.g., Brown & Williamson Tobacco Corp.*, 778 F.2d at 37-39; *In re Am. Tobacco Co.*, 119 F.T.C. at 4.

We disagree, then, with those courts holding that the FTC has "authorized" Philip Morris's "light" and "lower tar and nicotine" claims so as to put them beyond the reach of state consumer protection statutes with exceptions similar to Maine's. *See Flanagan v.*

Altria Group, Inc., No. 05-71697, 2005 WL 2769010, at *6 (E.D. Mich. Oct. 25, 2005); *Price*, 848 N.E.2d at 50; *see also Sullivan v. Philip Morris USA, Inc.*, No. 03-796, 2005 WL 2123702, at *9 (W.D. La. Aug. 31, 2005) (finding "light" and "lower tar and nicotine" claims to constitute "conduct that complies with" 15 U.S.C. § 45(a)(1) and therefore exempt from Louisiana Unfair Trade Practices and Consumer Protection Act). In our view, these decisions overlook the subtleties in the Commission's approach to tar and nicotine claims we have already discussed.

The court in *Price*, for example, concluded that the FTC, through its 1971 and 1995 consent orders with American Tobacco, "could, and did, specifically authorize all United States tobacco companies to utilize the terms 'low,' 'lower,' 'reduced' or like qualifying terms such as 'light' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams of the smoke produced by the advertised cigarette." 848 N.E.2d at 50. As we have explained, though, the American Tobacco consent orders may have provided guidance to the rest of the industry on how the Commission would likely view such claims in the future, but they by no means reflected an across-the-board approval of the use of the descriptors alongside the tar and nicotine ratings. And again, had the FTC intended to "authorize" those kinds of advertisements, it needed only to exercise its rulemaking authority to that end.[29] That the Com-

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[29] Indeed, Philip Morris, while maintaining that "[t]he FTC has specifically permitted the use of descriptors . . . that reflect the Cambridge Method's yield measurements," has nevertheless asked it to "adopt a rule expressly authorizing the industry to

mission has not done so is reason enough to doubt the conclusions of *Price* and other courts that the FTC's handling of "light" and "lower tar and nicotine claims" has removed them from the purview of state consumer protection laws.

Furthermore, even if the consent decrees did "authorize" particular tar and nicotine claims for purposes of state consumer protection laws, that authorization does not appear to extend to the claims at issue here. Insofar as the 1971 consent decree permits "use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," it does so only if "the statement is accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette" per the Cambridge Filter Method. *In re Am. Brands, Inc.*, 79 F.T.C. at 258 (internal formatting omitted). But, as the plaintiffs point out, Philip Morris uses the terms "light" and "Lowered Tar and Nicotine" on the packages of Marlboro and Cambridge Lights *without* mentioning their tar and nicotine ratings. Philip Morris responds that the FTC could not have mandated those disclosures on the packages because, under the FCLAA, "[n]o statement relating to smoking and health, other than the [health warnings] re-

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continue to use such descriptors" if accompanied by "disclaimers" about compensation and in accordance with "uniform" definitions of the terms to correspond to particular tar ratings. Petition for Rulemaking at 4, 34, *In re Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure* (F.T.C. Sept. 18, 2002), *available at* http://www.ftc.gov/os/comments/philipmorrisconabisco/philipmorrispetition.pdf. The FTC has yet to rule on the petition.

quired by [15 U.S.C. § 1333], shall be required on any cigarette package."[30] 15 U.S.C. § 1334 (a).

We see at least two weaknesses in this position. First, as we have noted, the FCLAA also provides that "[n]othing in this chapter (other than the requirements of [15 U.S.C. § 1333]) shall be construed to limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. So it is at least arguable that the restriction on additional health-related statements in the FCLAA does not apply to the FTC. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 185 (2000) (Breyer, J., dissenting). Second, if the portion of the 1971 consent order requiring disclosure of tar and nicotine yields does not apply to cigarette packages, then, it would seem to us, neither does the portion of the order permitting the use of the descriptors. Otherwise, the order would have allowed American Tobacco to label its cigarettes as low tar without disclosing that they in fact had more tar than the average cigarette—in essence, to continue the same allegedly deceptive practice that led the FTC to seek the order in the first place. We have great difficulty reading the consent order in such a self-defeating manner.[31]

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[30] Philip Morris does not argue that the 1995 American Tobacco consent order relaxed the requirements of the 1971 order, so we do not separately discuss the 1995 order here.

[31] The court in *Price* read the 1971 consent order to authorize Philip Morris's use of the descriptors sans disclosures on the theory that the disclosure requirement "applies only when the manufacturer is making a direct comparison between its brand of cigarettes and a competing brand." 848 N.E.2d at 37. Philip Morris does not rely on that reading here. As we have said,

We do not mean to suggest that the consent orders have no bearing at all on whether Philip Morris's use of the terms "light" and "Lowered Tar and Nicotine" violates the Maine Unfair Trade Practices Act. Indeed, the Act provides that, in construing its ban on unfair or deceptive acts or practices, "courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to [15 U.S.C. § 45(a)(1)], as from time to time amended." Me. Rev. Stat. Ann. tit. 5, § 207; *see, e.g.*, *Searles v. Fleetwood Homes of Pa., Inc.*, 878 A.2d 509, 520 (Me. 2005) (relying on FTC consent decree to determine whether particular practice was unfair under § 207). But whether Philip Morris's challenged statements fit the statutory proscription is not the question before us. We conclude simply that those statements are not "authorized" by the consent orders or anything else in the FTC's approach to tar and nicotine claims so as to exempt them from the Act. *See Mulford*, 2007 WL 1969734, at *29; *Aspinall v. Philip Morris Cos.*, Civ. A. No. 98-6002, 2006 WL 2971490, at *8 (Mass. Super. Ct. Aug. 9, 2006), *rev. granted*, No. SJC-09981 (Mass. Apr. 25, 2007).

Finally, in an echo of its implied preemption argument, Philip Morris posits that, even if the consent orders did not authorize the tar and nicotine claims at issue here, the FTC's "comprehensive, detailed regulation of cigarette advertising and promotion" suffices to exempt them from the Maine Unfair

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[Footnote continued from previous page]

however, we take the view that, because the disclosure requirement is essential to the order, if it does not apply in a certain context, than neither does any "authorization" of the descriptors.

Trade Practices Act (internal quotation marks omitted). The Act, however, exempts "[t]ransactions or actions otherwise *permitted*" (emphasis added), not "otherwise *regulated*." *Cf.* Mary Dee Pridgen, *Consumer Protection and the Law* § 4:32 (1986 & 2006 supp.) (contrasting consumer protection statutes exempting "actions or transactions otherwise . . . regulated" with those exempting "only those activities 'permitted'").

Unlike Philip Morris, we do not believe that the Maine Supreme Judicial Court equated these two concepts in *First of Maine Commodities v. Dube*, 534 A.2d 1298 (Me. 1987). There, the plaintiffs claimed that the defendant real estate broker had violated the Maine Unfair Trade Practices Act by failing to notify them of their purported right under another statute to void the parties' exclusive listing agreement within three days of its execution. *Id.* at 1301. The court observed that the Maine Real Estate Commission "may investigate and penalize licensed brokers who violate the numerous statutory restrictions on their activities," including one imposing specific standards on exclusive listing agreements—but not the three-day voiding option the plaintiffs sought to enforce. *Id.* at 1301 (citing Me. Rev. Stat. Ann. tit. 42 § 4004 (1978 & 1986 supp.). Thus, the court concluded that "[b]ecause by statute the Maine Real Estate Commission extensively regulates brokers' activities, including the execution of exclusive listing agreements, such activities fall outside the scope of Maine's Unfair Trade Practices Act." *Id.* at 1302.

We read *First of Maine Commodities*, then, for the proposition that conduct is exempt from the Unfair Trade Practices Act where it is subject to specific standards left to the enforcement of an administrative agency, not merely those circumstances in which

the agency's regulatory scheme is generally "extensive" or "detailed." *See also Weinschenk*, 868 A.2d at 205 (rejecting argument that § 208(1) exempted builder's sales of homes "because industry operations are separately regulated by state or federal law"). As we have discussed, the FTC does not appear to have imposed specific standards on tar and nicotine claims in cigarette advertising; even if it has, the plaintiffs here, in contrast to the plaintiffs in *First of Maine Commodities*, do not seek to hold Philip Morris liable under the Unfair Trade Practices Act for complying with those standards. Neither *First of Maine Commodities* nor the language of § 208(1) itself supports Philip Morris's argument that its use of the terms "light" and "Lowered Tar and Nicotine" is a "transaction[] or action[] otherwise permitted under laws administered by any regulatory board or officer" exempt from the Maine Unfair Trade Practices Act.

III.

In summary, we conclude that the plaintiffs' claims that Philip Morris has made fraudulent misrepresentations in violation of the Maine Unfair Trade Practices Act by advertising and promoting Marlboro and Cambridge Lights as "light" and having "Lowered Tar and Nicotine" are not (1) expressly preempted by the FCLAA, (2) implicitly preempted, either by the FCLAA or by the FTC's oversight of tar and nicotine claims in cigarette advertising, or (3) barred by the Act's exemption for "transactions or actions otherwise permitted." We do not, of course, reach any conclusion on the merits of the plaintiffs' claims, the availability of summary judgment on other grounds, or the force of or any other defense potentially available to Philip Morris; and nothing in what we have said should be construed as expressing any views on those issues that are not before us. As

always, "we leave the extent and nature of further proceedings in the hands of the district court." *Patterson v. Patterson*, 306 F.3d 1156, 1162 (1st Cir. 2002). We ***vacate*** the judgment of the district court and remand for further proceedings.

So ordered.

APPENDIX B

Stephanie GOOD, Lori A. Spellman, and Allain L. Thibodeau, individually and on behalf of all others similarly situated, Plaintiffs,

v.

ALTRIA GROUP, INC., and PHILIP MORRIS USA, INC., Defendants.

No. CV 05 127-B-W.

United States District Court,
D. Maine.

May 25, 2006.

Gerard V. Mantese, Mantese and Associates, P.C., Mark C. Rossman, Mantese and Associates, P.C., Troy, MI, Samuel W. Lanham, Jr., Cuddy & Lanham, Bangor, for Stephanie Good Individually and on behalf of others similarly situated, Lori A. Spellman Individually and on behalf of others similarly situated, Allain L. Thibodeau Individually and on behalf of others similarly situated, Plaintiffs.

Frances E. Bivens, Davis Polk & Wardwell, Guy Miller Struve, Davis Polk & Wardwell, New York, NY, David C. King, Rudman & Winchell, Bangor, H. Peter Del Bianco, Jr., Lambert, Coffin, Portland, Kenneth J. Parsigian, Goodwin Proctor LLP, Boston, MA, Teresa M. Cloutier, Lambert, Coffin, Portland, for Altria Group Inc., Phillip Morris USA Inc., Defendants.

ORDER ON DEFENDANT PHILIP MORRIS USA, INC.'S MOTION FOR SUMMARY JUDGMENT

WOODCOCK, District Judge.

Long-time smokers of Marlboro Lights cigarettes, Stephanie Good, Lori Spellman, and Allain Thibodeau filed a class action against Altria Group, Inc. (Altria) and Philip Morris USA, Inc. (Philip Morris), claiming that Altria and Philip Morris deliberately deceived them about the true and harmful nature of light cigarettes, thereby violating the Maine Unfair Trade Practices Act and enriching themselves unjustly. Philip Morris moved for summary judgment on the ground that federal law expressly pre-empts these state causes of action. Based on *Cipollone v. Liggett Group*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) and its progeny, this Court agrees that federal law pre-empts the Plaintiffs' causes of action and grants summary judgment in favor of Philip Morris.[1]

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[1] Philip Morris also raised two other arguments in its motion: that the claims were implied pre-empted and that Plaintiffs' claim under the Maine Unfair Trade Practices Act was barred by statutory exemption. Because this Court has granted summary judgment on express pre-emption grounds, it has not reached these additional arguments.

I. Statement of Facts[2]

a. The Parties

The Plaintiffs, Maine residents, allege not only that they are long-time Marlboro Lights smokers, but also that they represent a class of all similarly-situated consumers in Maine.[3] *First Am. Compl.* at ¶¶ 7–9, 41–51 (Docket # 12). Altria is a Virginia corporation, which through its wholly owned subsidiary, Philip Morris, engaged in the business of designing, manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights brand cigarettes.[4] *Id.* at ¶¶ 10, 11.

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[2] The parties raise several objections to the statements of material facts, which this Court has addressed in a separate, contemporaneous order. *See Order on Parties' Objs. to the Statements of Mat. Facts.*

[3] On September 21, 2005, the Plaintiffs moved this Court for class certification. *Pls.' Mot. for Class Certification* (Docket # 10). Defendants objected and moved to stay. *Defs.' Obj. to Pls.' Mot. for Class Certification* (Docket # 28); *Joint Mot. to Stay* (Docket # 23). This Court granted Defendants' Motion to Stay pending resolution of this motion. *Good v. Altria Group, Inc.*, 231 F.R.D. 446 (D. Me. 2005).

[4] The motion for summary judgment was filed only by Philip Morris. At oral argument, the parties acknowledged as a practical matter the Court's ruling would be equally applicable to Altria. This opinion refers only to Philip Morris, since it is the sole moving party.

b. Congressional regulation[5]

Shortly after the Surgeon General's Advisory Committee on Smoking and Health issued its 1964 report concluding that cigarette smoking was a health hazard, Congress responded by enacting the Federal Cigarette Labeling and Advertising Act (FCLAA) in the face of impending regulation by federal agencies and the States. *Def.'s Statement of Undisputed Facts* at ¶¶ 1–3 (Docket # 21) (DSUF); *Pls.' Opposing Statement of Mat. Facts* at ¶ 2 (Docket # 51) (POSMF). The purpose of FCLAA, enacted in 1965, was "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health. . . ." *DSUF* at ¶ 3; 15 U.S.C. § 1331. By means of FCLAA, Congress specified the text of the warning labels that manufacturers were required to place on cigarette packages and expressly prohibited others from imposing additional requirements with respect to cigarette labeling. *DSUF* at ¶¶ 4–5; 15 U.S.C. § 1333–1334. FCLAA, however, did not require the use of a "Lights" descriptor or representations that cigarettes are purportedly "lower in tar and nicotine". *POSMF* at ¶ 5.

Originally due to expire in 1969, Congress amended FCLAA that year to ban cigarette advertisements on any medium of electronic communication subject to the jurisdiction of the Federal Trade

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[5] Consistent with the "conventional summary judgment praxis," the Court recounts the facts in a light most favorable to Plaintiffs' theory of the case, consistent with record support. *Gillen v. Fallon Ambulance Serv.*, 283 F.3d 11, 17 (1st Cir. 2002). The Court has relied either on the uncontested facts or on Plaintiffs' version, if contested.

Commission (FTC), taking cigarette advertisements off television and radio. *DSUF* at ¶¶ 6–7. Also in 1969, Congress changed the required warning labels on cigarette packages and expressly provided that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act". *DSUF* at ¶¶ 8–9; 15 U.S.C. § 1334. The Senate report states that these amendments were intended to ensure national uniformity with respect to the advertising and promotion of cigarettes. *DSUF* at ¶ 12. *See also DSUF* at ¶ 1. However, none of the changes added any provisions with regard to the specific use of a "Lights" descriptor or representations that cigarettes are purportedly "lower in tar and nicotine". *POSMF* at ¶ 12.

In 1984, Congress amended FCLAA again, this time to require a series of rotating health warnings.[6] *DSUF* at ¶ 13; *POSMF* at ¶ 13. Over time, Congress considered, but rejected, legislation aimed at further regulating tobacco, including legislation that would have required cigarette manufacturers to identify tar and nicotine yields on cigarette packages and would have given the Food & Drug Administration (FDA) authority over cigarettes. *DSUF* at ¶¶ 14–15.

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[6] These are the statutorily mandated warnings, each beginning with "SURGEON GENERAL'S WARNING": "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy"; "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health"; "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight"; and "Cigarette Smoke Contains Carbon Monoxide." *DSUF* at ¶ 13.

c. FTC: Early Involvement with the Tobacco Industry

The FTC was created to enforce the nation's antitrust and consumer protection laws. The aim of consumer protection laws is to prevent unfair or deceptive business practices, including unfair or deceptive advertising. *DSUF* at ¶ 17. Since the 1930s, the FTC has exercised its authority to monitor cigarette advertisements and promotions in several respects and has used several enforcement mechanisms such as cease-and-desist orders, corrective advertising, bans, posting of bonds, disgorgement of profits, and financial penalties.[7] *DSUF* at ¶¶ 20, 22; POSMF at ¶¶ 20, 22. In the 1940s, the FTC addressed tar and nicotine claims in cigarette advertisements, but not the specific descriptors "lights" and "lowered tar and nicotine". *DSUF* at ¶ 23; *POSMF* at ¶ 23.

In 1955, the FTC issued Cigarette Advertising Guides for staff use in evaluating cigarette advertising, asking that the industry substantiate claims regarding tar and nicotine yields. *DSUF* at ¶ 24; *POSMF* at ¶ 24. Nevertheless, in the 1950s, different manufacturers used different test methods, and it was difficult to compare tar and nicotine yields among brands. *DSUF* at ¶ 25. In 1959, after an FTC statement that it would file enforcement actions against disclosures it deemed to be *per se* deceptive or unsubstantiated health claims, all seven major manufacturers agreed to delete all tar and nicotine claims from advertising. *DSUF* at ¶ 26; *POSMF* at ¶ 26. In regulating cigarette advertising and promotions, the FTC has relied on the views and findings of

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[7] Any final action taken by the FTC is subject to judicial review. *POSMF* at ¶ 20.

the scientific community and other government agencies, such as the U.S. Department of Health and Human Services, and has developed expertise in assessing the impact of advertising claims on the general public. *DSUF* at ¶¶ 19, 21.

d. FTC: The FTC Method

The FCLAA expressly preserved the authority of the FTC to regulate and proscribe unfair or deceptive acts or practices in the advertising of cigarettes, although even the FTC was precluded from requiring additional requirements on cigarette packages. *DSUF* at ¶¶ 5, 11; *POSMF* ¶ 5; 15 U.S.C. § 1336. In 1964, after the Surgeon General's report, the FTC proposed a Trade Regulation Rule that would have prevented any cigarette label or advertisement from stating or implying without substantiation that smoking an advertised brand promotes good health or physical well-being, is not a hazard to health, or is less of a hazard to health than smoking other brands and noted that claims regarding lowered tar and nicotine could be deceptive without an adequate warning and scientific support. *DSUF* at ¶¶ 27–28. The Trade Regulation Rule was vacated by the voluntary agreement of the cigarette companies to subject themselves to a Cigarette Advertising Code and the enactment of FCLAA that same year. *DSUF* at ¶¶ 29–31; *POSMF* at ¶¶ 29–30.

In 1966, the FTC, prompted by its belief that a scientific consensus had emerged regarding the hazards of tar and nicotine in cigarettes, proposed a standardized method for measuring tar and nicotine levels. *DSUF* at ¶¶ 32–35; *POSMF* at ¶¶ 33–35. Known as the FTC or Cambridge Method, this method involves detailed specifications pursuant to which a machine smokes each cigarette the same

way to the same length and the particulate matter is collected on a pad and measured for tar and nicotine content. *DSUF* at ¶¶ 35–38; *POSMF* at ¶¶ 35, 37. The FTC established its own testing lab to measure tar and nicotine yields and the testing results were published in the Federal Register. *DSUF* at ¶ 39, 52; *POSMF* at ¶ 52. However, the FTC never formally adopted the FTC method. *POSMF* at ¶ 37.

In 1970, the FTC once again published notice of a proposed trade regulation regarding "advertising of cigarettes", which was never enacted. The regulation would have required the tobacco companies to disclose in their advertising the tar and nicotine content of their cigarettes as measured by the FTC Method, but again did not specifically reference "Lights" cigarettes or the descriptor "lowered tar and nicotine". *Pls.' Statement of Additional Mat. Facts* at ¶¶ 10–12 (Docket # 51) (PSAMF); *Def.'s Resp. to Pls.' Statement of Additional Mat. Facts* at ¶¶ 11–12 (Docket # 55) (DRPSAMF); *DSUF* at ¶ 53. The FTC informed manufacturers that in lieu of rulemaking, it would accept an agreement from them, and, as a result, the tobacco companies voluntarily undertook to disclose such claims and to use the FTC Method: *DSUF* at ¶¶ 54–55; *POSMF* at ¶¶ 54–55; *PSAMF* at ¶ 15; *DRPSAMF* at ¶ 15. This agreement did not refer to the use of the specific descriptors at issue here. *POSMF* at ¶ 55. The FTC reminded companies that it retained the right to reinstitute rulemaking procedures at any time if necessary, and in turn the companies challenged FTC's ability to promulgate the rule in the first place, characterizing it as a voluntary program. *DSUF* at ¶ 56; *POSMF* at ¶ 56; *PSAMF* at ¶¶ 16–17; *DRPSAMF* at ¶¶ 16–17. The FTC classified its testing regime as "regulatory activ-

ity" when reporting to Congress in 1970. *DSUF* at ¶¶ 41, 57; *POSMF* at ¶¶ 41, 57.

The FTC closed its testing lab in 1987. *DSUF* at ¶ 42; *POSMF* at ¶ 42. Since then, companies themselves have reported their test results to the FTC, which publishes them in the Federal Register each year. *DSUF* at ¶¶ 43, 52, 59; *POSMF* at ¶¶ 43, 52. The FTC may inspect testing facilities. *DSUF* at ¶ 44; *POSMF* at ¶ 44. But, companies are not required to test and report pursuant to the FTC Method either by law or regulation.[8] *PSAMF* at ¶¶ 19, 24, 26; *DRPSAMF* at ¶¶ 19, 24, 26.

The FTC was aware of certain limitations of the test, including that it could not accurately measure how much tar and nicotine a human smoker would receive from any particular cigarette. *DSUF* at ¶¶ 45–47; *POSMF* at ¶¶ 45, 47; *PSAMF* at ¶ 19; *DRPSAMF* at ¶ 19. Indeed, Philip Morris, among others, cautioned the FTC that a single, uniform testing method could not account for the many variations in human smoking habits. *DSUF* at ¶ 45; *POSMF* at ¶ 45. By 1978, the public health community and the FTC concluded that some "light" cigarette smokers engaged in "compensatory behavior": changing the way they smoked to ensure no actual reduction of tar and nicotine. Examples of compensatory behavior include unconsciously covering invisible "ventilation holes" in the filter paper, smoking the cigarettes more intensely, inhaling more deeply, and holding the smoke in the lungs for a longer time period. *DSUF* at ¶¶ 62–64; *POSMF* at ¶¶ 62–64. In light of this conclusion, the FTC investigated

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[8] High-ranking FTC officials admitted as much at a 1987 congressional hearing. *Id.*

whether to change the FTC Method; however, even after this problem was brought to its attention, the FTC did not advocate a new testing method. *DSUF* at ¶¶ 65–67; *POSMF* at ¶¶ 65–67. In 1978, the FTC issued an advisory opinion directing Lorillard Tobacco Company (and by implication other companies who had signed on to the voluntary disclosure agreement) not to use any tar figures other than those obtained through the FTC method. *DSUF* at ¶¶ 58, 67; *POSMF* at ¶¶ 58, 67.

In 1981, in response to complaints from other cigarette companies regarding a Brown & Williamson brand, the FTC investigated assertions that the FTC Method was itself deceptive because it did not measure the actual amount of tar and nicotine ingested by smokers. *DSUF* at ¶¶ 68–69; *POSMF* at ¶ 68. As part of its investigation, the FTC consulted experts in the smoking and health field and considered different methods of measuring tar and nicotine. *DSUF* at ¶ 70. That investigation and subsequent litigation led to a specific prohibition against Brown & Williamson use of FTC results because their filter design "fooled" the FTC machine. *DSUF* at ¶¶ 68, 71–72; *POSMF* at ¶¶ 68, 72. No regulatory action has been brought against any other cigarette company regarding similar conduct; nor was the use of the descriptor "ultra low" challenged in the case against Brown & Williamson. *DSUF* at ¶¶ 73–74; *POSMF* at ¶¶ 73–74. After the Brown & Williamson case, the FTC published notice in the Federal Register seeking public comment as to whether the testing method should be altered. *DSUF* at ¶ 75. However, it never promulgated any rules. *POSMF* at ¶ 75. The cigarette companies continue to comply voluntarily with the FTC Method. *POSMF* at ¶ 76.

Although compliance remains voluntary, the FTC Method is supported by epidemiologic studies which found that reducing tar yields as measured by the FTC Method provided a measure of tar and nicotine yields that reduced the risk of disease. *DSUF* at ¶¶ 51, 79, 80; *POSMF* at ¶¶ 79– 80. It also allows for uniform comparison among companies and is "capable of being presented to the public in a manner that is readily understandable". *DSUF* at ¶¶ 40, 48, 77–78; *POSMF* at ¶¶ 40, 48, 77–78. The FTC considered that a uniform test would stimulate competition among manufacturers, and continues to rely on the forces of competition, at least in part, to regulate cigarette advertising. *DSUF* at ¶ 50; *POSMF* at ¶ 50; *PSAMF* at ¶ 25; *DRPSAMF* at ¶ 25. The FTC has also been purportedly unable to identify a viable alternative. *DSUF* at ¶ 77; *POSMF* at ¶ 77.

e. FTC: Lights and Lowered Tar & Nicotine

In 1966, the FTC lifted its 1959 "ban" on substantiated factual statements of tar and nicotine content, but not as to "collateral representations" regarding reduction or elimination of health hazards. *DSUF* at ¶ 81; *POSMF* at 81. In the confusion that followed the lifting of the "ban", the FTC, in an internal memorandum and in a letter to the National Association of Broadcasters, stated that as a general rule it would not challenge representations relating to "low" tar and nicotine content when such representations were shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the FTC and the basis of comparison was fully and fairly stated. *DSUF* at ¶¶ 82–85; *POSMF* at ¶¶ 84–85. Still, no regulatory action was taken, although the letter's content was described by the FTC

as a "policy statement". *POSMF* at ¶ 85; *DSUF* at ¶ 86. The FTC has defined "low tar" as 15.0 mg. or less tar, but has not defined any other similar descriptor. *DSUF* at ¶ 87; *POSMF* at ¶ 87. In 1969, an enforcement action against the American Tobacco Company a/k/a American Brands resulted in a consent decree prohibiting American Tobacco from advertising that it had reduced tar levels if it did not disclose the precise content and restricting improper comparisons to other brands. *DSUF* at ¶¶ 88–89; *POSMF* at ¶¶ 88–89.[9] The action was disclosed under "regulatory activity" in a 1971 Report to Congress. *DSUF* at ¶ 90; *POSMF* at 90.

The FTC has reviewed the propriety of certain terms to describe cigarettes measuring lower in tar and nicotine several times since the 1970s.[10] As a

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[9] Plaintiffs argue the action did not involve the specific descriptors in this case: "Lights" and "lowered tar and nicotine". *POSMF* at ¶¶ 88–89. However, the complaint referenced American Tobacco Company's use of the terms "lower in tar" and other statements "of similar import". *Compl. In the Matter of Am. Tobacco Co.* at ¶ 4 (Docket # 21—Def. Exh. 249). Furthermore, the consent order required American Tobacco to cease and desist from "stating in advertising that any cigarette manufactured by it . . . is low or lower in 'tar' by use of the words 'low', 'lower', and 'reduced' *or like qualifying terms*, unless the statement is accompanied by a clear and conspicuous disclosure of: (1) the 'tar' and nicotine content. . . ." *Decision and Order In the Matter of Am. Tobacco Co.* at 2 (Docket # 21—Def. Exh. 255) (emphasis supplied). This Court does not consider the descriptors in this case as outside the range contemplated in the American Tobacco Company Order, even if they are not precisely the same.

[10] These reviews occurred in 1992, at the behest of a consumer group; in 1997, when the FTC formally sought public com-

result, the FTC indicated that the descriptors are not forbidden and are not unfair or deceptive (at least if not unsubstantiated), although the FTC has also not imposed any actual regulations covering use of the terms. *DSUF* at ¶¶ 91–95; *POSMF* at ¶¶ 91–95.[11]

Congress held hearings on low tar cigarettes in 1987 following the closure of the FTC testing lab. *DSUF* at ¶¶ 96–97. In 1988, an act proposing the repeal of FCLAA's preemption provision to "make the tobacco companies liable for misrepresentation, false advertising, and other breach of warranties" was introduced in the United States House of Representatives. *DSUF* at ¶ 98. Its sponsor claimed that advertisements for low tar cigarettes were deceptive because they implied that smoking cigarettes was safer without any supporting medical evidence. *DSUF* at ¶ 99. The proposed bill would have permitted states to require more stringent warnings than federal law requires, allowing states to neutralize such deceptive advertisements. *DSUF* at ¶ 100. The FTC opposed this proposed bill, because it was concerned that if FCLAA did not preempt state law, states would be allowed to require additional and/or inconsistent warnings which would make it difficult

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[Footnote continued from previous page]

ments; and, in 1998, at the behest of Senator Lautenberg. *DSUF* at ¶¶ 91–93.

[11] In 1995, another consent decree with the American Tobacco Company was issued, concerning brand comparisons. In it, the FTC indicated that the presentation of tar and nicotine ratings of two brands, made for comparative purposes, was not by itself improper, with or without representations that a brand is "low" or "lower", so long as no more than a single cigarette or pack of one brand is visually depicted versus a single cigarette or pack of any other brand. *DSUF* at ¶ 91; *POSMF* at ¶ 91.

if not impossible to advertise on a national basis. *DSUF* at ¶¶ 101–102; *POSMF* at ¶¶ 101–102.

f. Philip Morris

Philip Morris began marketing Marlboro Lights cigarettes in 1971 and Cambridge Lights in 1986. *DSUF* at ¶ 103. These brands must carry the same Surgeon General's warnings as "full flavor" cigarettes. *DSUF* at ¶ 104; *POSMF* at ¶ 104. It used "Lights" to advertise both brands, and "lowered tar and nicotine" to advertise and promote Marlboro Lights. *PSAMF* at ¶ 6; *DRPASMF* at ¶ 6. These descriptors are based on FTC Method test results. *DSUF* at ¶ 105; *POSMF* at ¶ 105. Philip Morris knew that a single uniform testing method, such as the FTC Method, could not account for the variations in human smoking habits. *DSUF* at ¶ 45; *POSMF* at ¶ 45; PASMF at ¶ 22; *DRPASMF* at ¶ 22. At least one Philip Morris study conducted suggested that smokers often have a larger smoke intake on Marlboro Lights than on Marlboros. PASMF at ¶ 8; *DRPASMF* at ¶ 8. Philip Morris also knew that the FTC Method "gave low numbers". PASMF at ¶ 21; *DRPASMF* at ¶ 21. In 2001, the U.S. Department of Health and Human Services found that the tobacco industry knew that representations of cigarettes as "light" were inherently deceptive. PASMF at ¶ 9; *DRPASMF* at ¶ 9. Philip Morris has never, however, expressly stated that Marlboro Lights are less hazardous than full flavor cigarettes. *DSUF* at ¶ 106; *POSMF* at ¶ 106.

In 2002, Philip Morris submitted a "Petition for Rulemaking to the FTC" in response to an FTC question regarding whether there was a need for official guidance with respect to the terms used in marketing lower rated cigarettes, requesting action in light

of recent scientific developments. *PSAMF* at ¶¶ 29–30; *DRPSAMF* at ¶¶ 29–30. In 2005, Philip Morris presented a FDA Position statement supporting legislation for FDA regulation of tobacco, including authority for the FDA to regulate or ban terms such as "light" or "low tar". *PSAMF* at ¶ 28; DRPSMF at ¶ 28.

II. Discussion

a. Standard of Review

Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The First Circuit has defined "material" to mean "a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant." *McCarthy v. Nw. Airlines, Inc.* 56 F.3d 313, 315 (1st Cir. 1995). It has defined "genuine" as "the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Id.* The burden on the moving party may be discharged by demonstrating an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court is obligated to view the entire record "in the light most flattering to the nonmovant" and indulge "all reasonable inferences in that party's favor." *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

b. Pre-emption

Since *McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 4 L.Ed. 579 (1819), it has been "settled that state law that conflicts with federal law is 'without effect'". *Cipollone v. Liggett Group*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting

Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)). In *Gibbons v. Ogden*, 9 Wheat. 1, 22 U.S. 1, 6 L.Ed. 23 (1824), Chief Justice Marshall wrote that the Supremacy Clause[12] of the United States Constitution requires that state laws which "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution . . . ," are preempted and, therefore, invalid. *Id.* at 211. The First Circuit has said that this "verity remains firmly embedded in our modern jurisprudence." *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir. 1992). Pre-emption "may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Global Naps, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59, 71 (1st Cir. 2006) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)).

To determine whether state law should be preempted, courts distinguish between express and implied pre-emption. *Grant's Dairy—Maine, LLC v. Comm'r of Me. Dep't of Agric.*, 232 F.3d 8, 15 (1st Cir. 2000); *Greenwood*, 971 F.2d at 822. Express preemption occurs only when a federal statute explicitly confirms Congress's intention to pre-empt state law and defines the extent of that preclusion. *Grant's Dairy*, 232 F.3d at 15. In this context, when "'Con-

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12 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

gress has unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)). *See also New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006) (citation omitted). In every pre-emption case, the "purpose of Congress is the ultimate touchstone." *Id.* at 74 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)).

Pre-emption is "not to be lightly presumed". *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). *See also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Ins. Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) ("despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law"). Moreover, consumer protection is "a subject[ ] over which the states have traditionally exercised their police powers." *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 43 (1st Cir. 2005) (quoting *Greenwood*, 971 F.2d at 828). And when Congress legislates in a field which the states have traditionally occupied, this Court begins with "the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress". *Pac. Gas & Elec. v. Energy Res. Comm'n*, 461 U.S. 190, 206, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) (quoting *Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)); *Grant's Dairy*, 232 F.3d at 14–15. Even so, though in the area of consumer protection law any "preemption provision must be construed cautiously and with due regard for state sovereignty. . . it does not serve as a buckler against the force of the Supremacy Clause". *Greenwood*, 971 F.2d at 828.[13]

In FCLAA, Congress recognized that "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" impede commerce and the national economy. 15 U.S.C. § 1331; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542–43, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). To avoid this specter of confusion, Congress prescribed the specific language of the Surgeon General's health warnings that must appear on all cigarette packages and in cigarette advertisements. *See* 15 U.S.C. § 1333. Further, pursuant to FCLAA's two-pronged pre-emption provision, found in 15 U.S.C. § 1334, Congress "unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in § 1333," and "precludes States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising or promotion of cigarettes." *Reilly*, 533 U.S.

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[13] In *Rowe*, the First Circuit recently discussed whether a pre-emption analysis should start with a presumption against pre-emption where the state law was enacted pursuant to its police power interest. *Rowe*, at 74 n.10. *Rowe* acknowledged that the "circumstances in which the presumption is to apply are not altogether clear." *Id.* However, unlike *Rowe* where the parties devoted "a great deal of argument" to the issue, *id.*, Philip Morris has not argued that the presumption should not apply, despite Plaintiffs' raising the issue. *See Pls.' Opp'n* at 16–17.

at 542, 121 S.Ct. 2404. At the same time, Congress declared that "nothing in this Act . . . (other than the requirements of section 4 [15 U.S.C. § 1333]) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practice in the advertising of cigarettes". 15 U.S.C. § 1336.

Philip Morris argues that Plaintiffs:

> [W]ould have this Court substitute its judgment for that of Congress and the FTC by applying state law either to *require* that PM USA provide additional health information about Marlboro Lights and Cambridge Lights or to *prohibit* the use of the terms "lights" and "lowered tar and nicotine" in cigarette labeling and advertising in Maine—and only in Maine. Imposing liability on plaintiffs' claims, therefore, under any legal theory, would necessarily create state law *requirements or prohibitions* with respect to cigarette advertising and promotion that are at odds with Congress's comprehensive federal scheme governing the advertising and promotion of cigarettes.

Def.'s Mot. at 14 (emphasis in original).[14] Plaintiffs rely on *Cipollone* to argue their claims are fraudulent-misrepresentation claims, not pre-empted by FCLAA. *Pls.' Opp'n* at 17–19. In reply, Defendant characterizes Plaintiffs' claims not as express fraud, but as "warning neutralization" or failure to warn—both expressly held preempted by *Cipollone*. *Def.'s Mot.* at 19; *Def.'s Reply* at 1–2, 8. To resolve the question, a close examination of the *Cipollone* opinion is needed.

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[14] It is useful at the outset to dispose of two preliminary matters. First, the predicate legal duty created by Plaintiffs' claims constitutes a "requirement or prohibition" under state law—and Plaintiffs do not appear to challenge this point, *see Def.'s Reply* at 7. Plaintiffs' prayer for relief requests an award of damages as well as "such injunctive relief as may be appropriate in the circumstances". *First Am. Compl.* (However, expressly disclaimed is any claim for damages for personal injuries. *Id.* at ¶ 4). In *Cipollone*, the Supreme Court, in a plurality opinion, noted that common-law damages actions impose forbidden "requirements or prohibitions" within the scope of 15 U.S.C. § 1334. "[State] regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 505 U.S. at 521, 112 S.Ct. 2608 (citations omitted).

Second, the claims here concern "advertising or promotion". *See Def.'s Mot.* at 17. While it may not necessarily be true, as Defendant claims, that "*every* communication between a cigarette manufacturer and consumers" is advertising or promotion within the meaning of FCLAA, *see Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1149 (9th Cir. 2005); *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997), nevertheless Plaintiffs concede that the claims here concern advertising. *See Pls.' Opp'n* at 19.

i. The *Cipollone* Conundrum

Much of the clarity and confusion that surrounds tobacco litigation can be traced to *Cipollone*, a 1992 Supreme Court decision. *Cipollone* arose from conflicts among lower courts about the extent federal tobacco law pre-empted state law claims. Perceiving "the manifest importance of the issue", the Court undertook "to resolve the conflict". *Cipollone*, 505 U.S. at 509, 112 S.Ct. 2608. Unfortunately, the Court issued a somewhat fractionalized opinion, clarifying some issues while raising new ones, to the extent that now, nearly fourteen years later, courts remain divided about what the decision means and how to apply it.[15] As if to prove the point, here both parties extensively cite *Cipollone* as plausibly supporting their opposing positions. *Cipollone*'s distinctions, though clear in theory, defy clear application.

Cipollone made at least two points.[16] After reviewing the 1965 and 1969 Acts, it concluded that their "pre-emptive scope" was "governed entirely by the express language in § 5. . . ." *Id.* at 517, 112 S.Ct. 2608. It ruled that there was "'no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation", because Congress had enacted a "provision explicitly address-

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15 Justice Stevens wrote for the majority in parts I, II, III and IV, but only three other justices joined his opinion in Parts V and VI. Justice Blackmum filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, joined by Justices Kennedy and Souter; Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, joined by Justice Thomas.

16 These points are in Parts III and IV, both portions of the opinion which commanded a majority.

ing that issue, and . . . that provision provides a 'reliable indicium of congressional intent with respect to state authority'."[17] *Id.* (citations omitted). Second, addressing § 5 in the 1965 Act,[18] *Cipollone* found that Congress had spoken "precisely and narrowly" and "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels . . . or in cigarette advertisements. . . ." *Id.* at 518, 112 S.Ct. 2608.

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17 As explained in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), by so concluding, *Cipollone* did not "mean that the express clause entirely forecloses any possibility of implied pre-emption." *Id.* at 288, 115 S.Ct. 1483. *See also Rowe*, at 74 ("The primary focus is on the 'plain wording' of the statute because the text 'contains the best evidence of Congress' pre-emptive intent'. . . . But '[a]lso relevant is the structure and purpose of the statute as a whole as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law.'") (citations omitted).

18 Captioned "Preemption", section 5 of the 1965 Act provided in part:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89–92, 79 Stat. 283, as amended, 15 U.S.C. § 1334.

When it turned to § 5 of the 1969 Act,[19] however, the majority melted to a plurality. Justice Stevens wrote that the "plain language of the pre-emption provision in the 1969 Act is much broader." *Id.* at 520, 112 S.Ct. 2608. First, it bars "not simply 'statements' but rather 'requirements or prohibitions . . . imposed under State law.' Second, the 1969 Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes." *Id.* To evaluate the sweep of the 1969 Act, *Cipollone* stated that "the appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525, 112 S.Ct. 2608. The Court proceeded through each state law claim and ruled on whether and the extent to which each was pre-empted:[20]

Failure to Warn: *Cipollone* said that to the extent the state law claim relies on a "requirement or prohibition . . . with respect to . . . advertising or

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[19] The 1969 Act modified the pre-emption provision by replacing the original § 5(b) with a provision that reads:

> (b) State Regulations. No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act

Public Health Cigarette Smoking Act, Pub. L. No. 91–222, 84 Stat. 87, as amended, 15 U.S.C. § 1334; *Cipollone*, 505 U.S. at 515, 112 S.Ct. 2608.

[20] This Court describes only those portions of *Cipollone* that address causes of action touching upon the theories Plaintiffs are pursuing.

promotion", it is pre-empted. *Id.* at 524, 112 S.Ct. 2608. In other words, if claims require a showing that Defendant's advertising or promotions should have included additional, or more clearly stated, warnings, these claims are pre-empted. *Id.* However, to the extent the state law claim relies "solely on [the defendant's] testing or research practices or other actions unrelated to advertising or promotion", it is not. *Id.* at 524–25, 112 S.Ct. 2608.

Fraudulent Misrepresentation: *Cipollone* described two fraudulent misrepresentation theories: one pre-empted; one not. The first involved an allegation that the tobacco companies "through their advertising, neutralized the effect of federally mandated warning labels", by, for example, minimizing the health hazards associated with smoking. *Id.* at 527, 112 S.Ct. 2608. This *Cipollone* found pre-empted, because it was "merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." *Id.* (emphasis in original). It is "inextricably related" to the failure-to-warn theory. *Id.* at 528, 112 S.Ct. 2608.

The second theory alleged "intentional fraud and misrepresentation both by 'false representation of a material fact [and by] concealment of a material fact.'" *Id.* at 528, 112 S.Ct. 2608. Such a claim is not pre-empted, even if the allegedly fraudulent statements appear in advertisements. *Id.* at 528–29, 112 S.Ct. 2608. *Cipollone* reasoned that such claims are "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* The justification for the distinction is that "unlike state-law obligations concerning the warning necessary to render a product 'reasonably safe', state-law proscriptions on intentional fraud rely only on a single, uniform standard:

falsity". *Id.* at 529, 112 S.Ct. 2608. It is this final theory that Plaintiffs argue applies, *see Pls.' Opp'n* at 19, while Defendant argues that Plaintiffs' assertions comprise failure-to-warn or warning neutralization claims. *Def.'s Mot.* at 19–24.

ii. The Crux of the Complaint

Plaintiffs claim that "Defendants engaged in a course of unfair and/or deceptive business practices in connection with the design, manufacture, distribution, promotion, marketing and sale of Marlboro Lights cigarettes by:

> a. Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;
>
> b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;
>
> c. Intentionally manipulating the design and content of Marlboro Lights and Cambridge Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of

greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" description; and

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Marlboro Lights and Cambridge Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine."

First Am. Compl. at ¶ 34.[21] More generally, Plaintiffs allege Defendants engaged in acts of

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[21] Elsewhere, the list of alleged deceptive acts and practices reads somewhat differently, but is essentially the same:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers "lowered tar and nicotine" in comparison to regular cigarettes;

b. Designing cigarettes to register lowered tar and nicotine levels under machine testing conditions while actually delivering higher levels of these compounds when smoked by consumers, thereby rendering the "light" product descriptor deceptive and misleading;

c. Placing ventilation holes on the filter of light cigarettes that are covered or blocked by the smoker's lips or fingers under normal use, thereby negating the represented effects of the light brand;

d. Manipulating the nicotine levels in their light cigarettes;

e. Employing techniques that purportedly reduce machine-measured levels of tar in their Marlboro Lights and Cambridge Lights cigarettes, including increased air dilution through the use of ventilation holes in or near the filter but which actually increase the

fraudulent concealment, which provide the basis for its asserted violations of Maine's UTPA and its claim of unjust enrichment.

iii. Children of *Cipollone*

If there is indeed anything new under the sun, tobacco litigation is not it. This precise question, express pre-emption of claims of deception regarding "lights" cigarettes, has generated controversy across this country. Three decisions are particularly helpful to Defendant: *Reilly*; *Dahl v. R.J. Reynolds Tobacco Co.*, No. MP 03–5582, 2005 WL 1172019 (Minn. Dist. Ct. May 11, 2005) and *In re Tobacco Cases II*, No. JCCP 4042, 2004 WL 2445337 (Cal. Super. Aug. 4, 2004).[22]

[Footnote continued from previous page]

> mutagenicity (genetic and chromosomal damage) of tar delivered to the consumer and thereby increase the level of harmful toxins per milligram of nicotine delivered to the consumer; and,
>
> f. Manipulating the design of their Marlboro Lights and Cambridge Lights cigarettes, including but not limited to, modifying the tobacco blend, weight, rod length and circumference; using reconstituted tobacco sheets and/or expanded tobacco; increasing smoke pH levels by chemical processing and additives, such as ammonia, in such a way that resulted in delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" product descriptor.

Id. at ¶ 54.

[22] Four more, relied on by Defendant, are less helpful. In *Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852 (8th Cir. 2005), the Eighth Circuit addressed whether a light cigarette class action could be removed to federal court under the federal officer removal statute. The statutory and policy considerations on whether federal courts should exercise jurisdiction are distinct

[Footnote continued from previous page]

from concerns raised by a motion for summary judgment on pre-emption grounds, but the Eighth Circuit concluded that in agreeing to the FTC Method test, Philip Morris was "'acting under' the direction of a federal officer"—a conclusion of some tangential applicability here. *Id.* at 859.

Newton v. R.J. Reynolds Tobacco Co., No. C–02–1415 VRW, slip op. (N.D. Cal. 2003) (Docket # 21—Attach. 5 ("Tab A")), dealt with the plaintiffs' attempt to amend their complaint to "include false and misleading advertising claims" regarding "light", "low-tar", and "low-nicotine" cigarettes. *Id.* at *11. *Newton* is distinguishable on two grounds. First, it is factually distinguishable because the *Newton* plaintiffs were not purchasers or users of such products and could not show any harm. *Id.* at *12. Second, *Newton* does not discuss *Cipollone*'s exemption for fraud based on intentional misstatement—*Cipollone* is not cited at all.

Philip Morris cites *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F. Supp. 2d 194 (D. Mass. 2000) for holding that an implied warranty of fitness for a particular purpose claim (i.e. that Defendant should have known that decedent relied on its expertise in creating safe tobacco products) was pre-empted. *See id.* at 203; *Def.'s Mot.* at 22. *Johnson* also held, however, that the claim that *Brown & Williamson* had breached its implied warranty of merchantability because the cigarettes were defectively designed in several respects, including insufficient reduction in tar and other carcinogens, was not pre-empted. 122 F. Supp. 2d at 202. Furthermore, in holding the fraud claim was not pre-empted, *Johnson* construed the complaint as alleging that "B & W made intentional misrepresentations and false statements of material fact in its advertising and promotional material". *Id.* at 203. This result is consistent with *Cipollone*'s holding that 'the 1969 Act does not preempt claims of intentional fraud and misrepresentation based on false representations and concealment of material fact, *even if the allegedly fraudulent statements were made in advertisements or promotions . . .*" *id.* at 203 (citing *Cipollone*, 505 U.S. at 528–29, 112 S.Ct. 2608) (emphasis supplied). *See also Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 348 (6th Cir. 2000).

In *Reilly*, the United States Supreme Court addressed an appeal from the First Circuit, concerning

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Flanagan v. Altria Group, Inc., No. 05–71697, 2005 WL 2769010 (E.D. Mich. Oct. 25, 2005), provides more useful support for Philip Morris. In *Flanagan*, involving nearly identical allegations against these same defendants, the Court held the case was exempt under the Michigan Consumer Protection Act. Determining that the conduct at issue had been impliedly authorized by the FTC, Judge Edmunds noted: "The FTC's regulatory scheme is not the only possible source of federal authorization. . . Under the FCLAA, Congress mandated that all cigarettes and cigarette advertisements contain certain health warnings, which have taken the form of the now-familiar SURGEON GENERAL'S WARNING labels found on tobacco products and advertisements. Furthermore, in an effort to ensure uniformity, Congress pre-empted governmental rulemaking bodies from prescribing additional warnings. A 1969 amendment to the FCLAA expanded the preemption provision. . . ." *Id.* at *6.

Supplementing this quartet is a slew of additional cases, not heavily relied on by Philip Morris and distinguishable as Plaintiffs posit, *see Pls.' Opp'n* at 24–25—but which collectively provide some (albeit limited) support for Defendant's position. *See Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183 (11th Cir. 2004); *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837 (8th Cir. 2001); *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3d Cir. 2001); *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042–43 (7th Cir. 1999); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837 (W.D. Ky. 1999); *Appavoo v. Philip Morris, Inc.*, No. 122469/97, 1998 WL 440036 (N.Y. Sup. Ct. July 24, 1998); *Geiger v. Am. Tobacco Co.*, 252 A.D.2d 474, 674 N.Y.S.2d 775 (N.Y. App. Div. 1998); *Peel v. R.J. Reynolds Tobacco Co.*, No. 1:98–CIV–2426–TWT, 1999 U.S. Dist. LEXIS 22691 (N.D. Ga. Apr. 30, 1999); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 679 N.Y.S.2d 593 (N.Y. App. Div. 1998); *Lacey v. Lorillard Tobacco Co., Inc.*, 956 F.Supp. 956 (N.D. Ala. 1997).

regulations the Massachusetts Attorney General had promulgated governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. 533 U.S. at 532, 121 S.Ct. 2404. A group of tobacco companies claimed the state regulations violated federal law and the United States Constitution. *Id.* Distinguishing between regulation of content, which would be pre-empted, and regulation of location, which would not, the First Circuit concluded the state regulatory scheme was not pre-empted by the FCLAA. *Id.* at 538–39, 121 S.Ct. 2404. The Supreme Court reversed on pre-emption. After examining the language of the FCLAA's pre-emption provision,[23] Reilly states that Congress "unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in § 1333." 533 U.S. at 542, 121 S.Ct. 2404. The Court described section 1334(b) as "more expansive", employing "far more sweeping language to describe the state action that is pre-empted." *Id.* After reviewing the history of federal regulation of the tobacco industry, *Reilly* observed that the former statute, enacted in 1965, had prevented only statements in advertising, but that the amended provision of the 1969 Act reaches all "requirements or prohibitions" imposed under state law "with respect to the advertising or promotion of cigarettes." *Id.* at 545. *Reilly* concluded that "Congress expanded the pre-emption provision with respect to the States, and at the same time, it allowed the FTC to regulate cigarette advertising." *Id.* at 545–46, 121 S.Ct. 2404.

Massachusetts argued its regulations were not based on smoking and health, because they did not

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23 15 U.S.C. § 1334.

involve health-related content in cigarette advertising but instead counteracted youth exposure to cigarette advertising. 533 U.S. at 547, 121 S.Ct. 2404. *Reilly* analyzed whether the state scheme could be separated from the congressional concern for cigarette smoking and health and concluded it could not: "At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected." *Id.* at 548, 121 S.Ct. 2404. *Reilly* concluded: "In this case, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth." *Id.* at 571, 121 S.Ct. 2404.

Though not dispositive, *Reilly* reinforced the preemptive force of the FCLAA over state regulatory schemes that touch on cigarette advertising and promotion, emphasized that the FCLAA can preempt areas, such as zoning-type restrictions, that have traditionally been within the police power of the states,[24] and required an assessment as to the actual impact of the state regulation on smoking and health. In the process, the Court rejected a narrow

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24 The First Circuit reasoned that the Attorney General's regulations are a form of zoning, a traditional area of state power, and therefore the presumption against pre-emption applied. 533 U.S. at 546, 121 S.Ct. 2404. The Supreme Court distinguished between generally applicable zoning regulations, which the FCLAA did not pre-empt, and regulations targeting cigarette advertising, which "squarely contradict[ ] . . . the FCLAA". *Id.* at 549–50, 121 S.Ct. 2404.

construction of the pre-emption provision proposed by the Commonwealth.

Dahl concerned a claim for violation of the Minnesota Deceptive Trade Practices Act based on Defendant's "[r]epresenting in . . . advertisement" that their light cigarettes "confer[red] a health benefit to consumers". 2005 WL 1172019 at *10. Plaintiffs argued that their causes of action were valid under *Cipollone* because they alleged "not violations of the Labeling Act's proscription against requirements or prohibitions on advertising or promotion of cigarettes based on smoking and health but violations of deceptive trade statutes that prohibit 'lying'". *Id.* Finding that "the allegation in this case is that the state's statute regarding Deceptive Trade Practices imposes a duty to modify the labeling of the cigarettes because of representations based on smoking and health that arise out of the word 'Light', therefore deceiving consumers into believing that the cigarettes are not as bad for them as regular cigarettes", the Court concluded the claim was expressly preempted under FCLAA. *Id.* Similarly, *Dahl* found that an unjust enrichment claim based on Defendant's "falsely and deceptively advertising that the cigarettes were lights, or contained lowered Tar and Nicotine" had been pre-empted. *Id.* at *12. The allegation "imposes a duty under state law by creating an avenue for an award of damages based on Reynolds promotion of their 'Light' cigarettes as less unhealthy for the smokers than regular cigarettes" and "avoiding liability . . . would require complying with a state-imposed duty (through the award of damages that would follow a failure to comply) related to the promotion of cigarettes based on their relationship to smokers' health". *Id.*

In *In re Tobacco Cases II*, the Superior Court of California, San Diego County, held that the Plaintiffs' claim that "Defendants violated the UCL [Unfair Competition Laws, California Business & Professions Code] through their false and deceptive statements, advertisements and publications throughout the class period which were likely to mislead reasonable consumers regarding claimed 'Light' and 'Low Tar' cigarettes" was pre-empted. 2004 WL 2445337 at *19. Even though the Plaintiffs "adduced absolutely no evidence that the Defendants have ever *expressly* stated to the public, in advertisements or otherwise, that Light cigarettes are healthier", they argued that Defendants "willfully chose the term 'Light' . . . to take advantage of the popular meaning of the term, and the public's desire for a healthier cigarette." *Id.* at *20 (emphasis in original).

Even assuming this was true, the Superior Court reasoned that: "Plaintiffs must show that even if Lights have less tar and nicotine, they are not in fact healthier because the consumer may obtain *without being aware of it* as much tar and nicotine from Light cigarettes as from regular cigarettes. From this perspective, Plaintiffs' case of fraud by implication is essentially only a case of *potential* fraud by implication—an alleged fraud that can only occur when smokers who mistakenly believe they are smoking a healthier cigarette by smoking Lights do not obtain the purported benefits of lower tar and nicotine". *Id.* (emphasis in original). Judge Prager then asked: "[H]ow can this happen?" *Id.*

The answer, according to Judge Prager, is the phenomenon of compensation. The Court noted that compensatory smokers include those who smoke more or who inhale more deeply and more fre-

quently. *Id.* For these smokers to be misled, the Court posited that they would have to be unaware of the change in their smoking behavior. *Id.* at *20–*21.[25] Judge Prager also questioned whether smokers who had never smoked anything other than Lights could be misled, given that they cannot be said to be compensating. *Id.* at *21. He also opined that if Lights were not in fact lower in tar, the phenomenon of compensating would not exist, undermining the very crux of Plaintiffs' fraud case. *Id.*

The Superior Court summarized Plaintiffs' claim: "Defendants have violated the UCL by failing to warn the public that the 'lightness' of Light cigarettes depends on the way they are smoked." While they insist that their Lights case does not depend on a finding of whether the Surgeon General's mandated warning is adequate, logic, as Mr. Spock would say, dictates otherwise. It dictates otherwise because it is obvious that Defendants' alleged deception . . . could easily be corrected by requiring an additional warning on the package to the effect that Light cigarettes can be more hazardous than regular cigarettes due to smoker compensation". *Id.* at *21. Thus, this was an inadequate warning case, expressly pre-empted under *Cipollone*.

Plaintiffs, however, are not without legal support. *Sullivan v. Philip Morris USA, Inc.*, No. 03–796, 2005 WL 2123702 (W.D. La. Aug. 31, 2005) of-

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25 And, in the case of those who compensate by taking deeper or more frequent puffs rather than by simply smoking more, believe that the advertised tar and nicotine ratings are fixed (as is nutritional content in food) such that they do not vary depending on the manner or rate or consumption.

fers a different approach.[26] In *Sullivan*, Plaintiffs

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[26] Plaintiffs cite several other cases in addition to *Sullivan*, which offer some support. In *United States v. Philip Morris, Inc.*, 263 F. Supp. 2d 72 (D.C.D.C. 2003), a RICO case in which the tobacco industry was sued over its alleged "unlawful conspiracy to deceive the American public", including, *inter alia*, marketing "'light' or 'low tar/low nicotine' cigarettes as being less hazardous to smokers even though there is no basis for believing they are safer than other cigarettes". *Id.* at 75. Finding that the claims were "virtually identical to the claims held not preempted in *Cipollone*", *id.* at 80, the Court rejected Defendant's claim of pre-emption. However, it is unclear whether the fraud at issue in *Philip Morris* had to do solely with the use of the "Lights" descriptors (as in the present matter), or whether there was any evidence in the record as to an affirmative advertising or marketing claim that "light" cigarettes are indeed safer to consumers (which would not be the case here)—and thus the case is of limited assistance. *See id.* at 81 ("In fact, what the Government claims is that the Defendants knowingly misled consumers with advertisements that suggested, for example, that 'light' cigarettes were less hazardous. The specific advertisements, which the Government claims were intentionally misleading, and which are the subject of these Motions, were certainly not mandated by the FTC").

In *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345 (E.D.N.Y. 2000), Plaintiff included among its allegations of deceptive conduct that Defendant "misled the public to believe smoke from 'lighter' cigarettes contained reduced levels of tar and nicotine relative to that released by conventional cigarettes". *Id.* at 359. Relying on *Cipollone*, the Court allowed predicate acts pled under civil RICO and deceptive acts pled under the New York Consumer Protection Act based on "fraudulent concealment and nondisclosure of the health effects of cigarettes . . . made while defendants were falsely claiming in their advertisements and promotions that they were making and would make full disclosure" to proceed. *Id.* at 387–88. However, the record in *Blue Cross & Blue Shield* presents more damning evidence of fraud, nondisclosure, and affirmative misstatements with regard not only to

pleaded redhibition pursuant to the Louisiana Civil Code,[27] breach of express and implied warranties

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[Footnote continued from previous page]

"low tar and nicotine" cigarettes but also to other forms of deceptive conduct than is present in this case. *See id.* at 360–62. *See also In re Simon II Litig.*, No. 00–CV–5332, 2002 U.S. Dist. LEXIS 25632 (E.D.N.Y. Oct. 22, 2002).

In *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000) a case involving the tobacco company's alleged "decades long campaign of misrepresentations, misinformation and intentional omissions", *id.* at 322, at the Eastern District of New York found that RICO and common-law fraud claims based on the duty not to deceive were exempted from preemption under *Cipollone*. *Id.* at 356–57. The focus of the *Falise* suit, however, was on "the unique health risks posed to those who both smoked and were occupationally exposed to asbestos"—not low tar and nicotine cigarettes. *Id.* at 326. *See also Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 170–72 (D. Conn. 2000) (complaint focused not on lights cigarettes but on the tobacco industry's misrepresentations about the health hazards of smoking in general and illegal youth marketing activities).

[27] Redhibition is a civil law action brought on account of some defect in a thing sold, seeking to void the sale on grounds that the defect renders the thing either useless or so imperfect that the buyer would not have originally purchased it. *See* BLACK'S LAW DICTIONARY 1282 (7th ed. 1999). The Louisiana Civil Code defines the warranty against redhibitory defects as follows:

> The seller warrants the buyer against redhibitory defects, or vices, in the thing sold. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.
>
> A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer

based on Philip Morris' introducing and marketing light cigarettes intended to mislead consumers into believing light cigarettes were safer, intentional misrepresentations of the true effect of light cigarettes, and violations of Louisiana's Unfair Trade Practices and Consumer Protection Act. *Id.* at *3. Holding that the redhibition claim was not expressly preempted, Judge Trimble reasoned:

> Plaintiffs assert that Philip Morris manipulated nicotine levels by finding a way to "trick" the testing machines so that light cigarettes would show lower tar and nicotine levels, when in fact Philip Morris knew that humans smoking the cigarettes would consume similar nicotine levels as experienced from regular cigarettes. *Philip Morris ignores the fact that instead of changing its labeling, it could possibly have designed a light cigarette that would actually deliver less tar and nicotine in the hands of a consumer.* Plaintiffs cite *Wright v. Brooke Group Ltd., et al.*, [114 F. Supp. 2d 797 (N.D. Iowa 2000)] to support its position that post–1969 claims that the tobacco industry concealed facts are not preempted when a plaintiff alleges that the defendants "knowingly designed, manufactured and distributed a product which they knew was both carcinogenic and addictive and, thus, not fit for the ordinary pur-

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[Footnote continued from previous page]

> would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

La. Civ. Code Ann. art. 2520.

> pose for which it was intended." [*Id.* at 828]. Plaintiffs are not asking Philip Morris to change its labeling. Plaintiffs are seeking an action in redhibition because the product itself was defective. The FTC method of testing gave lower tar and nicotine measurements than what each light cigarette actually delivered to a human smoker. Hence, the product was not reasonably fit for its intended purpose—to deliver lower tar and nicotine. Because this cause of action does not impose a requirement or prohibition based on smoking and health with respect to advertising or promotion, it is not preempted by the Labeling Act.

Id. at *6 (emphasis supplied).[28] Buoyed by *Sullivan*, Plaintiffs argue in their brief that "Philip Morris would still have the option to honestly design and manufacture a cigarette that delivers lowered tar and nicotine, and is actually "light", if it is held liable under any theory". *Pls.' Opp'n* at 21 & n.14.[29] At

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[28] Defendant notes that a request for reconsideration in *Sullivan* was pending at the time of its motion. *Def.'s Mot.* at 22–23 n.8. The request was denied on December 2, 2005, and Judge Trimble signed a certificate of appealability. *Order denying Corrected Mot. for Reconsideration re J. on Mot. for Summ. J. and granting Mot. for Certificate of Appealability, Sullivan v. Philip Morris*, No. 03–796 (W.D. La. Dec. 2, 2005).

[29] Defendant points out that this language referred to a redhibition claim, not asserted in this case. *Def.'s Mot.* at 22–23 n.8. In the same breath, Philip Morris criticizes *Sullivan*, arguing that it "misapplied *Cipollone* in failing to focus on the substance of the claims rather than their labels." *Id.* This Court agrees with Philip Morris that the substance of the claim should be examined rather than simply its label, *cf. Dahl*, 2005

oral argument, when asked whether there was any evidence in this record regarding *Sullivan*'s finding that the cigarette companies could have designed a light cigarette that was truly light, Plaintiffs' counsel characterized Judge Trimble's words as "rhetorical" and of "limited assistance" and conceded there is no evidence to that effect in this record.

iv. Conclusion

A pre-emption analysis must begin with the plain language of the statute, the best evidence of the "ultimate touchstone" of congressional intent. *Rowe*, at 74. Here, the pre-emptive language reads:

> (b) State Regulations. No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act

15 U.S.C. § 1334(b). The question is whether the Plaintiffs' claims would impose a requirement or prohibition under Maine law "with respect to the advertising or promotion of any cigarettes."

Plaintiffs have made a valiant attempt to tailor their claims to fit within the *Cipollone* exception for violations of the duty not to deceive; however, this Court concludes that they have failed. Facially the Plaintiffs draw support from *Cipollone*'s statement that "fraudulent-misrepresentation claims that do arise with respect to advertising and promotions

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[Footnote continued from previous page]

WL 1172019 at *10; which is why it agrees with Plaintiff that "the logic . . . [of *Sullivan*] applies with equal force" in this context. *Pls.' Opp'n* at 21 n.14.

(most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by § 5(b)." 505 U.S. at 528, 112 S.Ct. 2608. After all, the Plaintiffs alleged that Philip Morris engaged in fraudulent concealment: ". . . Defendants effectively, affirmatively, and fraudulently concealed from consumers of their products, including Plaintiffs, their knowing misrepresentations about the nature and effect of their 'light' cigarettes." *First Am. Compl.* at ¶ 35.

But, under Rule 56 and *Cipollone* and *Reilly*, the analysis must extend beyond the allegation. *Cipollone* states that one type of fraudulent misrepresentation claim, what has come to be known as a "warning neutralization" claim, is also pre-empted; that is, a claim "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." 505 U.S. at 527, 112 S.Ct. 2608. And in rejecting the Massachusetts Attorney General's "narrow construction" of the relevant statutory language "based on smoking and health" and determining that "at bottom" the state's concern about youth exposure to cigarette advertising was intertwined with a concern about smoking and health, *Reilly* instructs to look beyond the characterization and assess the claim's actual impact. 533 U.S. at 547–48, 121 S.Ct. 2404.

To be clear, the Plaintiffs have not argued that the manufacture and sale of Lights constitutes a violation of law. Although Congress could arguably ban the manufacture and sale of cigarettes, including Lights, it has not done so, electing instead to mandate warnings to potential consumers of specified risks. The Plaintiffs contend that, even though Philip Morris has engaged in a lawful business, it

should be held legally accountable, because it produced a product it knew contained hidden risks, including enhanced risks of addiction and health problems not apparent or known to the consumer. The Plaintiffs further urge that in choosing the term, "light", to characterize its product, Philip Morris compounded its fault by selecting a term that would mislead the public.

If this were an industry where advertising were not tightly regulated and if the industry agreed with the accusation, it would be free to stop using the offensive term and to alert consumers of the hidden risks so that they could make informed decisions about whether the benefits exceed the risks or, alternatively, knowingly decide to engage in risky behavior, regardless of the benefits. The price for failing to do so could be the imposition of civil liability, based in part upon the theories the Plaintiffs press here.

But, the tobacco industry is hardly unregulated in what it says to consumers about its products, including light cigarettes. Here, the gist of the Plaintiffs' cause of action runs to what Philip Morris actually said about Lights and what the Plaintiffs claim they should have said. It is true that Philip Morris described the cigarettes as "light" and having "lowered tar and nicotine". But, the record establishes that Congress and the FTC have demonstrated their ability to vigorously restrict tobacco company advertisement and promotion, that Congress and the FTC were aware of the use of these descriptors, that the FTC established a method for testing their accuracy, that the tobacco companies at the behest of the FTC entered into voluntary self-regulation incorporating the FTC Method, and that, despite this, Congress and the FTC never acted to restrict the tobacco companies from using these general descriptors. Other

than these descriptors, the record here is devoid of any *affirmative* misstatement.[30] Thus, the Plaintiffs point to no Philip Morris representation about light cigarettes inconsistent with what the FTC condoned; no evidence Philip Morris ever affirmed that light cigarettes were good for you, were healthy, or would not cause the host of physical problems listed on every package; no evidence that any descriptors Philip Morris applied to Marlboro Lights and to Cambridge Lights contravened what the FTC and Congress knew the tobacco companies as a group and Philip Morris in particular were saying about these cigarettes.

More to the point, what is it the Plaintiffs would have had Philip Morris say about light cigarettes that it did not say? The Plaintiffs would have Philip Morris disavow the term, light, and adopt some other more accurate descriptor. But, there is no evidence what, if any, descriptor would accurately describe a low tar and nicotine cigarette. Further, to change the descriptor, light, without explanation would itself cause confusion and would fail to adequately inform the smoking public of the hidden risks forming the basis for this law suit. To respond to Plaintiffs' concerns, Philip Morris would have to tell the public

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[30] The Plaintiffs explain the claim in their memorandum: "... This case is about Philip Morris having deceived Maine consumers by making fraudulent misrepresentations for the last 35 years as to its so-called "Lights" cigarettes. Specifically, Philip Morris intentionally designed its cigarettes so as to register misleadingly low levels of tar and nicotine when tested on a machine, but which would deliver very high levels of these chemicals when actually smoked; and then represented to the smoking public that theses cigarettes were 'light' and 'lowered in tar and nicotine.'" *Pls.' Opp'n* at 2.

that the FTC Method test, though accurate in the laboratory, was inaccurate in real life, and that light cigarette smokers consciously or unconsciously gamed the FTC Method test and infused greater amounts of nicotine and tar than the designation "Lights" and "Lowered Tar and Nicotine" would imply. But, this information, if conveyed through a form of advertising, would run head first into what *Reilly* describes as the "comprehensive federal scheme governing the advertising and promotion of cigarettes". 533 U.S. at 541, 121 S.Ct. 2404. Further, this is not a case where Philip Morris stood silent while producing and selling a product that it knew would hurt the public. It fully complied with federal directives, placing on every cigarette package, Lights and regulars, the health warnings the federal government mandated.

If Philip Morris had not advertised and promoted its cigarettes as "light" and having "lowered tar and nicotine", the Plaintiffs would have no claim whatsoever. If they thought they were purchasing Marlboro "full flavor" cigarettes and instead received Marlboro Lights, they could not say that Philip Morris deceived them about the health benefits of their purchase. Thus, the law suit is grounded not on the properties of the cigarette itself, but on what the Defendant said about the cigarette—and what they said about the cigarette is substantially intertwined with what the federal government told them to say. Although the Plaintiffs proclaim that the difference between what they thought they were getting and what they got amounts to deliberate fraud, it is only because Philip Morris labeled the cigarettes and advertised and promoted them as "light" that there is even an arguable difference between perception and product. But, it is precisely this area that Congress pre-

empted as part of "a comprehensive federal scheme governing the advertising and promotion of cigarettes". *Reilly*, 533 U.S. at 541, 121 S.Ct. 2404. As in *Reilly*, the difference is "intertwined with the concern about cigarette smoking and health". *Id.* at 548, 121 S.Ct. 2404. This Court must conclude that the Plaintiffs' claims are grounded on Philip Morris's "advertising or promotion of . . . cigarettes the packages of which are labeled in conformity with the provisions of" federal law and regulation. 15 U.S.C. § 1334(b). As such, under § 1334(b), they are expressly preempted.

III. Conclusion

This Court GRANTS Defendant's motion for summary judgment on the ground that Plaintiffs' claims are expressly preempted by FCLAA.

SO ORDERED.

OPPOSITION BRIEF

No. 07-562

FILED
DEC 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,

Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTIONS PRESENTED

1. Does the Federal Cigarette Labeling and Advertising Act ("FCLAA") expressly preempt state-law claims that a cigarette company violated the Maine Unfair Trade Practices Act by falsely representing its product to the public when: (a) the predicate state-law duty of such claims is the duty not to deceive; and (b) the Federal Trade Commission ("FTC") has not only refused to approve or authorize the alleged misrepresentations, but has prohibited their use in a consent decree with a third party?

2. Are such claims impliedly preempted even though: (a) no court has ever held such claims impliedly preempted; (b) this Court has held that there is no implied preemption under FCLAA; (c) the FTC has never exercised its rule making power to address the conduct at issue; and (d) the FTC prohibited the challenged conduct in a consent decree with a third party?

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INTRODUCTION

Respondents Stephanie Good, Lori A. Spellman and Allain L. Thibodeau ("Respondents") allege in this putative class action that Petitioners Altria Group, Inc. and Philip Morris USA, Inc. ("Philip Morris") violated Maine's Unfair Trade Practices Act by falsely stating on packages of Marlboro Lights and Cambridge Lights that such cigarettes delivered "LOWERED TAR AND NICOTINE" and were, therefore, "LIGHTS." The complaint alleges that Philip Morris knew that smokers would actually receive as much, or more, tar and nicotine from so-called "light" cigarettes as they would receive from regular, non-light cigarettes.

Respondents seek economic damages that they suffered as a result of Philip Morris' intentional fraud. They do not seek to recover for any health-related injuries caused by Philip Morris' products. Nor do Respondents claim that Philip Morris failed to warn them of the dangers of smoking cigarettes or that Philip Morris' statements on the packages of Marlboro Lights had the effect of neutralizing the warnings which are required by the Federal Cigarette Labeling and Advertising Act ("FCLAA"). *See* 15 U.S.C. § 1331 *et seq.* Rather, Respondents allege only that the statements "LOWERED TAR AND NICOTINE" and "LIGHTS" were false, and, accordingly, violated Maine's state-law prohibition on deceptive business practices. Me. Rev. Stat. Ann. tit. 5, § 207.

In granting Philip Morris' motion for summary judgment, the United States District Court for the District of Maine held that Respondents' claims are expressly preempted by FCLAA because they are more properly characterized as an attack on the adequacy of the federally mandated warnings than as claims for fraudulent misrepresentation. Its conclusion rested on its factual finding that the Federal Trade Commission ("FTC") had found the challenged representations to be truthful, and had authorized their use in advertising. Pet. at 63a. The First Circuit reversed. Based on a careful examination of the evidentiary record, it found – contrary to the District Court's conclusion – that the FTC had never found the "low tar" representations to be true or approved their use to advertise cigarettes. Accordingly, it held that Respondents had asserted fraudulent misrepresentation claims that are neither preempted nor foreclosed by any FTC conduct.

In its Petition to this Court, Philip Morris repeats the factual argument it made below, claiming that the FTC had authorized the use of the challenged representations and had determined that they were not deceptive. This factual argument is premised on a decision of the Fifth Circuit in which the cigarette manufacturers' characterization of the FTC's conduct was not disputed by the plaintiffs, and therefore was deemed true. However, as explained further below, the findings of the Fifth Circuit cannot be squared with the real facts when properly tested by a genuine adversarial proceeding.

In 2006, the United States District Court for the District of Columbia concluded – after a nine-month bench trial in a racketeering action brought by the federal government – that Philip Morris and other cigarette manufacturers had "falsely represented that Light and Low Tar Cigarettes Deliver less Nicotine and Tar" and enjoined the use of such representations. *United States v. Philip Morris, USA, Inc.*, 449 F.Supp.2d 1, 859, 938 (D.D.C. 2006) (injunction stayed pending appeal) ("*U.S. v. Philip Morris*"). The court's finding that Philip Morris had knowingly made false representations was largely based on Philip Morris' own internal memoranda. Moreover, the court heard testimony from the FTC itself that it had never "authorized" the use of any "low tar" or "light" descriptors.[1]

That case is currently on appeal to the D.C. Circuit. If it is affirmed, all cigarette manufacturers will be prohibited from using any "low tar" descriptors – thus, rendering the issues in this case of no future practical consequence – and issue preclusion may thereafter apply in private lawsuits that, like

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[1] The FTC provided testimony in *U.S. v. Philip Morris* pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. C. Lee Peeler testified on behalf of the FTC that "[t]he FTC does not have a view on the use of ["low tar"] descriptors in – on cigarette packages or in cigarette advertising." *See Aspinall v. Philip Morris Cos. Inc.*, No. 98-6002, 2006 WL 2971490 at *5 (Mass.Super.Ct. Aug. 9, 2006) (appeal docketed in Supreme Judicial Court of Massachusetts, oral argument scheduled for January 10, 2008).

this one, challenge those statements as false. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331-332 (1979) (private plaintiffs may avail themselves of issue preclusion after government enforcement action results in final judgment).

STATEMENT OF THE CASE

A. At All Times, Philip Morris Knew That the Representations "LIGHTS" and "LOWERED TAR AND NICOTINE" Were False.

In 1967, the FTC adopted the Cambridge Filter testing method to measure the number of milligrams of tar and nicotine that cigarettes deliver when smoked in a standardized fashion by a machine. The FTC knew that the machine would not perfectly replicate the experience of a human smoker. However, the FTC did not know that because of the way humans smoke "low tar" cigarettes (a phenomenon known as "compensation"), the testing method would consistently yield meaningless low ratings for such cigarettes – rather than simply imperfect measurements resulting from variations in the smoking habits of individual smokers. *U.S. v. Philip Morris*, 449 F.Supp.2d at 501.

Unlike the FTC, Philip Morris was fully aware of the defects of the Cambridge Filter testing method. Nevertheless, for over 30 years, Philip Morris falsely reported on its cigarette packages that consumers would receive lower amounts of tar and nicotine from

Marlboro Lights than from regular Marlboro cigarettes, even though it knew that human smokers regularly used compensatory smoking techniques to ensure that they would satisfy their daily nicotine quotas. Thus, Philip Morris ensured that its customers would receive as much, if not more, tar and nicotine from smoking Marlboro Lights as they would from smoking regular cigarettes.

In a July 28, 1967 memorandum sent to Philip Morris' Director of Development, a Philip Morris Associate Scientist explained that "[s]mokers adjust puff intake in order to maintain TPM [total particulate matter] and/or nicotine constancy." *U.S. v. Philip Morris*, 449 F.Supp.2d at 462. One month later, Philip Morris' Vice President of Corporate Research and Development explained in greater detail:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case. . . . In the smoking machine the puff volume is constant so that with dilution the quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human smoker who appears to adjust to the diluted smoke by taking a larger puff so that he still gets about the same amount of equivalent undiluted smoke. . . . The smoker is, thus, apparently defeating the purpose of dilution to give him less "smoke" per puff. He is certainly not performing like

> the standard smoking machine; **and to this extent the smoking machine data appear to be erroneous and misleading**.

Id. (emphasis added).

Other studies conducted by Philip Morris in the late 1960's provided "further support to the postulate that smokers adjust puff intake in order to maintain constant smoke intake." *Id.* at 463. A Philip Morris Senior Scientist working on such studies reported to the Board of Philip Morris in the fall of 1969 that "[i]t would appear that smokers do modify their smoking habits in order to obtain a preferred [nicotine] intake level." *Id.* Two years later, in 1971, yet another Philip Morris special research report corroborated the earlier research findings that "the smoker does have daily intake quotas for tar and/or nicotine and that he titrates his smoke intake to meet these quotas." *Id.*

Moreover, by the 1970's, Philip Morris, unlike the FTC, had developed a method by which it could obtain measurements of tar and nicotine intake that reflected what a human smoker received with a "mean accuracy reading of 96%." *Id.* at 464. When using that Human Smoker Simulator method to study the difference between Marlboro Lights and regular Marlboros, the results were telling:

> Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers

> and Marlboro Lights smokers. . . . The panelists smoked the cigarettes according to physical properties; i.e., the dilution and the lower RTD [resistance to draw] of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of Marlboro Lights proportionally. In effect, the Marlboro 85 smokers in this study **did not achieve any reductions in smoke intake smoking a cigarette (Marlboro Lights) normally considered lower in delivery**.

Id. at 465-466 (emphasis added). As that report itself indicated, these findings were consistent with other studies conducted by Philip Morris. *Id.* Another internal Philip Morris 1976 report discussing a study that compared Marlboro 100's (regulars) and Marlboro Lights using the Human Smoker Simulator was more explicit: "the tar and nicotine yields for these two brands were **basically identical**." *Id.* at 466 (emphasis added).

Philip Morris never disclosed to the FTC its internal research concerning compensatory smoking. On the contrary, as evidenced by a 1996 regulatory affairs strategic memorandum, Philip Morris' objective into at least the 1990's was to cast doubt on the evidence of compensatory smoking and its effect on the FTC testing results. It sought to preserve the illusion of a credible factual basis on which it could claim that its cigarettes deliver less tar and nicotine, even though it knew such representations were false.

Id. at 506 (listing objectives as "preserve our ability to . . . advertise low tar/light and ultra low tar/ultra light cigarettes as such; avoid changes in the FTC method for as long as possible; [and] minimize changes in the FTC method to the extent possible . . . ").

When the Cambridge Filter test was originally adopted, the cigarette manufacturers represented to the FTC (through the Tobacco Institute) that the test could be misleading because the results would be **too high**, not too low. *Id.* at 501 (FTC method "may be deceptive because a smoker may assume his cigarette is delivering the amount of 'tar' and nicotine reported by the FTC when in fact it will be delivering much less, the way he smokes."). As late as 1994, in a statement reminiscent of its sworn testimony before Congress denying that cigarettes were addictive earlier that same year,[2] Philip Morris made submissions to a National Cancer Institute conference on the FTC Cigarette Testing Methodology (convened at the request of the FTC) in which it denied the phenomenon of compensatory smoking: "While there is a fair amount of recent literature on compensation, few studies have been performed that provide reliable data to establish the occurrence of this suggested phenomenon. . . . [T]here can be no real dispute that,

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[2] *See* 1994 WL 229351 (F.D.C.H. April 14, 1994) (House of Representatives Committee on Energy, Health, and the Environment).

to date, the scientific literature on compensation is limited and inconclusive." *Id.* at 505-506.

Philip Morris' strategy worked, and the FTC remained unaware of the true extent of compensatory smoking for many years. As noted in FTC testimony before Congress on November 13, 2007, the FTC was not fully aware of the limitations of the Cambridge Filter test with respect to compensatory smoking until the 1990's, and since that time, it has sought the advice of science-based government agencies to address these issues. *See* www.ftc.gov/os/testimony/P064508tobacco.pdf at 7-8 (limitations in the testing methodology "became a substantially greater concern by the 1990's as a result of . . . a better understanding of the nature and effects of compensatory smoking behavior.") ("FTC Prepared Statement").

B. The FTC Never Mandated or Authorized the Use of "Low Tar" Descriptors, or Provided Any Other Official Guidance Regarding the Advertising of So-Called "Light" Cigarettes.

Contrary to the petition's repeated assertions, *see, e.g.*, Pet. at 2-3, 21, 22, 24, and, notwithstanding Philip Morris' concerted efforts to distort the truth regarding compensatory smoking, the FTC never approved its use of "low tar" or "light" descriptors. In 1997, the FTC issued a request for public comment concerning two separate issues, Cigarette Testing Methodology (Section I), and Cigarette Descriptors

(Section II). 62 Fed. Reg. 48,158, 1997 WL 563104 (1997). Unlike its discussion of the agency's involvement with the testing methodology, the FTC was clear that as of 1997 it had "no official definitions" for the "low tar" descriptors used by the cigarette manufacturers to advertise cigarettes. *Id.* at 48,163. The FTC repeated this statement in its November 13, 2007 testimony to Congress. FTC Prepared Statement, *supra* at 6, n.16.

The FTC's 1997 request for public comment also stated that because the Ad Hoc Committee of the President's Cancer Panel had stated that such descriptors "should be regulated," the FTC was "beginning the process" of seeking comment on the issue, in order to determine whether "there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." *Id.* at 48,163. Thus, as of 1997, the FTC had not yet determined whether it should regulate the use of "low tar" descriptors, but instead was asking the public: "If yes, why? If no, why not?" *Id.*

In 1998, Philip Morris and several other manufacturers responded to the FTC's question. Contrary to their litigation position in this and other "low tar" cases, they acknowledged that there had been, to that date, no official guidance from the FTC on how these terms could be used in advertising cigarettes, and that:

> The manufacturers are not convinced that there is a need for official guidance with

> respect to the terms used in marketing lower rated cigarettes.

U.S. v. Philip Morris, 449 F.Supp.2d at 511-512.[3] Thus, while the FTC has endorsed the disclosure of the number of milligrams of tar and nicotine measured by the Cambridge Filter test, it has never provided any official guidance concerning whether or how "low tar" descriptors may be used in advertising.[4]

The closest the FTC has ever come to addressing the permissibility of using the terms in advertising cigarettes was in a 1971 consent decree resolving a 1969 enforcement action it had brought against American Brands. *See In re American Brands, Inc.*, 79 F.T.C. 255 (1971) (1971 WL 128779). In that case, the FTC had challenged as false and misleading in violation of the FTC Act American Brands' use of the representation "lower in 'tar'" in a television advertisement, among other representations. *Id.* (Complaint at ¶¶4, 7). In resolving the matter, the 1971

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[3] The FTC also asked whether there should be "a disclosure warning smokers about compensatory smoking behavior . . . in all ads." 62 Fed. Reg. at 48,162. Philip Morris and other manufacturers responded that they "were not convinced that compensatory smoking behavior is a sufficiently common or documented phenomenon that consumers should be alerted to its existence." *U.S. v. Philip Morris*, 449 F.Supp.2d at 504.

[4] The FTC provided testimony in the federal government's racketeering action against Philip Morris stating unequivocally that the FTC did not "have a view" on the use of such "descriptors . . . on cigarette packages or in cigarette advertising." *Aspinall*, 2006 WL 2971490 at *5.

consent decree explicitly prohibited the use of "the words 'low,' 'lower,' or 'reduced' or like qualifying terms, **unless the statement is accompanied by a clear and conspicuous disclosure of . . . [t]he tar and nicotine content in milligrams in the smoke produced by the advertised cigarette . . .**" *Id.* (Order at Section I) (emphasis added).

It is undisputed that Philip Morris has never included the "tar and nicotine content in milligrams" on its packages of so-called "light" cigarettes. *Aspinall*, 2006 WL 2971490 at *8 ("Defendant is not in compliance with the conditions established [in the 1971 consent decree] because the Defendant has admittedly never included the FTC method milligram yields of tar and nicotine on Marlboro Lights cigarette packages.").

Thus, the only FTC action specifically addressing "low tar" descriptors, a consent decree to which Philip Morris was not a party, actually **contradicts** Philip Morris' claim that the FTC authorized the use of these terms as Philip Morris has used them here. At the very least, that decree establishes that the FTC views numerical test results as fundamentally different from the "low tar" descriptors, which it only began to consider regulating in 1997. Indeed, the FTC testified in the *U.S. v. Philip Morris* case that its 1971 consent decree with American Brands **prohibited** the use of the descriptors in the absence of the numerical ratings. *See Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010 at *4 (E.D.Mich. Oct. 25, 2005) (quoting FTC 30(b)(6) witness in *U.S. v.*

Philip Morris: "this order doesn't affirmatively permit anything. What this order does is say what you can't do and it says you can't use any of these terms unless you provide a disclosure of the tar and nicotine content in the smoke produced by the advertised cigarette . . . "); *Watson v. Philip Morris Cos. Inc.*, 420 F.3d 852, 862 (8th Cir. 2005) (in 1971 consent order, "FTC explained its view of how the use of certain descriptors could constitute deceptive advertising – it would be deceptive to use descriptors like 'low,' 'lower,' 'reduced,' or other qualifying terms unless the tar and nicotine levels were also stated."), *rev'd on other grounds*, 127 S. Ct. 2301.

Philip Morris fully understood that it was not allowed to use the "low tar" descriptors without the numerical test results. In a 2002 petition to the FTC, well after the "low tar" litigation was in full swing, Philip Morris itself asked the FTC to promulgate a rule "expressly authorizing" use of the descriptors – a request that would have been unnecessary if authorization had already been granted, as Philip Morris now contends. *Aspinall*, 2006 WL 2971490 at *5. Thus, contrary to Philip Morris' repeated claims here (including in their statement of the "Question Presented" to this Court), the FTC has **not** authorized Philip Morris to use the "low tar" descriptors that appeared on Marlboro Lights packages without also setting forth the Cambridge Filter milligram yields of tar and nicotine on those packages. Marlboro Lights packages have never displayed these numerical yields. *Aspinall*, 2006 WL 2971490 at *8.

Nor has the FTC authorized manufacturers to make tar and nicotine representations that are simply consistent with Cambridge Filter test results. In fact, the FTC has taken enforcement action against manufacturers even when their representations **were** consistent with Cambridge Filter testing results. *First*, in 1985, the FTC successfully prosecuted Brown & Williamson for representing its Barclay cigarettes as delivering 1 mg of tar even though that is how the cigarette tested under the Cambridge Filter method. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985) (enjoining use of 1 mg rating unless further information provided to prevent consumer confusion). *Second*, in 1995, the FTC entered into a consent decree with American Tobacco that prohibited the company from making any representations about tar and nicotine in the form of percentages or ratios, *e.g.* one pack of Carltons has the tar content of 10 packs of another brand, even where such ratios were consistent with Cambridge Filter testing results. *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995) (1995 WL 17012576).

C. The Preemptive Scope of the Federal Cigarette Labeling and Advertising Act.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a seven-Justice majority of this Court held that the preemptive scope of FCLAA was "governed entirely" by the preemption provision set forth in the

statute, 15 U.S.C. § 1334. 505 U.S. at 517. The Court reaffirmed this holding several years later:

> In *Cipollone* we did hold that the pre-emptive scope of the [FCLAA] was governed by the language in [the] act. That conclusion rested on a familiar canon of statutory construction and on the absence of any reason to infer any broader pre-emption.

Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995). Thus, any FCLAA preemption defense depends "entirely" on whether the state-law claims are **expressly** preempted by the plain language of the statute. There can be no implied preemption under FCLAA.

In interpreting the scope of FCLAA's express preemption provision, Justice Stevens wrote on behalf of a four Justice plurality that the "central inquiry" when considering whether a state claim is preempted by FCLAA is whether "the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." *Cipollone*, 505 U.S. at 524.

Justice Stevens explained that a state-law duty compelling a manufacturer to include additional health warnings, or more clearly stated warnings than those required by FCLAA, would be "based on smoking and health" and would thus be a preempted

state-law "requirement." 505 U.S. at 524. Likewise, a state law forbidding a manufacturer from including images, graphic material, or statements that negate or disclaim the adequacy of the FCLAA warnings, so as to neutralize the warnings, would also be a pre-empted "prohibition." 505 U.S. at 527-528.[5] Because claims based on failure to warn or warning neutralization have predicate legal duties that target only the cigarette manufacturers, such claims are based on smoking and health and preempted. *Id.* at 524, 527-528.

However, the Court did **not** find that **all** state-law claims related to concerns about smoking and health would be preempted. The Court distinguished claims directed at the adequacy of the health warnings "necessary to render a product reasonably safe" from state-law claims that have predicate legal duties based on more general obligations that are applicable to all commercial actors, and do not challenge the federally mandated label warning. 505 U.S. at 529. Even though *Cipollone* was itself a personal-injury action arising out of the plaintiff's lung cancer, the *Cipollone* Court held that "fraudulent misrepresentation claims (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted" because the predicate legal duty of such claims is not " 'based on smoking

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[5] Justices Scalia and Thomas joined in the judgment that such claims were preempted, albeit for different reasons, as they would have found all state-law claims expressly preempted.

and health' but rather on a more general obligation[,] the duty not to deceive." 505 U.S. 528-529.[6]

In reaching this decision, the Court looked to the "ultimate touchstone" of any preemption analysis, Congressional intent. 505 U.S. at 516. It held that in enacting FCLAA, Congress did not seek to immunize the cigarette manufacturers from "longstanding rules governing fraud" or "*similar police regulations*" applicable to all commercial actors, but rather only from claims based on legal duties that specifically targeted the tobacco industry due to concerns about smoking and health. 505 U.S. at 529, n.26 (emphasis in original).[7] In other words, Congress did not intend to give the tobacco companies a free pass to violate state laws that are promulgated pursuant to traditional

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[6] Justices Blackmun, Kennedy, and Souter concurred that such claims were not preempted because of the absence of any suggestion in the statute or legislative history that **any** state-law damages actions were preempted. They would have held that **all** state-law damage claims survive the express preemption defense.

[7] The critical consideration is not whether the claim itself implicates concerns about smoking and health, as Philip Morris argues. The preemption analysis looks to the underlying or predicate state-law duty to determine whether it is generally applicable or whether it targets only the cigarette companies. Were there any doubt that this was the holding in *Cipollone*, one need only examine Justice Scalia's dissent, in which he criticizes the plurality's reasoning. 505 U.S. at 532 (arguing for preemption of the state-law claim even though "New Jersey's tort-law 'duty not to deceive,' is a general one, applicable to all commercial actors and all kinds of commerce . . . ").

state police powers and are binding on all other commercial actors.

The Court subsequently affirmed this principle in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), where the Massachusetts Attorney General had promulgated regulations that targeted cigarette manufacturers by forbidding them (**and only them**) from placing advertisements in specified locations. The Court held that the state's advertising regulations were preempted by FCLAA because the predicate legal duty on which they were based targeted only the tobacco industry. *Cipollone*, 505 U.S. at 550 ("we hold only that the FCLAA pre-empts state regulations *targeting cigarette advertising*. States remain free to enact generally applicable zoning regulations . . . ") (emphasis added). All nine Justices concurred with the essential holding of *Cipollone* that an exercise of state police powers that imposes "generally applicable" restrictions would not be preempted because such restrictions would not be "based on smoking and health":

> Restrictions that apply to cigarettes *on equal terms with other products* appear to be outside the ambit of the pre-emption provision. Such restrictions are not "based on smoking and health."

Reilly, 533 U.S. at 551 (emphasis added).

After *Reilly*, there can be no dispute that the critical inquiry in an express preemption analysis is whether the predicate state-law duty underlying the

claim applies to all commercial actors equally, or whether it targets only the cigarette industry due to concerns about smoking and health. The Respondents' claims here are based on Maine's Unfair Trade Practices Act, which is a statute of general applicability, precluding all commercial actors in the state from making affirmative misrepresentations of fact.

D. The Federal Trade Commission's Preemptive Powers are Highly Circumscribed.

Unlike FCLAA, the Federal Trade Commission Act (15 U.S.C. § 45) includes a savings clause expressly preserving state-law remedies. 15 U.S.C. § 57b(e) ("Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."). There is no provision in the statute delineating the preemptive powers of the agency. Thus, any preemption defense based on FTC conduct must be predicated on an implied conflict with an FTC policy that carries the full force of federal law.

Every court that has analyzed the legislative history of the FTC Act has concluded that Congress did not intend an FTC policy to have the power to preempt state law unless that policy had been promulgated pursuant to the formal rule-making procedures set forth in the statute. Precisely because of the potential preemptive effect of FTC rules on state consumer protection law, Congress created heightened procedural safeguards in the FTC's rule-making

process that exceed what is required for other agencies under the Administrative Procedure Act ("APA"). *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 989-90, n.41 (D.C. Cir. 1985) (holding that FTC may "declare by rule" that certain state laws are preempted, but preemption occurs only with "validly enacted regulations") (internal quotations and citations omitted); *Katharine Gibbs Sch., Inc. v. FTC*, 612 F.2d 658, 667 (2nd Cir. 1979) (holding that preemption requires "valid enactments" pursuant to rulemaking authority); *Good*, Pet. at 47a; *U.S. v. Philip Morris, Inc.*, 263 F.Supp.2d 72, 78 (D.D.C. 2003) ("State prohibitions of unfair and deceptive trade practices are not preempted *unless* they conflict with an express FTC rule.") (emphasis in original); *Wisconsin v. Amoco Oil Co.*, 293 N.W.2d 487, 496 (Wis. 1980) (holding that interpretive guides, unlike substantive rules, "do not have the force and effect of law" and therefore do not "pose a preemption issue under the supremacy clause.").

All three courts of appeals that have addressed this question cited with approval the work of a noted scholar on this issue:

> While the Commission was not given the authority broadly to occupy the field of state unfair competition in consumer protection law, it was authorized to **declare by rule** preemption of state activities that conflict with federal regulations. **Since the rule making provisions are carefully surrounded by procedural protections,**

minimal injury is done to federal–state relations.

Am. Fin. Servs, 767 F.2d at 989-90, n.41 (citing Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 243 (1976)) (emphasis added); *Katharine Gibbs*, 612 F.2d at 667, n.7 (same); *Good*, Pet. at 47a (same); *see also Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445, 453-454 (7th Cir. 1990) (discussing importance of adhering to procedural safeguards under APA for agency substantive rules to have preemptive force of federal law for those agencies whose rule-making is governed by APA).

E. Proceedings Below

The District Court held that Respondents' fraudulent misrepresentation claims are expressly preempted by FCLAA. Pet. at 63a. The First Circuit reversed, applying the preemption principles discussed above in a straightforward manner. With respect to express preemption, it concluded that the complaint alleged that "Philip Morris made material statements of fact that it knew to be false . . ." Pet. at 26a-27a. It found that Respondents' fraudulent misrepresentation claims were predicated on the general state-law duty not to engage in deceptive business practices by misrepresenting the nature of the product advertised. *Id.* at 31a. As this Court had done with respect to the New Jersey fraudulent misrepresentation claim at issue in *Cipollone*, the

First Circuit held that Respondents' claims are not preempted. *Id.*

In reaching this conclusion, the First Circuit rejected Philip Morris' argument that the claims should be re-characterized as warning neutralization claims. Pet. at 30a-31a ("plaintiffs here . . . do not allege that the statements 'light' and 'lower tar and nicotine' diluted the warnings on Philip Morris's packaging or advertising so as to make its cigarettes unreasonably dangerous or otherwise defective."). The First Circuit correctly distinguished between claims challenging the use of fraudulent statements and those that attacked the adequacy of the warnings on the packages.

In addition, like every other court to consider the issue, the First Circuit also held that there could be no implied preemption here. *First*, there is no implied preemption defense available under FCLAA. Pet. at 39a-42a. *Second*, regardless of the level of FTC action required to have preemptive force, there is no clear FTC policy that conflicts with the Respondents' claims. Pet. at 46a-55a.

The First Circuit found that the FTC's actions with respect to tar and nicotine representations did not evidence authorization of either the use of the descriptors themselves, or the use of any other representation that was simply consistent with the cigarettes' numerical testing results. Pet. at 51a-52a. On the contrary, two FTC enforcement actions challenged similar representations as false and misleading even

though they were consistent with the results of the Cambridge Filter test.[8] Moreover, the court noted that Philip Morris had not complied with the terms of the 1971 consent decree with American Brands that prohibited the company from describing its cigarettes as "low tar" without also stating the numerical testing results. Pet. at 57a. In light of the lack of evidence of any coherent FTC policy in conflict with the Respondents' claims, the court properly declined to find any conflict with any federal policy.

CONSIDERATIONS CONCERNING WHETHER *CERTIORARI* SHOULD BE GRANTED

I. The Apparent Disagreement Between the First and the Fifth Circuits Arises From Differing Evidentiary Records, Not From Different Views of the Law.

Citing *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), Philip Morris argues that there is a division in the courts of appeals

[8] *See* Pet. at 51a-52a (noting situations where the FTC "challenged statements about the tar or nicotine content of a particular brand even though they were supported by such testing") (citing *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985) (cannot represent cigarette as having 1mg of tar even though consistent with testing results); and, *In re Am. Tobacco Co.*, 119 F.T.C. at 4 (cannot represent Carltons as having 10% of the tar of another brand (or expressing any tar or nicotine content in the form of percentages or ratios) even if consistent with numerical testing results)).

over how to interpret this Court's rulings in *Cipollone* and *Reilly*. To be sure, *Brown* found that claims similar to those asserted here were expressly preempted by FCLAA, and the First Circuit disagreed with that conclusion in this case. However, the reason these courts reached opposite conclusions did not stem from any differences regarding what the law requires. Ever since this Court's holding in *Cipollone*, all courts, including the Fifth Circuit in *Brown*, have uniformly held that claims of fraudulent misrepresentation of fact are not preempted by the express preemption provision of FCLAA. *See Brown*, 479 F.3d at 391-392 ("claims based on 'fraud by intentional misstatement' are not preempted because Congress did not intend to 'insulate' manufacturers from state liability for affirmative lies . . . ").

What then caused the disparate conclusions of the First and Fifth Circuits? The answer has nothing to do with the doctrine of federal preemption, let alone with differing views regarding that doctrine. Rather, the two courts were presented with fundamentally different evidentiary records concerning the position of the FTC with respect to whether the "low tar" descriptors were deceptive, and whether the FTC had specifically authorized, or even mandated, their use. For present purposes, the two most important sentences in the Fifth Circuit's decision in *Brown* are contained in the very first footnote, neither of which is mentioned in the petition or in any supporting *amicus* brief:

> The Manufacturers presented a regulatory history in support of their motion for summary judgment. Plaintiffs did not dispute any of the facts relating to the regulatory history, and thus they are deemed admitted.

Brown, 479 F.3d at 387, n.1. In other words, the plaintiffs in *Brown* erroneously conceded – contrary to the actual facts – that the FTC had authorized, and indeed mandated, the use of "low tar" descriptors, and had approved their use in advertising as true statements if they were substantiated by the testing results. *Id.* at 388, 391-392, 393 (referring to the terms as "FTC-approved" and "mandated").

Believing that a challenge to the truth of the manufacturers' representations had been foreclosed by purported FTC authorization, the Fifth Circuit was left with the only alternative characterization available: that the plaintiffs' claims alleged that the representations had diminished or "neutralized" the power of the Surgeon General's warnings concerning the health effects of smoking. Under *Cipollone*, such warning neutralization claims are preempted, and the *Brown* court ruled accordingly.

The First Circuit summarized the approach of the *Brown* court as follows:

> In rejecting plaintiffs' characterization of their claim as sounding in fraud, *Brown* concluded that "[t]he terms 'light' and 'Lowered Tar and Nicotine' cannot . . . be inherently deceptive or untrue," . . . This reality, in

> *Brown's* eyes, foreclosed any fraudulent misrepresentation claim, leaving plaintiffs to argue that the challenged statements served to neutralize the warnings – a theory preempted by *Cipollone's* construction of the FCLAA.

Pet. at 33a-34a. Thus, the Fifth Circuit's conclusion that the "low tar" descriptors were "inherently" true, and that the plaintiffs' claims must therefore be viewed as a disguised attack on federally mandated warnings, was based on an evidentiary record that was the fictional construct of the tobacco companies. That record – unlike the one before the Court in this case – simply had not been properly tested by the adversary process.

Indeed, that is the federal government's position. In *U.S. v. Philip Morris*, the government explained that the FTC had not authorized the use of these terms, and that the *Brown* court's contrary conclusion was "because the [*Brown*] plaintiffs explicitly accepted the view that the FTC had authorized the descriptors." U.S. Brief filed November 19, 2007 at 161-162 (D.C. Cir. No. 06-5267) (quoting manufacturers' brief that the *Brown* plaintiffs' there had made this "remarkable concession.").

Having had the benefit of a genuine adversarial proceeding, the First Circuit reached precisely the same conclusion as has the federal government, explaining that decisions like *Brown* "overlook the subtleties in the [Federal Trade] Commission's approach to tar and nicotine claims . . . " Pet. at 56a; *see*

also Dahl v. R.J. Reynolds Co., No. A05-1539, ___ N.W.2d ___, 2007 WL 4234141 at *11 (Dec. 4, 2007) (explicitly rejecting *Brown* and following the decision of the First Circuit here).

The cigarette companies' unchallenged construction of the evidentiary record in *Brown* had two critical results. *First*, the court was deprived of the evidence discussed in *U.S. v. Philip Morris*, *supra*, that demonstrates that the "low tar" descriptors are, in fact, false, and that Philip Morris had known them to be false for over three decades. *Second*, contrary to the Fifth Circuit's conclusion that defendants' representations were "FTC-approved" or "mandated," the FTC has always distinguished between the numerical testing results expressed in milligrams, and generalized "low tar" representations, which it specifically addressed only in the 1971 consent decree with American Brands. In that decree, it concluded that the terms were false and misleading, and **prohibited** their use unless accompanied by the numerical tar and nicotine ratings expressed in milligrams. Given that Philip Morris admittedly never accompanied its "low tar" representations with the numerical testing results, its conduct was inconsistent with the terms of the 1971 consent decree, which is the only instance in which the FTC has specifically addressed the issue. *Aspinall*, 2006 WL 2971490 at *8.

Philip Morris' own statements to the FTC in 1998 acknowledged that there was no FTC regulation of these terms, and it lobbied against the creation of any such official guidance. Not surprisingly, in 2002, after

"low tar" litigation had commenced across the country, Philip Morris decided to ask the FTC to promulgate a rule "expressly authorizing" such "low tar" descriptors, but to date, the FTC has not done so. *Aspinall*, 2006 WL 2971490 at *5.

The *Brown* court was not presented with these facts before determining that the descriptors were "inherently" true and sanctioned by the FTC. *Brown*, 479 F.3d at 392. Had it been aware of this evidence, its conclusion that the "low tar" descriptors "cannot . . . be inherently deceptive or untrue" would have been untenable. *Id.* Because the *Brown* plaintiffs did not contest the defendants' assertion that use of the descriptors had been approved by the FTC as truthful, the Fifth Circuit assumed that the plaintiffs would be unable to prove the sort of false representation claim that would survive preemption under *Cipollone*. Based on this faulty assumption, it recharacterized the plaintiffs' claims as warning neutralization claims.

However, that is not the case here.[9] Respondents

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[9] Philip Morris' argument that the claims should be re-characterized as warning neutralization claims ignores the allegations in the complaint and the evidence demonstrating that the representations are false. To accept Philip Morris' argument would convert every claim challenging a false statement that related in any way to health, such as a claim that "Marlboro Lights Do Not Cause Cancer," into a warning neutralization claim. Many courts have refused to re-characterize similar fraud claims. *See Mulford v. Altria Group, Inc.*, 506 F.Supp.2d 733, 752 (D.N.M. 2007) (claim that the "terms 'lights' and 'lowered tar and nicotine' are false and misrepresent the facts" is not a warning neutralization claim, and court "is not free to convert the claim into something that it is not."); *Aspinall*, 2006 WL 2971490 at *10 (refusing to characterize fraud claim as one of warning neutralization); *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608 at *19 (Ill. Cir.Ct. Mar. 21, 2003) (affirmative misrepresentations of "light" and "lowered tar and nicotine" are "neither based upon a failure of Philip Morris to provide adequate warnings nor based upon a neutralization claim."), *rev'd on other grounds*, 848 N.E.2d 1, 33, but affirming trial court's rejection of Philip Morris' "attempt to cast plaintiffs' claim as one of failure to make additional disclosures beyond the warning required by federal law . . . [and concluding] Plaintiffs' claim is not based on failure to warn or on neutralization of the required warnings."); *Johnson v. Brown & Williamson*, 122 F.Supp.2d 194, 203 (D.Mass. 2000) ("Nowhere, however, does the complaint allege fraudulent dilution of the federally-mandated cigarette warning labels . . . [The] fraud claim can thus be characterized as an allegation that [defendant] made intentional misrepresentations and false statements of material fact in its advertising and promotional material. Construed as such, his fraud claim is not preempted."); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F.Supp.2d 167, 174-176 (D. Conn. 2000) (rejecting defendant's argument that when "look[ing] beyond the descriptive label" of plaintiff's claims, intentional fraud claims were in reality failure to warn or warning neutralization claims). These courts recognized that to hold otherwise would vitiate the

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vigorously contested Philip Morris' contention that the company's use of the descriptors had been authorized. Thus, in this case, the allegations in the complaint that Philip Morris made express misrepresentations of material fact, which are supported by ample evidence, are precisely the types of claims that survive an express preemption defense under *Cipollone*.

In considering whether to grant *certiorari* on the express preemption question, the Court should understand that the apparent division in the courts below resulted only from these differing assessments of FTC policy rather than a difference in the courts' views of the preemptive scope of the FCLAA. Indeed, **all** courts, including the Fifth Circuit, 479 F.3d at 391-392, agree that false misrepresentation claims are not preempted, expressly or by implication, by any statute or FTC conduct. The case law is uniform on this point: all courts have described the *Cipollone* rubric consistently; it is the application of the undisputed legal standard to the varying evidentiary records in the "low tar" cigarette cases that has led to divergent outcomes. *See* Rule 10(c) of this Court ("A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

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holding in *Cipollone* that misrepresentation claims, including the claim challenging representations related to the plaintiff's lung cancer in *Cipollone*, are not preempted.

Accordingly, a plaintiff who files a "low tar" case within the Fifth Circuit can defeat a preemption defense just as easily as a plaintiff within the First Circuit: by presenting an evidentiary record that demonstrates that the descriptors were not deemed true by the FTC, and were never authorized or mandated by that agency.

Respondents do not dispute that the issue raised by this case is important. However, Respondents do not believe that decisions like *Brown* are likely to occur in the future. With the decision of the First Circuit in this case and the racketeering judgment in *U.S. v. Philip Morris*, it is unlikely that future courts will conclude that the "low tar" descriptors are true, inherently or otherwise, or that they had been approved by the FTC. Even since Philip Morris' petition was filed in this Court, one appellate court has already reversed a trial court that found the claims were preempted, relying primarily on the decision of the First Circuit here. *Dahl*, 2007 WL 4234141 at *7.[10]

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[10] Other than *Brown*, Respondents know of only four trial courts that have ruled such claims are expressly preempted. *See In re Tobacco Cases II*, No. JCCP 4042, 2004 WL 2445337 (Cal.Super.Ct. Aug. 4, 2004); *Newton v. R.J. Reynolds Tobacco Co.*, No. 02-1415 (N.D.Cal. Mar. 13, 2003) (unpublished slip op.); *Pearson v. Philip Morris, Inc.*, No. 0211-11819, 2007 WL 2692026 (Or.Cir.Ct. Sept. 5, 2007) (appeal docketed); *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F.Supp.2d 639 (S.D.N.Y. 2007) (motion pending for interlocutory appeal). In the California cases, the "low tar" misrepresentation claims were

(Continued on following page)

Moreover, if the *U.S. v. Philip Morris* judgment is affirmed on appeal, all manufacturers, not just Philip Morris, will be enjoined from using the "low tar" descriptors at issue in these cases. Such a final judgment, should it be entered, would also provide a basis for issue preclusion with respect to the falsity of the representations, a claim which even Philip Morris concedes is not preempted. *Parklane*, 439 U.S. 322, 331-332.

II. There is No Conflict on the Implied Preemption Question.

Philip Morris is incorrect when it argues that lower courts are in conflict regarding whether claims

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apparently neither the primary claims asserted, nor were they appealed. *Id.*; *see In re Tobacco Cases II*, 20 Cal.Rptr.3d 693, 699 n.5. However, preemption rulings on other claims in one of the cases were appealed to the California Supreme Court, which recently issued a decision supporting Respondents' position here. *In re Tobacco Cases II*, 41 Cal.App.4th 1257, 1271-1272 (2007) (fraudulent misrepresentation claims are not preempted because based on duty to deceive).

The other two cases will likely be addressed by the relevant appellate courts soon. Although *Pearson* was decided after the First Circuit's decision in this case, the court distinguished the claim from the one here because the plaintiffs there purportedly alleged that additional statements should have been included on the packages. 2007 WL 2692026 (page 20 of slip op.; no page references available for Westlaw version). And, in *Clinton*, the court relied heavily on the *Brown* decision, which, as shown above, was based on a fictional evidentiary record. 498 F.Supp.2d at 652. *Brown* may well be the only appellate court that will ever find express preemption of these claims.

such as those alleged here are impliedly preempted. The only courts that found such claims preempted have done so under an **express** preemption analysis. *See supra*, n.10. None of the 24 cases cited by Philip Morris (Pet. at 25) held that the plaintiffs' claims were impliedly preempted under either FCLAA or the FTC Act. The jurisprudence could not be more uniform.

The agreement among the lower courts on this issue with respect to FCLAA is not surprising. In *Cipollone*, seven Justices of this Court held that there was no implied preemption defense available under FCLAA because the preemptive scope of the statute was defined "entirely" by its express preemption provision. *Cipollone*, 505 U.S. at 517. That holding was affirmed just three years later in *Freightliner*, 514 U.S. at 287-288. Given the clarity with which this Court has spoken, the lower courts, including the district court below, *see* Pet. at 83a-84a, have been unanimous in rejecting implied preemption defenses under FCLAA.

With implied preemption under FCLAA foreclosed, Philip Morris suggests that there is a split in the lower courts regarding the preemptive power of the FTC acting pursuant to the FTC Act. However, no court has ever held that the FTC's actions with respect to "low tar" descriptors are sufficient to impliedly preempt state-law claims similar to those asserted here. Thus, there is no division between the Courts of Appeals, or even the trial courts, on this issue.

The First Circuit did observe that there are some differences among the courts with respect to the powers of administrative agencies **other than the FTC** to preempt state law. However, those differences arise out of the specific terms of the varying statutes that govern those agencies' activities. If there is any doctrine of preemption that is unassailable, it is that the "ultimate touchstone" of the preemption inquiry is the intent of Congress in enacting the statute. *Cipollone*, 505 U.S. at 516. Accordingly, what Congress intended in vesting one agency with regulatory powers is not relevant to a preemption inquiry concerning a different administrative agency acting under a different federal statute.

With respect to the Federal Trade Commission Act, the parties agree that a formally promulgated rule may preempt inconsistent state law. However, they also agree that the FTC has never promulgated a rule that conflicts with Respondents' claims.

Philip Morris has identified only one potential division in the courts regarding the FTC's preemptive powers – whether a consent decree with the FTC will preempt any state-law obligations applicable to the parties to that decree. Pet. at 23.[11] However, that

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[11] One court has held that a consent decree with the FTC can preempt state regulations in conflict with the decree, at least with respect to how those regulations apply to an actual party to the consent decree. *Gen. Motors Corp. v. Abrams*, 897 F.2d 34 (2nd Cir. 1990). The *Abrams* court did not engage in a meaningful analysis of the legislative history of the FTC Act. *Id.*

(Continued on following page)

purported division in the courts, even if it were found to exist, does not apply here, because neither of the two consent decrees cited by Philip Morris provides any support for its position. Indeed, Philip Morris was not a party to either decree, and that alone would be enough to find that the Respondents' claims are not impliedly preempted.

Moreover, due to the absence of any conflict with Respondents' claims, the First Circuit correctly held that those two decrees do not support an implied preemption defense here, and there is no divergent authority on that question. The 1971 decree explicitly **prohibited** American Brands from using "low tar" descriptors unless accompanied by "a clear and conspicuous disclosure of the tar and nicotine ratings" of the cigarettes. 79 F.T.C. 255 (1971) (1971 WL 128779) (Order at Section I). Philip Morris has already conceded that it failed to make this accompanying disclosure when using these descriptors on cigarette packages. Pet. at 57a; *Aspinall*, 2006 WL 2971490 at *8.

The 1995 decree **prohibited** tar and nicotine representations in the form of ratios or percentages when comparing different types of cigarettes, even though such representations were fully consistent

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at 39 (analyzing intent of FTC, not Congress, in determining whether FTC consent order could preempt state law). Absent Congressional intent to empower the FTC to preempt state law by means of a consent decree, it would not matter whether the agency itself sought to preempt such law.

with Cambridge Filter test results. Pet. at 51a (citing 119 F.T.C. at 4). Thus, the 1995 decree did **not authorize** the use of any such statement simply because it may be consistent with numerical testing results. Accordingly, neither decree cited by Philip Morris conflicts with Respondents' claims and, therefore, the decrees cannot form the basis for an implied preemption defense to such claims. No court has held to the contrary.

In light of this uniform jurisprudence, there is no reason why the Court should grant *certiorari* on the implied preemption defense question. However, should the Court be inclined to address the question, Respondents respectfully request that it seek the views of the Solicitor General before doing so. The Solicitor General has in the past provided guidance to this Court on the scope of FTC regulation of tar and nicotine claims, and its views on the actions taken by the FTC could provide a useful perspective on whether the issue merits review by this Court at this time. *See, e.g.*, Brief for United States as Amicus Curiae, 127 S. Ct. 2301 (2007) (No. 05-1284) 2006 WL 3694382 at *4 (FTC has no official "regulatory position" on "low tar" descriptors).

CONCLUSION

The apparent division between the First and Fifth Circuits relates only to the express preemption

issue, and derives from the differences in the respective evidentiary records, rather than any disagreement on the law (on which the circuits are uniform). No court has held that claims similar to those of Respondents are impliedly preempted by virtue of any FTC regulation or order. In sum, there is no conflict among the lower courts that warrants review of the First Circuit's decision.

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December 28, 2007

REPLY BRIEF

Supreme Court, U.S.
FILED
JAN 2 - 2008
OFFICE OF THE CLERK

No. 07-562

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

"Respondents do not dispute that the issue raised by this case"—the proper construction of the express preemption provision of the Federal Cigarette Labeling and Advertising Act—"is important." Opp. 31. And they acknowledge that, in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), the Fifth Circuit "found that claims similar to those asserted here were expressly preempted by [the Labeling Act], and the First Circuit disagreed with that conclusion in this case." Opp. 24.

Respondents nevertheless maintain that there is no need for this Court's review of this "important" question of federal law on which the First and Fifth Circuits concededly "disagreed," because (according to respondents) that disagreement had "nothing to do with the doctrine of federal preemption" but instead is attributable solely to "fundamentally different evidentiary records" before the two courts. Opp. 24. Respondents are wrong: The divergent preemption conclusions reached by the First and Fifth Circuits had absolutely nothing to do with purported factual differences between the two cases. Rather, the flatly inconsistent outcomes are attributable exclusively to differing legal understandings of the Labeling Act preemption framework articulated by a plurality of this Court in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992)—an issue that, as several Members of this Court predicted at the time, has generated widespread confusion among lower courts for more than a decade. *See id.* at 544 (opinion of Blackmun, J.); *id.* at 556 (opinion of Scalia, J.).

While it is undisputed that the Labeling Act preempts *some* state-law claims, neither a majority of

this Court in *Cipollone* nor those lower courts that have attempted to implement the *Cipollone* plurality's preemption framework have been able to agree on exactly *which* claims are preempted. This Court's review is necessary to provide an authoritative resolution to this sharply disputed issue of federal preemption law, which has a direct bearing on the outcome of hundreds of pending cases in both the "lights" and broader smoking-and-health contexts.

ARGUMENT

In *Brown*, the Fifth Circuit held that state-law consumer fraud claims challenging the use of tar and nicotine descriptors constitute "'implied misrepresentation'" neutralization claims preempted by the Labeling Act as construed by the plurality in *Cipollone*—rather than express misrepresentation claims, which, according to the Fifth Circuit, the Labeling Act does not preempt. 479 F.3d at 392, 395. The Fifth Circuit explained that, because "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the" testing methodology developed by the FTC, descriptors "cannot be inherently deceptive" and are, at most, impliedly misleading. *Id.* at 392.

In the decision below, the First Circuit explicitly rejected the Fifth Circuit's *legal* dichotomy between express and implied misrepresentations, reasoning that "[t]he 'express' or 'implied' nature of an allegedly fraudulent misrepresentation . . . does not determine whether it is preempted by the [Labeling Act] under the *Cipollone* approach." Pet. App. 26a. The First Circuit continued that "we do not see anything in *Cipollone*'s discussion of warning neutralization claims that equates them with 'implied misrepresentation' claims as *Brown* does." *Id.* at 32a; *see also id.*

at 32a n.18 ("reiterat[ing]" that "*Cipollone* does not differentiate between 'express' and 'implied' misrepresentations").

Contrary to respondents' contention, the details of the FTC regulatory history discussed at length in the opposition brief (at 4-14) have nothing to do with the express preemption question on which the First and Fifth Circuits reached diametrically opposite conclusions. That question is whether a state-law consumer fraud claim challenging the use of tar and nicotine descriptors constitutes a state-law "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes," and is therefore preempted by the Labeling Act. 15 U.S.C. § 1334(b). It is utterly irrelevant to the resolution of *that* question whether the FTC has approved the use of tar and nicotine descriptors, prohibited their use, or expressed no opinion on the matter. For that reason, respondents' suggestion that "the apparent division in the courts below resulted only from [their] differing assessments of FTC policy rather than a difference in the courts' views of the preemptive scope of the [Labeling Act]" (Opp. 30) is just plain wrong. Indeed, both *Brown* and the decision below were decided on summary judgment based on undisputed factual records, and respondents have not identified any factual issue that would preclude entry of summary judgment in petitioners' favor were this Court to agree with the Fifth Circuit's legal interpretation of the Labeling Act's preemption provision.

Confronted with state-law consumer fraud claims indistinguishable from those asserted by respondents, the Fifth Circuit in *Brown* explained that, although "claims based on 'fraud by intentional misstatement' are not pre-empted" because they are

based on nothing more than a duty not to deceive, rather than "based on smoking and health" (479 F.3d at 391), "the Labeling Act pre-empts . . . 'implied misrepresentation' claims, which arise from statements or imagery in marketing that misleadingly downplay the dangers of smoking." *Id.* at 392 (citing *Cipollone*, 505 U.S. at 527). The Fifth Circuit held that state-law claims challenging the use of tar and nicotine descriptors are "based on smoking and health"—and are therefore expressly preempted by the Labeling Act—because the statement that Marlboro Lights and Cambridge Lights are lower in tar and nicotine than "regular" cigarettes is indisputably accurate under at least one methodology for measuring tar and nicotine yields (the FTC Method). *Ibid.* Because such statements are not inherently false, the Fifth Circuit reasoned that, under the *Cipollone* plurality, the plaintiffs' fraud claims challenging those statements were not "based on a duty not to deceive." *Ibid.*

The First Circuit, in contrast, explicitly "disagree[d] . . . with *Brown*'s view that the [Labeling Act] preempts fraud theories arising out of 'light' and 'lower tar and nicotine' because those statements are not 'inherently deceptive or untrue.'" Pet. App. 35a (quoting *Brown*, 479 F.3d at 392). In rejecting *Brown*'s preemption analysis and holding that respondents' claims are not preempted by the Labeling Act, the First Circuit did not—as respondents contend—engage in "a careful examination of the evidentiary record" (Opp. 2) or adopt a "differing assessment[ ] of FTC policy." *Id.* at 30. Indeed, respondents do not—because they cannot—point to a single statement in the First Circuit's discussion of express preemption (Pet. App. 15a-37a) disagreeing with the *facts* recited by the Fifth Circuit. What the

First Circuit did disagree with, however, was the Fifth Circuit's *legal* conclusion that, because "'[t]he terms 'light' and 'Lowered Tar and Nicotine' cannot . . . be inherently deceptive or untrue,'" state-law fraud claims challenging such statements cannot, under the *Cipollone* plurality, be based on "the duty not to deceive." *Id.* at 34a (quoting *Brown*, 479 F.3d at 392) (alterations in original).

Respondents' contention that the conflicting decisions reached by the First and Fifth Circuits "did not stem from any differences regarding what the law requires" (Opp. 24) is flatly refuted by the decision below. In response to the Fifth Circuit's preemption analysis, the First Circuit stated:

> We think [the *Brown*] approach puts the cart before the horse. The assertion that Marlboro Lights and Cambridge Lights rate lower in tar and nicotine than their full-flavored cousins according to the Cambridge Filter Method may ultimately affect whether the plaintiffs can show that the challenged statements are false. We do not resolve the issue, however, because . . . we do not believe that the issue has any relevance in deciding the express preemption question. . . . [W]e do not see how the statements' falsity—or, for that matter, their materiality, or whether Philip Morris made them with the requisite scienter—bears on the preemption analysis. Such issues go to the merits of the fraud claim, not to the threshold question of preemption. We disagree, then, with *Brown*'s view that the [Labeling Act] preempts fraud theories arising out of "light" and "lower tar and nicotine" because those statements are not "inherently deceptive or untrue." 479 F.3d at 392.

Pet. App. 34a-35a (alterations, citations, and internal quotation marks omitted).

The First Circuit's express and acknowledged "disagree[ment]" with the Fifth Circuit is a direct result of the two courts' divergent interpretations of the preemption framework endorsed by a plurality of this Court in *Cipollone*—a matter that has been a source of confusion and frustration for lower courts for the past decade and that urgently requires clarification from this Court. *See, e.g.*, *Pearson* v. *Philip Morris Inc.*, 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 19) ("the *Cipollone* rubric [is] extremely difficult to apply"); *see also* Pet. 18.

Respondents are simply wrong when they attempt to downplay the lower courts' confusion about the scope of Labeling Act preemption by suggesting that, since *Cipollone*, "all courts, including the Fifth Circuit in *Brown*, have uniformly held that claims of fraudulent misrepresentation of fact are not preempted by the express preemption provision of [the Labeling Act]." Opp. 24. That assertion not only distorts *Brown*'s holding that fraudulent misrepresentation claims *are* preempted when they are based on statements that are not inherently false (479 F.3d at 392), but it also disregards other decisions recognizing that the Labeling Act does preempt some categories of fraudulent misrepresentation claims. *See, e.g.*, *Glassner* v. *R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 349 (6th Cir. 2000) ("claims of fraud based upon fraudulent misrepresentation . . . are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion"); *see also* Pet. 18.

No more persuasive is respondents' contention that the First Circuit's approach is faithful to the

analysis of the *Cipollone* plurality because, according to respondents, the plurality's "analysis looks to the underlying or predicate state-law duty to determine whether it is generally applicable or whether it targets only the cigarette companies." Opp. 17 n.7. Respondents' proposed standard cannot account for the fact that *all* of the state-law claims asserted by the plaintiff in *Cipollone*—failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts—were based on "predicate state-law dut[ies]" that were "generally applicable" to all categories of defendants and did not "target[ ] only the cigarette companies." 505 U.S. at 509-10. The *Cipollone* plurality nevertheless concluded that several of these claims, including the plaintiff's fraudulent misrepresentation claim based on alleged "neutralization" of the federally mandated warning labels, were preempted. *Id.* at 527.

Nor does respondents' proposed preemption standard account for this Court's holding in *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), that the Labeling Act preempted state regulations restricting cigarette advertisements that were promulgated pursuant to the Massachusetts Unfair Trade Practices Act, which is also indisputably applicable to all categories of businesses, not only tobacco companies. *Id.* at 550-51; *cf. Morales* v. *TWA, Inc.*, 504 U.S. 374, 386 (1992) ("the notion that only state laws specifically addressed to the airline industry are preempted, whereas the ADA imposes no constraints on laws of general applicability" would "creat[e] an utterly irrational loophole").

Even if, *arguendo*, the analysis employed by the First Circuit were *correct*—which is what respondents' position ultimately boils down to—that would

not alleviate the need for this Court to review the *conflict* between the decision below and the Fifth Circuit's decision, which rested on a materially different understanding of the Labeling Act. Moreover, the decision below is *not* correct. Under a correct application of the preemption framework adopted by the *Cipollone* plurality, it is inherent "falsity" that distinguishes state-law fraudulent misrepresentation claims that are based on the "duty not to deceive" from state-law claims that are "based on smoking and health" because "state-law proscriptions on intentional fraud rely on a single, uniform standard: falsity"—and therefore need not be preempted to attain the Labeling Act's goal of national regulatory uniformity. 505 U.S. at 529. The First Circuit's conclusion that "the statements' falsity" does not "bear[ ] on the preemption analysis" (Pet. App. 35a)—and its holding that state-law fraud claims challenging tar and nicotine descriptors are not preempted even though such statements are concededly accurate under the FTC Method (Compl. ¶ 23)—is flatly inconsistent with the analysis of the *Cipollone* plurality.

Although respondents do not dispute the importance of this case to the "'low tar' litigation" that "ha[s] commenced across the country" (Opp. 28), they contend that the pending appeal in *United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *appeal docketed*, No. 06-5267 (D.C. Cir. Sept. 11, 2006), might alleviate the need for this Court's review. Respondents vastly overstate the implications of that case, a RICO action initiated by the federal government that does not even implicate the issue of federal preemption presented by this petition. Indeed, the district court's decision in *Philip Morris* was issued *before* the Fifth Circuit's decision in *Brown* and the First Circuit's decision in this case,

and did not resolve the question whether state-law claims challenging the use of tar and nicotine descriptors are preempted because descriptors are not inherently false. Regardless of the outcome of appellate proceedings in *Philip Morris*, other courts will continue to struggle with the preemption framework of the *Cipollone* plurality in cases arising under state law, both in the "lights" context and, more broadly, in the smoking-and-health setting.

There are currently more than 30 cases pending in state and federal courts across the country challenging tobacco companies' use of tar and nicotine descriptors. *See* Pet. 25 n.6. Still more implicate the Labeling Act's preemption provision outside the "lights" context. Those cases should be adjudicated under a uniform framework of federal preemption law. Parties in the Fifth Circuit should not be treated differently from parties in the First Circuit based on those courts' divergent understandings of federal preemption. Only this Court can bring certainty to this exceptionally important area of the law and—as Congress intended to do when enacting the Labeling Act—alleviate the pervasive "nonuniform[ity]" and "confusi[on]" regarding "cigarette labeling and advertising." 15 U.S.C. § 1331.*

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* Respondents also fail to suggest a tenable basis for this Court to decline review of the First Circuit's implied preemption analysis. Respondents, for example, conveniently ignore the FTC's 1967 policy statement, in which the agency explicitly stated that it "would not challenge statements or representations of or relating to tar and nicotine content of cigarettes" where those statements were substantiated by the FTC Method. C.A. App. 250 ¶ 162. That policy statement reflects the FTC's long-standing regulatory policy of providing consumers with standardized tar and nicotine information and encouraging the development of low-yield cigarettes. *See* Pet. 21-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[Footnote continued from previous page]

State-law consumer fraud claims challenging the use of tar and nicotine descriptors are "an obstacle to the accomplishment" of those regulatory objectives and are therefore impliedly preempted. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted). Moreover, respondents are incorrect when they suggest that PMUSA's conduct was "inconsistent with the terms of the 1971 consent decree" because PMUSA did not disclose numerical tar and nicotine yields on cigarette packages. Opp. 27. The Labeling Act explicitly prohibits anyone other than Congress—including the FTC—from requiring such information on cigarette packages. 15 U.S.C. § 1334(a). Finally, respondents are unable to reconcile the First Circuit's holding that the FTC cannot preempt state law without "issu[ing] a formal rule" (Pet. App. 46a) with the Second Circuit's conclusion in *General Motors Corp.* v. *Abrams*, 897 F.2d 34 (2d Cir. 1990), that an FTC consent order "may preempt state legislation" (*id.* at 39). The conflict between the First Circuit's implied preemption analysis and the decisions of both this Court and other courts reinforces the compelling need for review. *See* Pet. 23.

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AMICUS CURIAE BRIEF

File Date:
Nov 28 2007

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

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IN THE

Supreme Court of the United States

NO. 07-562

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million companies and

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of *amicus*'s intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has filed *amicus* briefs in other preemption cases and is well situated to address the preemption issues raised in this case. Its members are engaged in commerce in each of the 50 States and are subject in varying degrees to a wide range of federal regulations. As a result, its members often confront the interplay between the duties imposed by federal law and the state-law standards applied in consumer fraud cases. The Chamber is, as a result, not only uniquely suited to offer a broader perspective on preemption than the parties could provide by themselves, but also is keenly interested in ensuring that the regulatory environment in which its members operate is rational and consistent.

INTRODUCTION AND SUMMARY

Today, more than ever, U.S. businesses confront product liability lawsuits that—rather than challenge the design or quality of the product itself—seek damages based on the product's label, accompanying brochures, or advertising, often through a common-law "failure to warn" claim or a state deceptive trade practices statute. At the same time, Congress and federal regulatory agencies have recognized the critical role that product labeling plays for both consumers and the national economy. Balancing a variety of interests such as accuracy, completeness, and consistency—as well as the interest in not burying important information in a haystack of verbiage—Congress and federal agencies have promulgated labeling regimes applicable to goods as diverse as automobiles, appliances, food, and pharmaceuticals. For

example, the Environmental Protection Agency ("EPA") performs automobile fuel economy tests and requires disclosure of such information. The National Highway Traffic Safety Administration ("NHTSA") conducts and requires disclosure of crash test results. The EPA and the Department of Energy certify appliances and electronics as energy efficient. And the Food and Drug Administration ("FDA"), in addition to reviewing drug labeling and advertising, regulates when producers may label their foods "light," "low fat," or "low cholesterol," and when producers can make certain health claims regarding a food.

This case reflects the growing uncertainty and disuniformity on the scope of federal preemption when those regimes and state tort law intersect. A state-law claim or statute is expressly preempted when Congress or an agency declares, in text, that federal authority is exclusive or specifies that state law has been displaced. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002). Equally important, a state-law claim may also be impliedly preempted by Congress or a federal agency. That occurs where Congress or the agency regulates so comprehensively as to leave no room for the exercise of state authority (field preemption), or where the state law "conflict[s] with" or otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the statutory or regulatory regime (conflict preemption). *Id.* at 64-65 (internal quotation marks omitted).

As the petition and the decision below both make clear, the First Circuit's decision in this case creates a square circuit conflict on the extent to which federal law preempts the tobacco claims in this case. The Fifth Circuit, in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), held that federal law preempted claims indistinguishable from those at issue

here. By contrast, the First Circuit's decision here, in open disagreement with the Fifth Circuit, held that the same claims were not preempted. See Pet. 9-11; Pet. App. 34a. If allowed to stand, the First Circuit's approach would balkanize cigarette labeling, advertising, and promotion into a state-by-state endeavor. Plaintiffs here claim that petitioners' use of the words "light" and "low tar" in connection with Marlboro Lights and Cambridge Lights cigarettes was false and misleading. There is no dispute that, under the testing regime mandated by the FTC for decades, those cigarettes are in fact "light" and "low tar," since they deliver less tar and nicotine than their regular Marlboro and Cambridge counterparts. The First Circuit nonetheless allowed plaintiffs' lawsuit to proceed based on the theory that the labels are misleading under state law because the FTC's method does not reflect real-world conditions, such as the tendency of smokers to compensate for lower tar and nicotine delivery by puffing more deeply or holding the smoke in their lungs for longer periods. That ruling means that, in some States, Marlboro Lights and Cambridge Lights can be marketed as before. But in Maine, the same products would either have to be sold and marketed under an entirely different name—or bear wholly different disclosures and warnings—on the theory that the government-mandated mechanism for measuring tar and nicotine, while required for representing the tar and nicotine content on cigarette packages, is false and misleading when used (absent further elaboration) as the basis for labeling the cigarettes "light" or "low tar." In the context of cigarettes, it is difficult to imagine a more powerful blow to the interest of nationwide uniformity and consistency.

The significance of the First Circuit's decision, however, extends well beyond the context of cigarette labels and advertisements. It does not require much imagi-

nation (or legal research) to identify myriad areas of federal concern in which judicial endorsement of theories like those adopted here would lead to similar discontinuities. For example, while the EPA mandates the mechanism for rating fuel economy and requires the display of the resulting fuel economy estimate on each new car, some plaintiffs have challenged advertising that mentions those exact same EPA estimates on the theory that they are misleading. See pp. 12-13, *infra*. Lawsuits in other areas subject to federal regulation, such as drug advertising, abound. See pp. 13-14, *infra*. The results in those cases have been anything but uniform.

The square circuit conflict at this case's heart thus reflects a broader need for additional guidance from this Court. In the 15 years since this Court decided *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992)—holding that Congress had preempted certain state tort actions related to cigarette labeling—*Cipollone* has become one of the most cited and influential decisions on preemption of common-law tort claims, finding application in a variety of non-cigarette contexts. See *Bates* v. *Dow Agrosciences, LLC*, 544 U.S. 431, 441 (2005) (discussing the "groundswell" of federal court preemption decisions in the pesticide context alone). But *Cipollone* was a fractured decision; one can discern a majority vote for particular results, but no single rationale garnered the votes of a majority of the members of this Court. The lower federal courts have not uniformly interpreted the distinctions drawn by the plurality opinion. And the increasingly important doctrine of implied preemption has correspondingly become a hopeless muddle, with little to unify the many disparate labeling and disclosure decisions being generated by the lower federal courts. Only by granting the petition and resolving the question presented can this Court restore uniformity and coherence to this important area of federal law.

REASONS FOR GRANTING THE PETITION

Today's information economy has brought with it the rise of the "information tort." In ever-increasing numbers, plaintiffs' lawsuits challenge not the propriety of a product's design or quality, but the content of the labeling, advertising, or other information provided by the manufacturer. The result has been an "explosive increase in the number of * * * failure to warn cases" and claims based on deception. Douglas R. Richmond, *Human Factors Experts in Personal Injury Litigation*, 46 Ark. L. Rev. 333, 338 (1993). Indeed, given the dramatic shift, "one may speculate that, in the near term, mechanized accidents will cease to provide the focal point of tort. Even in the heartland of modern accident law—products liability—one already sees a relative increase in claims grounded on failure to warn and inform, as well as misrepresentation." John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 582-83 (2003); see also Richard C. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers?*, 37 Wake Forest L. Rev. 97, 137 (2002) (similar); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 2 (2006) (similar).

Plaintiffs in this case assert precisely such a claim. Seeking damages under Maine's Unfair Trade Practices Act, plaintiffs challenge the marketing and labeling of Marlboro and Cambridge Lights. In particular, plaintiffs claim that petitioners' use of the word "light," and the words "lowered tar and nicotine," is deceptive. It is undisputed that both Marlboro and Cambridge Lights in fact have lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes when tested under the method the FTC has long mandated for purposes of cigarette advertising. Cmplt. ¶ 23. But plaintiffs claim

that advertising cigarettes as "light" or "low tar," even if consistent with federal test results, is deceptive because smokers may compensate for the lower yields of tar and nicotine by inhaling more deeply or by holding the smoke in their lungs longer—an effect that is not reflected in the FTC's mandated methodology or petitioners' advertising. Pet. App. 4a. Despite congressionally mandated warnings, plaintiffs assert that petitioners used the words "light" and "low tar" on labels and in advertisements "with the intention of communicating," Cmplt. ¶¶ 15, 17, that those cigarettes "were less harmful or safer than [their] regular" counterparts, *ibid.* And they make that claim notwithstanding a federal statute declaring that "[n]o requirement or prohibition *based on smoking and health* shall be imposed under State law with respect to the *advertising or promotion* of any cigarettes" where the cigarette packaging conforms with federal requirements. 15 U.S.C. § 1334(b) (emphasis added).

In the decision below, the First Circuit held that plaintiffs' claims were neither expressly preempted by 15 U.S.C. § 1334(b), nor impliedly preempted by the FTC's standards. As the petition points out—and the First Circuit itself conceded—that creates a square conflict with the Fifth Circuit's decision in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007). See Pet. 9-11; Pet. App. 34a (disagreeing with *Brown* and declaring that the Fifth Circuit's "approach puts the cart before the horse"). That square conflict and its potential impact on the innumerable tobacco cases now being litigated in state and federal court are themselves sufficient reason to grant the petition.

But the consequences of the decision below and the confusion it reflects extend well beyond the limited (but important) context of this particular case. As plaintiffs and their lawyers have gravitated toward labeling claims, Congress and federal agencies too have recognized the

importance of product labels. The statute at issue here is merely one of many statutes that preempt state-law regulation to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform, and confusing" requirements. 15 U.S.C. § 1331. Seeking to avoid the fragmentation of our national economy while balancing interests such as comprehensiveness, intelligibility, and consistency—as well as preventing consumers from being so inundated by disclosures that none gets read—Congress has enacted statutes addressing appliance energy efficiency labeling, 42 U.S.C. § 6297(a); motor vehicle fuel economy, 49 U.S.C. § 32919; crash test data, 49 U.S.C. § 30103(b); health claims and nutritional labels for food products, 21 U.S.C. § 343-1; and country of origin labeling for motor vehicles, 49 U.S.C. § 32304. Federal agencies likewise have enacted a raft of labeling requirements. As a result, litigation about the preemptive effect of those federal statutes and regulations has expanded dramatically—as has an increasingly fragmented and incoherent body of federal case law.

In the 15 years since this Court held that 15 U.S.C. § 1334(b) preempts certain state-law tort claims relating to cigarette labeling in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), *Cipollone* has become one of the most cited preemption decisions. But, as the circuit conflict in this case illustrates, that decision—a fractured ruling in which no single rationale was joined by a majority of the Court—has failed to provide the sort of guidance necessary to produce coherent and consistent preemption rulings. That has had a tremendous impact on *amicus*, its members, the business community, and potential claimants. Confronted by unpredictable preemption rulings and an increasing number of "information tort" suits under a multitude of state standards, businesses participating in the national economy may have to balkanize their labeling and promotions, with

different websites, labeling, and advertisements for as many as 50 different States. And consumers claiming injury now regularly confront protracted litigation over preemption before any court ever addresses the merits of their claims. This case thus presents the Court not merely with an opportunity to reconcile a square conflict in circuit precedent. It also provides the Court with the opportunity to provide badly needed guidance on an increasingly important issue more generally. For that reason too, the petition should be granted.

I. The Circuit Conflict On Preemption Reflects Widespread Disuniformity Under A Variety Of Regulatory Regimes.

A. While the statute and regulatory actions at issue in this case are now as many as four decades old, they are by no means unique. Responding to a 1964 Surgeon General report linking smoking with lung cancer, Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.*, to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. To apprise the public of the health risks associated with smoking, Congress mandated that all cigarette packages bear a prominent warning label. *Ibid.* And, to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform and confusing cigarette labeling and advertising regulations," *ibid.*, Congress preempted certain state laws respecting the labeling and promotion of cigarettes that are labeled in conformity with federal requirements. The FCLAA thus states:

> No requirement or prohibition *based on smoking and health* shall be imposed under State law *with respect to the advertising or promotion of any cigarettes* the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b) (emphasis added). Because the Act preempted only "State law," the FTC continued to regulate and police cigarette advertising and promotion. See *Cipollone*, 505 U.S. at 515. Among other things, the FTC required cigarette manufacturers to disclose the tar and nicotine yields of their cigarettes, as calculated under a methodology often referred to as the "FTC Method." *In re American Brands*, 79 F.T.C. 255, 257 (1971); see also *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978).

As the petition explains in detail, the First Circuit's approach to that statutory and regulatory framework does not merely create a conflict in the circuits. It also parses Section 1334(b)'s text and the FTC's actions so finely as to deprive them of virtually any effect. Relying on the plurality opinion in *Cipollone*, the First Circuit appears to have ruled that state-law claims are not preempted—no matter how intertwined with "smoking and health" they may be—so long as they are "premised on a state-law duty that is broader in scope," *i.e.*, a duty that imposes obligations beyond the context of cigarettes. Pet. App. 21a.

That sort of reasoning effectively converts Section 1334(b) and this Court's *Cipollone* decision into a pleading rule: So long as the plaintiff invokes a sufficiently broad principle in the complaint (the duty to meet a reasonable standard of care, the duty not to deceive, *etc.*) when challenging the advertising, the claim is not preempted. Such a rule is not merely nonsensical. It also subjects the tobacco industry to a fragmented, state-by-state disclosure regime that cannot be reconciled with Congress's desire to establish uniformity. And such a rule makes it virtually impossible to distinguish preempted claims from non-preempted claims, except when a plaintiff is foolish enough to identify his challenge as a "warning neutralization" claim of the sort this Court held preempted in *Cipollone*. See Pet. 16-17.

B. While *amicus* agrees that the First Circuit's approach is fundamentally unsound—and that the Fifth Circuit's approach in *Brown* v. *Brown & Williamson Tobacco Corp.* is correct—the First Circuit's parsimonious construction of statutory text and *Cipollone* is part of a larger problem. Invoking a generalized presumption against preemption of local law articulated by the *Cipollone* plurality, 505 U.S. at 517, some federal courts have departed from the lodestar of all statutory construction—the rule that words and phrases are to be construed in accordance with their ordinary meaning. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)). Correspondingly, they often have refused to find implied preemption even where, as here, the legal theory underlying the state-law claim in effect challenges the veracity of a federal methodology—deeming the results under that methodology, and representations that are accurate according to that methodology, not merely false but fraudulent. The result has been a body of inconsistent and often unsupportable decisions that wreak havoc with federal statutory and regulatory goals.

That confusion infects virtually every area of product labeling in which the federal government has intervened. For example, in 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), codified as amended at 42 U.S.C § 6291 *et seq.* and 49 U.S.C. § 32901 *et seq.*, to regulate the testing and labeling of a range of energy-consuming products. For automobiles, Congress authorized the EPA to establish a methodology for testing fuel economy, and mandated that automobile manufacturers post labels on their cars (known as "Monroney stickers") providing, among other things, "the fuel economy of the automobile." 49 U.S.C. § 32908(b). Congress expressly preempted States from imposing any law "*on disclosure of fuel economy* or fuel operating costs"

unless it is "identical" to the federal standards. 42 U.S.C. § 32919 (emphasis added). And the EPA has promulgated exhaustive regulations governing the methodology for testing fuel economy. 40 C.F.R. §§ 600.002-08 *et seq.*

Properly read, those provisions and the accompanying regulations should preclude States from imposing inconsistent disclosure requirements. Nonetheless, invoking a presumption against preemption, at least one court has held that car buyers can sue a vehicle manufacturer under California's Unfair Competition and False Advertising statutes for including EPA fuel economy results (labeled as such) when advertising its hybrid automobile, holding that any preemption is limited to vehicle *stickers*. *True* v. *American Honda Motor Co.*, No. EDV 07-287-VAP, — F. Supp. 2d —, 2007 WL 3054569, at *3-*4 (C.D. Cal. June 27, 2007). The court stated that "[i]t would be an unreasonable assumption * * * that Congress intended to preempt states from regulating false or misleading advertising of a vehicle's fuel efficiency * * * ." *Id.* at *4. And the court rejected the claim that the complaint represents "a challenge to EPA testing guidelines" because, according to the court, the lawsuit merely challenged "the manner in which Defendant advertised the Honda Civic Hybrid in mediums other than the Monroney Sticker and [federally mandated] information booklet." *Ibid.*; see *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422 (Cal. 2004) (holding that federal approval of wine labels does not preempt the State from requiring additional disclosures), cert. denied, 544 U.S. 922 (2005).

That decision is difficult to reconcile with text or common sense. Surely a state law governing fuel economy disclosures in advertising is a law "on disclosure" of fuel economy within the meaning of 42 U.S.C. § 32919. Likewise, it is impossible to reconcile the EPA's *mandate* that manufacturers use a particular measure of fuel economy when putting labels on their cars with a state-law *prohi-*

bition on using that same measure (accurately described as the EPA standard) in advertising. Such a rule allows state law, in effect, to indict as fraud in one medium the very statements the federal government requires manufacturers to make in another medium.

For that reason, many courts have taken precisely the opposite approach in other contexts. In *Prohias* v. *Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla. 2007), for example, the district court held that claims regarding the defendants' marketing of Lipitor were preempted by FDA labeling requirements. The court explained that, under the Food, Drug, and Cosmetic Act ("FDCA"), the FDA has broad authority to regulate prescription drug labeling and advertising, see 21 U.S.C. § 393(b), which the FDA has exercised through extensive regulations, 21 C.F.R. § 202.1 *et seq.* See 490 F. Supp. 2d at 1234 n.6. The court held that, although the plaintiff had challenged the *advertisements* for Lipitor, the FDA's approval of the *labels* for Lipitor preempted the claims. *Id.* at 1233.

> [While] Lipitor was not approved to reduce the risk of heart attacks in all patients, *the alleged advertisements derive from, and largely comport with, the approved label.* For this reason, the plaintiffs['] efforts to hold Pfizer liable for the advertisements *conflicts with the FDA's jurisdiction over drug labeling, and specifically its approval of Lipitor to reduce the risk of heart disease in some patients.* Those claims are therefore preempted by federal law.

Id. at 1234 (emphasis added).

The Third Circuit came to the same conclusion in connection with a Delaware Consumer Fraud Act claim that challenged the advertisements used for Nexium. *Pennsylvania Employees Benefit Trust Fund* v. *Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007). Holding that the FDA's

regulations preempted those claims, the court explained that an "even stronger case for preemption occurs when FDA-approved *labeling* is the basis for allegedly fraudulent representations *made in prescription drug advertising*." *Id.* at 251 (emphasis added). The "purpose of protecting prescription drug users in the FDCA would be frustrated," the Third Circuit explained, "if states were allowed to interpose consumer fraud laws that permitted plaintiffs to question the veracity of statements approved by the FDA" for product labels. *Ibid.* In *True*, the court nonetheless allowed precisely what *Zeneca* proscribed: It allowed state tort law to question "the veracity of" fuel economy statements in advertising even though the EPA and federal law mandated the inclusion of those exact same statements on vehicle labels.

C. That inconsistency is important here because it evidences the jurisprudential gulf that separated the First Circuit's preemption analysis below from the Fifth Circuit's analysis in *Brown* v. *Brown & Williamson Tobacco Corp.*, *supra*. Like the district court in *True*, the First Circuit in this case struggled to narrow the scope of preemption. It parsimoniously construed phrases like "requirement or prohibition based on." See Pet. App. 19a. It refused to attach much significance to the fact that the representations—"light" and "lowered tar"—were entirely accurate under the FTC-approved methodology. See Pet. App. 33a-34a (no dispute that, under the FTC method, the "light" or "lowered tar" cigarettes in fact did have lower tar and nicotine yields than their "full-flavored" counterparts). Thus, like *True*, the First Circuit's decision allows plaintiffs to challenge advertisements on a theory that effectively challenges the "veracity" of the method the government imposed. If the First Circuit's decision is allowed to stand, plaintiffs in this case will, in effect, need to prove at trial that the FTC's method (and thus the "low tar" and "light" descriptors

petitioners based on that method) misleads consumers by failing to account for human factors like smoker "compensation" (inhaling more deeply or holding the puff longer). Pet. App. 31a-32a.

By contrast, the Fifth Circuit's decision in *Brown* v. *Brown & Williamson Tobacco Corp.*, *supra*, and the drug advertising cases described at pp. 13-14, *supra*, take the opposite approach. Those cases recognize that, hair-splitting aside, any challenge to a disclosure that is truthful under a federally approved methodology necessarily implicates federal interests. Such disclosures cannot be deemed misleading unless the plaintiff seeks to impose an additional disclosure obligation—an obligation to qualify the disclosure by "tell[ing] the public that the [federal methodology], though accurate in the laboratory, [i]s inaccurate in real life." 479 F.3d at 393 (quotation marks omitted). Those cases further recognize that, once a federal agency approves a methodology or label, federal law will not allow the accuracy of the federal methodology to be placed on trial as deceptive under state law. *Id.* at 392. Allowing such a challenge would "directly undermine the entire purpose of the standardized federal labeling system." *Ibid.*; accord *Zeneca*, 499 F.3d at 251 (allowing suits under consumer fraud laws to challenge "the veracity of statements approved by the FDA" for product labels would "frustrate" the FDCA's "purpose"). The fact that the circuit conflict at issue here is symptomatic of a larger federal divide likewise weighs strongly in favor of granting the petition.

II. The Issues Raised Are Of Enormous And Increasing Importance.

Given the broad range of federal statutes that regulate labeling and the increasing number of lawsuits predicated not on product design or quality, but on the accompanying information, the issues raised in this case are of great and growing importance. Congress and federal

agencies have already enacted an increasing number of statutes requiring manufacturers to perform federally regulated tests on their products and to disclose the results of those tests to consumers. Congress has also expressly preempted state law in a variety of disclosure-related statutes. Each of those contexts raises the prospect of lawsuits, and conflicting results, similar to those at issue here.

A. A few examples illustrate the breadth of this issue. Addressing automobile crashworthiness, Congress has directed the NHTSA to promulgate a number of Federal Motor Vehicle Safety Standards ("FMVSS"), 49 U.S.C. § 30111(a), preempted States from creating their own standards, 49 U.S.C. § 30103(b), and given the NHTSA the authority to carry out any testing necessary to create and enforce those standards, 49 U.S.C. § 30168. That includes crash-testing passenger vehicles and publishing the results. 49 C.F.R. § 571.208; see www.safercar.gov (last accessed Nov. 20, 2007). Under the Automobile Information Disclosure Act ("AIDA"), 15 U.S.C. § 1232, automobile manufacturers now must include window stickers that display the results of NHTSA crash tests, including the rating—indicated by a number of stars—the car received. 15 U.S.C. § 1232(g); see also 49 C.F.R. pt. 575. Manufacturers that receive high crash test ratings often use those ratings in their advertisements, and consumers may use the data to decide whether a car meets their safety requirements.

That effort to educate consumers, however, could easily be derailed by a lawsuit parallel to the one the First Circuit upheld here. In this case, plaintiffs cannot credibly claim that cigarette labels such as "low tar" and "light" are literally false if evaluated under the FTC-approved methodology. To the contrary, under that methodology, the "light" and "lowered tar" cigarettes did yield less tar and nicotine than their regular counter-

parts. But plaintiffs claim that the use of those terms is nonetheless *misleading* because the FTC-approved test does not accurately reflect a human factor—that smokers may compensate by smoking more "light" or "lowered tar" cigarettes, inhaling more deeply, and holding a puff longer than with regular cigarettes. Pet. 7. And plaintiffs therefore claim that petitioners misled the public when they used short-hand terms such as "light" and "lowered tar" despite that shortcoming.

But a plaintiff could just as easily challenge a car manufacturer's advertisement of an automobile's five-star crash rating—even though it is true as a matter of federal law—under the same theory. For example, a plaintiff might argue that advertising a five-star rating is misleading because the government's test does not reflect all real-world conditions. (No test ever does.) And some studies suggest that the human factor of "compensating" behavior—a tendency to drive more aggressively if the car is safer—may also function in the crashworthiness context. See, *e.g.*, Steve Peterson, George Hoffer, & Edward Millner, *Are Drivers of Air-Bag Equipped Cars More Aggressive? A Test of the Offsetting Behavior Hypothesis*, 38 J.L. & Econ. 251 (1995) (finding drivers of air-bag equipped cars tend to drive more aggressively); Anindya Sen, *An Empirical Test of the Offset Hypothesis*, 44 J.L. & Econ. 481 (2001) (offering support for the hypothesis that drivers take more risks when wearing seat belts). This case thus raises the prospect that the safety ratings—while literally true and approved by a federal agency—could be the basis of a fraud action under state law because they allegedly do not account for real-world conditions.

The same theory likewise could be applied to evade the national uniformity goal underlying the National Labeling and Education Act ("NLEA"), which creates national standards for food labeling. 21 U.S.C. § 343-1(a).

When Congress enacted that statute, it explicitly preempted States from creating labeling requirements that are not identical to federal standards. 21 U.S.C. § 343(a)(1). Pursuant to the NLEA, the FDA has promulgated numerous regulations allowing food producers to use descriptors to identify "healthier" food products. Much like the FTC's regulatory activity regarding the use of "light" in connection with marketing cigarettes, the FDA allows foods that meet certain nutritional thresholds to use descriptors such as "Low Calorie," 21 C.F.R. § 101.60; "Reduced Fat," 21 C.F.R. 101.62(b); and "Light," 21 C.F.R. § 101.56. In addition, the FDA regulates food health claims on labels if they link the consumption of specific nutrients to health conditions (such as the claim that "diets low in sodium may reduce the risk of high blood pressure"). See, *e.g.*, 21 C.F.R. § 101.74 (regulating claims concerning the relationship between sodium and high blood pressure); 21 C.F.R. § 101.73 (total fat consumption and cancer); 21 C.F.R. § 101.75 (saturated fat and cholesterol and heart disease); 21 C.F.R. § 101.72 (calcium and osteoporosis).

With respect to those terms too, enterprising plaintiffs can claim deception under state law because, once again, the labels—although accurate under a federal methodology—could be read to imply that the food is healthier despite a variety of putatively compensating factors that make them less healthy. Indeed, research shows that, when given "low fat" and "sugar-free" foods as substitutes for higher fat versions of the same item, consumers tend to compensate by eating *more*—just as smokers allegedly compensate by puffing more deeply or holding their breath longer. See Brian Wansink & Pierre Chandon, *Can "Low Fat" Nutrition Labels Lead to Obesity?*, 43 J. Marketing Res. 605 (2006); B. J. Rolls & D. L. Miller, *Is the Low-Fat Message Giving People a License to Eat More?*, 16 J. Am. College of Nutrition 535

(1997); Dianne Engell, *et al.*, *Effects of Information About Fat Content On Food Preferences in Pre-Adolescent Children*, 30 Appetite 269 (1998). That effect is compounded by the fact that foods with artificially reduced fat content are often higher in calories and sugar than their ordinary counterparts, and thus potentially more fattening in and of themselves. See B. J. Rolls & D. L. Miller, *supra*, at 535.[2]

Other examples abound. The ECPA, in addition to regulating fuel efficiency ratings and disclosure, regulates the testing and labeling of consumer products in connection with energy consumption. See, *e.g.*, 42 U.S.C. §§ 6293 & 6294 (ECPA testing and labeling requirements for consumer product energy consumption); 16 C.F.R. pt. 305 (same); 42 U.S.C. § 6297(a)(1)(A & B) (ECPA preemption provision).[3] Under that statute, the EPA and the Department of Energy ("DoE") have created the "Energy Star" program, which allows manufacturers to label their products as "Energy Star" certified if they meet certain energy efficiency testing requirements. See, *e.g.*, 10 C.F.R. pt. 430 (incorporating Energy Star guidelines) & 16 C.F.R. § 305.11 (FTC rule

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[2] See also *Pelman* v. *McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (States may require restaurants exempt from federal labeling requirements to disclose nutritional information); *New York State Restaurant Ass'n* v. *New York City Bd. of Health*, 509 F. Supp. 2d 351, 357 (S.D.N.Y. 2007) (States may not impose additional requirements on restaurants that have voluntarily provided nutritional information in accordance with FDA regulations); *Reyes* v. *McDonald's Corp.*, No. 06-C-1604, 2006 WL 3253579, at *4 (N.D. Ill. Nov. 8, 2006) (NLEA preempted state-law deceptive practices claims based on voluntary disclosure of transfats in McDonald's french fries).

[3] Detailed guidelines for a number of products are available at: http://www.energystar.gov/index.cfm?c=product_specs.pt_product_specs (last accessed Nov. 20, 2007).

allowing manufacturers to use the Energy Star logo with DoE approval). The Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*, regulates wine labels and requires federal approval of each label. 27 U.S.C. § 205(e); see *Bronco Wine Co.*, 95 P.3d at 422. Congress has regulated country of origin labeling for motor vehicles. 49 U.S.C. §32304. And, as noted above, p. 13, *supra*, the FDA extensively regulates the labeling of pharmaceuticals as well as related advertising. With respect to each of those regulatory regimes, state court actions challenging disclosures that are correct under federal methods could threaten the federal program by putting the veracity of any federal standard invoked in a promotion on trial, precisely as plaintiffs seek to do here.

B. The need to clarify the proper way to analyze the preemptive effect of these federal programs increases with each passing day. As the Nation's economy grows more integrated, the impetus for Congress and agencies to establish national standards that facilitate interstate commerce—and ensure that consumers can understand packaging anywhere in the United States—will only increase. At the same time, plaintiffs (and state legislatures) are increasingly attuned to labeling and advertising claims as well. Indeed, as explained above, the number of lawsuits predicated on state deception statutes and common-law failure-to-warn theories is growing exponentially. See p. 6, *supra*.

Given the direct, acknowledged, and undeniable circuit conflict, this case would warrant further review even if its impact were limited to tobacco cases. But its impact is not so limited. The confusion that has developed in the 15 years since *Cipollone* was decided infects many areas of the law, and the circuit conflict in this particular context merely reflects that greater uncertainty. In light of the number of federal labeling regimes that exist today, and the growing number of state-law challenges

predicated on advertising and disclosure, the importance of this issue will continue to grow, as will the uncertainty absent prompt review by this Court. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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November 28, 2007

AMICUS CURIAE BRIEF

3
File Date:
No. 07-562
Nov 28 2007

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* R. J. REYNOLDS TOBACCO COMPANY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

CORPORATE DISCLOSURE STATEMENT

R. J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R. J. Reynolds Tobacco Company, a New Jersey corporation. The existing R. J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., a publicly held corporation. Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) holds more than 10% of the stock of Reynolds American Inc.

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R. J. Reynolds Tobacco Company ("R. J. Reynolds") respectfully submits this brief *amicus curiae* pursuant to Supreme Court Rule 37.3 in support of petitioners.[1] *Amicus* urges the Court to grant certiorari in this case to clear up the lower courts' pervasive confusion regarding the scope of preemption under the Federal Cigarette Labeling and Advertising Act (the "Labeling Act" or "Act"). The First Circuit's decision exacerbates that longstanding confusion and, if left undisturbed, will impede the tobacco industry's efforts to conduct nationwide advertising campaigns and expose the industry to massive potential liability.

INTEREST OF *AMICUS CURIAE*

R. J. Reynolds manufactures and sells cigarettes and other tobacco products. R. J. Reynolds, which now includes the U.S. cigarette and tobacco business of the former Brown & Williamson Tobacco Corporation, is the second-largest tobacco company in the United States. Its brands account for approximately 33% of all U.S. cigarette sales.

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[1] Pursuant to Supreme Court Rule 37.6, R. J. Reynolds states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have been notified more than ten days before filing of R. J. Reynolds' intent to file this *amicus* brief. In addition, all parties have consented to its filing, and their consent letters are on file with the Clerk's Office.

R. J. Reynolds faces a large volume of tobacco-related litigation and is regularly subjected to the same types of claims at issue in this case. In fact, since 1998 R. J. Reynolds or its affiliates have been named as defendants in 15 putative class action suits asserting state-law causes of action that are virtually identical to the claims at issue in this petition. Billions of dollars have been at stake in *each* of these cases. For that reason, R. J. Reynolds has a strong interest in this Court resolving the uncertainty created by the First Circuit's decision regarding the preemption provision contained in the Labeling Act.

SUMMARY OF THE ARGUMENT

As the petition explains, the traditional reasons for granting certiorari are present here: The decision below implicates a clear split among the federal courts of appeals, as well as several lower federal and state courts, concerning an important and recurring question of federal law. *Amicus* wishes to highlight additional reasons why it is important for this Court to grant certiorari in this case.

This case poses a question that is critically important in a second wave of tobacco litigation that is currently threatening the tobacco industry: whether state-law challenges to statements regarding tar and nicotine yields in cigarette packaging and advertising are preempted by federal law. The court below misapplied this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and held that respondents' allegations escaped the preemptive reach of the Labeling Act because the substance of the claims at issue "is that Philip Morris has falsely represented certain of its brands as 'light' or having 'lower tar and nicotine.'"

Pet. App. 16a. Having so characterized respondents' claims, the First Circuit concluded that they were not preempted, because respondents had, according to the First Circuit, pleaded their claims so that they were not "based on smoking and health" but instead on a state law "duty not to deceive." *Id.* at 16a-17a. As the petition explains, the First Circuit's holding creates a direct conflict between the courts of appeals. *See* Pet. 10-14. Indeed, the First Circuit explicitly "disagree[d]" with *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), which held that the Labeling Act preempts substantively identical state-law fraud claims challenging the same statements on cigarette packaging and advertising, Pet. App. 35a; *see also* Pet. 10-14, and thus further exacerbated confusion in the lower courts on this important and recurring issue of federal law, *see* Pet. 18-20.

At a practical level, the First Circuit's holding effectively repeals the Labeling Act's preemption provision as applied to a new wave of "lights fraud" cases that plaintiffs have brought against the tobacco industry in courts throughout the country. In the First Circuit, plaintiffs challenging a tobacco company's advertising practices can now evade the Labeling Act's preemption provision by simply asserting that their fraud claims are based on the "duty not to deceive." Yet, under this Court's interpretation of the Labeling Act in *Cipollone*, such claims should be preempted, no matter how artfully they are pleaded, because they amount to a claim that the cigarette's effect on the plaintiffs' health was different from what the packaging allegedly suggested to the plaintiffs. Imposing liability based

on this theory would necessarily create state-law requirements or prohibitions that transgress Congress' comprehensive federal scheme for the national advertising and promotion of cigarettes.

A lawsuit alleging such a theory is grounded on what a company says about the cigarette on packaging and labeling—and what it says about the cigarette is inextricably intertwined with what the federal government requires or authorizes it to say in advertising and promotion. A requirement that a tobacco company take certain actions so as not to be in violation of state law is precisely the type of requirement barred by the Labeling Act because compliance with it would mean modifying a tobacco company's advertising, promotion, or labeling in some way and would create a patchwork of divergent state-law requirements for tobacco advertising and promotion. *See* 15 U.S.C. §§ 1333, 1334.

The First Circuit's holding has upset the uniformity that Congress legislated with the Labeling Act. With tobacco companies thus deprived of a preemption defense in the First Circuit for statements made in accordance with federal law, *amicus curiae* R. J. Reynolds and other tobacco companies will now be faced with defending claims in that circuit that should not be viable. Plaintiffs' lawyers throughout the country will also now be emboldened to file similarly styled complaints in the First Circuit and elsewhere. Such a result flies in the face of Congress' effort to create uniformity in this area and undermines the comprehensive regulatory regime that Congress has established to supervise tobacco advertising and promotion.

Without guidance from this Court, lower courts in the First Circuit and elsewhere will continue to reach inconsistent results in cases that regularly pose the specter of billions of dollars in damages awards in *each* case. The financial stakes that turn on the question presented by this petition are thus enormous. For this reason and because the decision below frustrates the uniform application of federal law that Congress has sought in this area, this Court should grant the petition to define the scope of the preemption provision under the Labeling Act and *Cipollone*.

ARGUMENT

THIS COURT'S REVIEW IS WARRANTED DUE TO THE CLEAR CIRCUIT SPLIT AND THE FINANCIAL STAKES IMPLICATED BY THE QUESTION PRESENTED

Review of the First Circuit's decision is essential. Without this Court's immediate intervention, the erroneous interpretation of the Labeling Act and *Cipollone* adopted by the First Circuit will undermine Congress' carefully crafted system of uniform regulation of cigarette packaging and advertising.

1. There can be no real debate that the question presented raises an issue of national importance. This Court has observed that preemption issues in tobacco litigation have "manifest importance." *Cipollone*, 505 U.S. at 509. Indeed, certain legal issues affecting the entire tobacco industry have been deemed so important to resolve that this Court has not hesitated to review them even in the absence of a split of authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 130 (2000) (considering

tobacco regulation by FDA even though there was no split of authority on the issue). This is one such issue. Permitting lawsuits such as this one to proceed will seriously undercut the uniform application of federal law by effectively repealing the Labeling Act's preemption provision as applied to these cases.

The First Circuit's decision should not be viewed as an isolated and limited holding. Rather, the First Circuit's decision and the direct and acknowledged split it has now created threaten to activate a flood of litigation in this area and put tobacco companies to the task of defending against state-law claims in courts throughout the country that, under the Labeling Act, Congress intended to be preempted by federal law. Congress included the express preemption provision in the Labeling Act to make clear which state laws can, and which cannot, be applied to tobacco companies in connection with advertising and promotion of cigarettes. *See Lorillard Tobacco v. Reilly*, 533 U.S. 525, 541 (2001). This Court should now "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and resolve the confusion created by the First Circuit's decision.

The Labeling Act expresses Congress' intent to maintain uniformity in the area of tobacco regulation, and maintaining such uniformity is an important reason why the Court should grant the petition. In the Labeling Act, Congress recognized that "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" impeded commerce and the national economy. 15 U.S.C. § 1331; *Reilly*, 533 U.S. at 542-43. To avoid this confusion, Congress

prescribed the specific language that must appear on all cigarette packages and in cigarette advertisements. *See* 15 U.S.C. § 1333. Further, pursuant to the Labeling Act's preemption provision in 15 U.S.C. § 1334, Congress "unequivocally preclude[d] the requirement of any additional statements on cigarette packages beyond those provided in § 1333," and "preclude[d] States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes." *Reilly*, 533 U.S. at 542. Congress has thus taken the affirmative steps required to create a uniform regulatory regime governing the tobacco industry, and, in so doing, has made the Federal Trade Commission its regulatory watchperson. *See* 15 U.S.C. § 1336 ("[N]othing in this chapter (other than the requirements of [§ 1333]) shall be construed to limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes.").

The split created by the First Circuit's decision has upset the uniform application of the Labeling Act, and threatens to make plaintiffs' choice of forum, as opposed to Congress or the FTC, the final arbiter of tobacco regulation. Indeed, if the First Circuit's decision stands, tobacco manufacturers will be severely constrained in running any nationwide advertising and promotion program for lights cigarettes because there is now confusion and nonuniformity in the application of the Labeling Act. Yet, Congress' clear purpose in enacting the Labeling Act was to give companies and consumers clarity by

creating one, nationwide set of guidelines for cigarette advertising and promotion.

This issue should not be resolved through judicial roulette or by allowing the split, and the lack of uniformity that it fosters, to widen. This Court should therefore grant review to resolve the question presented and restore uniformity to lower courts' applications of the Labeling Act.

2. The lack of uniformity that the First Circuit's decision has engendered implicates numerous pending cases that should be preempted under Congress' plain language and this Court's decision in *Cipollone*. Since 1998, for example, there have been a total of 15 "lights fraud" cases filed under state law against *amicus curiae* R. J. Reynolds or its affiliates. These cases, most of which are putative class actions brought on behalf of *millions* of past and present lights smokers, raise claims in connection with light and low-tar cigarettes that are nearly identical to the claims at issue in this petition. Each case seeks, in the aggregate for all plaintiffs in the class, *billions* of dollars in damages. Ten of those cases are still pending at various stages in the lower courts against R. J. Reynolds or its affiliates, with more than 30 cases pending against all tobacco companies nationwide. *See, e.g., Black v. Brown & Williamson Tobacco Corp.*, No. 002-08526 (Mo. Cir. Ct., filed Dec. 11, 2000); *Collora v. R. J. Reynolds Tobacco Co.*, No. 002-00732 (Mo. Cir. Ct., filed Mar. 17, 2000); *Dahl v. R. J. Reynolds Tobacco Co.*, No. 03-005582 (Minn. Dist. Ct., filed Apr. 3, 2003); *Howard v. Brown & Williamson Tobacco Corp.*, No. 00L000136 (Ill. Cir. Ct., filed Feb. 14, 2000); *Mills v. Martin & Bayley Inc.*, No. 04L001270 (Ill. Cir. Ct., filed Nov. 12, 2004);

Rios v. R. J. Reynolds Tobacco Co., No. 02-01391 (Fla. Cir. Ct., filed Feb. 1, 2002); *Rivera v. Brown & Williamson Tobacco Corp.*, No. 05002779 (Fla. Cir. Ct., filed Feb. 18, 2005); *Thompson v. R. J. Reynolds Tobacco Co.*, No. 05-002389 (Minn. Dist. Ct., filed Feb. 15, 2005); *see also* Pet. 24-25 & n.6.

Preemption is one of the dispositive issues in these cases. And because the claims asserted in them are, in substance, identical to the claims asserted against Philip Morris USA in this case, the importance of the question presented for *amicus curiae* and other tobacco companies cannot be overstated. With a preemption defense under the Labeling Act, these cases will be dismissed. Without it, they may proceed to trial and subject the companies named as defendants to the threat of massive judgments. R. J. Reynolds and other tobacco companies thus have a compelling interest in this Court resolving whether the Labeling Act's preemption provision is available in "lights fraud" cases raising state law claims that are, in substance, substantially similar to the claims at issue in this case.

This Court should also resolve this question now, because the confusion created by the First Circuit's decision will only continue to fester without this Court's intervention and will encourage future class actions in the First Circuit and elsewhere. Unless this confusion is resolved, the First Circuit's decision will not only cast a cloud of uncertainty over the existing "lights fraud" cases, but will encourage still more cases by plaintiffs who will flock to the First Circuit to escape a preemption defense that, in the Fifth and other circuits, is dispositive of the types of claims at issue in this case. The *in terrorem* effect of

the First Circuit's rule thus is not limited to this case, but will expand its tentacles to other, already-existing "lights fraud" litigation and, indeed, likely give rise to a whole new series of cases, unless this Court intervenes and settles the issue now. *See Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting the "*in terrorem* effect" of a "potentially enormous aggregate recovery for plaintiffs"); *see also Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (class treatment "can put considerable pressure on the defendant" even when the "plaintiff's probability of success on the merits is slight"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Under the First Circuit's erroneous decision, R. J. Reynolds and other tobacco companies thus now face the prospect of receiving divergent treatment in courts in different parts of the country and the threat of potentially staggering judgments in cases that, under the Labeling Act, should be preempted. This Court should not countenance such a result because the whole purpose of the Labeling Act is to impose a uniform regulatory regime over the advertising and promotion of tobacco products.

To avoid the instability created by the First Circuit's decision and restore the uniform application of federal law that Congress intended in this important area, the Court should thus grant the petition and resolve the question concerning the scope of the preemption provision under the Labeling Act.

3. Finally, this case presents the Court with a particularly suitable vehicle to resolve this vitally important issue. This case arrives to the Court on

the district court's entry of a final judgment for Philip Morris USA, on the basis of the Labeling Act's preemption provision. A case where a court in the First Circuit or elsewhere denies a tobacco manufacturer's preemption defense, however, will of course be in an interlocutory posture. This case thus presents an opportunity for the Court to resolve the critical question of the scope of the preemption defense under the Labeling Act *before* the First Circuit's decision gives rise to any further confusion and subjects the tobacco industry to the very risks of nonuniformity and high-stakes litigation that Congress sought to avoid in the Labeling Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 28, 2007

JOINT APPENDIX

109 (22)

Supreme Court, U.S.
FILED
MAR 31 2008
OFFICE OF THE CLERK

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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FTC News Release (Oct. 26, 1967) (Ex. 98) 480a

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FTC News Release (Nov. 24, 1998) (Ex. 105) 483a

FTC News Release (Aug. 1, 1967) (Ex. 107) 485a

FTC Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act (June 30, 1968) (Ex. 112) 490a

FTC Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act (Dec. 31, 1970) (Ex. 114) 549a

FTC Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act for the Year 1979 (Ex. 116) 578a

FTC Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act for the Year 1980 (Nov. 15, 1982) (Ex. 117) 589a

Methods To Be Employed in Determining Tar and Nicotine Content of Cigarettes (Nov. 30, 1966) (Ex. 144) 605a

Nomination of Miles W. Kirkpatrick To Be Chairman of the FTC, Hearing Before the Senate Comm. on Commerce, 91st Cong. (1970) (Ex. 162) 626a

Letter from John Gardner to Senator Magnuson (Jan. 10, 1967) (Ex. 172) 644a

Nat'l Institutes of Health, Nat'l Cancer Institute, Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine & Carbon Monoxide Yields of U.S. Cigarettes (1996) (Ex. 178) 649a

Philip Morris Inc. et al., Supplementary Observations Following Nov. 30, 1966 Hearing (Dec. 20, 1966) (Ex. 188) 664a

Letter from David H. Remes to Joan Z. Bernstein (Dec. 16, 1998) (Ex. 242) 683a

In re American Tobacco Co. Complaint and Order (Jan. 3, 1995) (Ex. 251).....687a

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Exhibits to Plaintiffs' Opposing Statement of Material Facts and Statement of Additional Material Facts in Response to Philip Morris USA Inc.'s Motion for Summary Judgment (Nov. 29, 2005)

Memorandum from Barbro Goodman to Leo F. Meyer (Sept. 17, 1975) (Ex. 1).....701a

Nat'l Institutes of Health, Nat'l Cancer Institute, Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine (2001) (Ex. 2).....713a

Letter from Horace R. Kornegay to FTC (Dec. 17, 1970) (Ex. 4).....899a

Some Unexpected Observations on Tar and Nicotine and Smoker Behavior (Mar. 1, 1974) (Ex. 5).....907a

Memorandum from R. Fagan to H. Wakeham (Mar. 7, 1974) (Ex. 6).....931a

Memorandum re Low-"Tar" Cigarette Advertising and the FTC Cigarette Testing Program: A Time for Re-examination (June 9, 1982) (Ex. 7).....933a

FTC Nicotine Program, Hearing Before the Subcomm. on Transp., Tourism & Hazardous Materials. of the House Comm. on Energy & Commerce, 100th Cong. (1988) (Ex. 8).....938a

Philip Morris USA, Policies, Practices & Positions (Nov. 14, 2005) (Ex. 9) 1040a

Philip Morris Inc., Petition for Rulemaking (Sept. 18, 2002) (Ex. 10) 1043a

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the United States Court of Appeals for the First Circuit (Aug. 31, 2007) 1a

Opinion of the United States District Court for the District of Maine (May 25, 2006)..... 63a

General Docket
US Court of Appeals for the First Circuit

Court of Appeals Docket #: 06-1965 Filed: 6/23/06
Nsuit: 4360 P.I.: Other
Good, et al v. Altria Group, Inc., et al
Appeal from: U.S. District Court of ME

* * *

6/23/06	CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellant Stephanie Good, Appellant Lori A. Spellman, Appellant Allain L. Thibodeau. Appearance form due 7/7/06. Docketing Statement due 7/7/06. Transcript Report/Order due 7/7/06, , . [06-1965] (mlyn)

* * *

09/16/06	BRIEF filed by Appellant's Stephanie Good, Lori A. Spellman, Allain L. Thibodeau. Length: 58 pgs; 13,922 words, Copies: 9, delivered by mailed. Certificate of service date 9/11/06. [1167217-1] Apellee brief due 10/23/06. [06-1965] (mlyn)

* * *

10/23/06	BRIEF filed by Appellee Altria Group, Inc., Appellee Philip Morris Inc. Length: 50 pgs; 12,995 words, Copies: 9, delivered by hand. Certificate of service date 10/23/06. [1178973] [06-1965] (mlyn)

* * *

11/21/06	REPLY BRIEF filed by Appellants Stephanie Good, Lori A. Spellman, & Allain L. Thibodeau. Length: 28 pages (6,951 words), Copies: 10, delivered by mail. Certificate of service date 11/20/06. [1188179-1] [06-1965] (chry)

* * *

1/9/07	CASE ARGUED 1/9/07. Howard, Selya, Shadur, JJ. Todd S. Heyman for Appellant Allain L. Thibodeau, Appellant Lori A. Spellman, Appellant Stehanie Good. Kenneth J. Parsigian for Appellee Philip Morris Inc. (kris)

* * *

8/31/07	OPINION filed. Judge Jeffrey R. Howard, Senior Judge Bruce M. Selya, Judge Milton I. Shadur, *Of the Northern District of Illinois, sitting by designation. Signed, Judge Jeffrey R. Howard, Authoring Judge. PUBLISHED. [1283464-1] [06-1965]
8/31/07	JUDGMENT entered by Judge Jeffrey R. Howard, Senior Judge Bruce M. Selya, Judge Milton I. Shadur. The judgment of the district court is vacated, and the matter is remanded to the district court for further proceedings consistent with the opinion issued this day. [1283467-1] [06-1965] (lina)
9/21/07	MANDATE ISSUED. [06-1965] (lina)

* * *

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #:
1:05-cv-00127-JAW

GOOD et al v. ALTRIA GROUP INC, et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Cause: 28:1391 Personal Injury

Date Filed: 08/15/2005
Jury Demand: Both
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

* * *

Date Filed	#	Docket Text
08/12/2005	1	COMPLAINT against ALTRIA GROUP INC, PHILIP MORRIS USA INC with Jury Demand, filed by STEPHANIE GOOD, LORI A SPELLMAN, ALLAIN L THIBODEAU. (Service of Process Deadline 12/12/2005) (jgw,) (Entered: 08/15/2005)

* * *

09/21/2005	12	First AMENDED COMPLAINT against all defendants with jury demand, filed by STEPHANIE GOOD, LORI A SPELLMAN and ALLAIN L THIBODEAU. (Service of Process Deadline 1/19/2006) (LANHAM, SAMUEL) (Modified on 9/22/2005 to include all filers (jgw,). (Entered: 09/21/2005)

* * *

10/03/2005	18	ANSWER to Amended Complaint by ALTRIA GROUP INC. (KING, DAVID) (Entered: 10/03/2005)
10/03/2005	19	*Defendant's* ANSWER to Amended Complaint by PHILIP MORRIS USA INC. (DEL BIANCO, H.) (Entered: 10/03/2005)
10/03/2005	20	MOTION for Summary Judgment by PHILIP MORRIS USA INC WITH INCORPORATED MEMO. Response due by 10/24/2005. (DEL BIANCO, H.) (Entered: 10/03/2005)

* * *

11/28/2005	50	RESPONSE to Motion re 20 MOTION for Summary Judgment filed by STEPHANIE GOOD, LORI A SPELLMAN, ALLAIN L THIBODEAU. Reply due by 12/9/05. (Attachments: #1 Attachment A – Atty. General Press Release) (LANHAM, SAMUEL) Modified on 11/29/2005 to remove duplicative docket text

		(jgw,). (Entered: 11/28/2005)

* * *

12/09/2005	54	REPLY to Response to Motion re 20 MOTION for Summary Judgment filed by PHILIP MORRIS USA INC. (CLOUTIER, TERESA) (Entered: 12/09/2005)

* * *

03/28/2006	63	Minute Entry for proceedings held before Judge JOHN A. WOODCOCK JR.: Motion Hearing held re 20 MOTION for Summary Judgment filed by PHILIP MORRIS USA INC. (Court Reporter Julie Edgecomb) (mlm) (Entered: 03/28/2006)

* * *

05/25/2006	66	ORDER granting 20 Defendant Philip Morris USA, Inc.'s Motion for Summary Judgment. By Judge JOHN A. WOODCOCK JR. (MFS) Additional attachment(s) added on 5/26/2006 (jgw,). (Entered: 05/25/2006)

* * *

05/26/2006	68	JUDGMENT in favor of defendants against plaintiffs By Walentine, DEPUTY CLERK. (jgw,) (Entered: 05/26/2006)
05/26/2006	69	AMENDED JUDGMENT in favor of defendants against plaintiffs by

		Walentine, DEPUTY CLERK. (jgw,) (Entered: 05/26/2006)

* * *

01/22/2008	88	Letter MOTION to Stay *pending review by U.S. Supreme Court (see PDF document 87)* by PHILLIP MORRIS USA INC (jgw) (Entered: 01/23/2008)
01/24/2008	89	ORDER granting without objection 88 Motion to Continue Stay. Once the U.S. Supreme Court has issued an opinion, counsel shall contact the Court to schedule a telephone conference. By JUDGE JOHN A WOODCOCK, JR. (MFS) (Entered: 01/24/2008)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEPHANIE GOOD, LORI A. SPELLMAN, and ALLAIN L. THIBODEAU, individually and on behalf of all others similarly situated, Plaintiffs,	)	
v.	)	Case No. _____
ALTRIA GROUP, INC., and PHILIP MORRIS, USA, INC., Defendants.	)	

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

Plaintiffs, Stephanie Good, Lori A. Spellman, and Allain L. Thibodeau, by their attorneys, and for their Class Action Complaint and Jury Demand, state as follows:

INTRODUCTION

1. Plaintiffs, Stephanie Good, Lori A. Spellman, and Allain L. Thibodeau, individually and on behalf of the class of all consumers in Maine similarly situated, (collectively "Plaintiffs"), bring this action pursuant to 5 M.R.S.A. § 213, which provides a private right of action under Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.*, against Defendants Altria Group, Inc. and Philip Morris USA, Inc. (collectively "Defendants"). Plaintiffs also state a claim against Defendants for Unjust Enrichment.

2. This case arises out of the unfair and deceptive practices employed by Defendants from at least 1971 forward to induce cigarette smokers to continue smoking in spite of the growing public awareness of a connection between cigarette smoking and serious health problems including cancer, by designing, manufacturing, promoting, marketing and selling Marlboro Lights and Cambridge Lights cigarettes purporting to be "light" and having "Lowered Tar and Nicotine," all while Defendants knew those cigarettes would not deliver less tar or nicotine to the consumer.

3. Plaintiffs and the proposed Class, purchasers of Marlboro Lights and Cambridge Lights cigarettes in the State of Maine, suffered a loss of money because the cigarettes they purchased were misrepresented by Defendants to be "light" and lower in tar and nicotine, when in reality the cigarettes were not lower in tar or nicotine than regular cigarettes.

4. Plaintiffs and the proposed Class expressly disclaim any claim for damages for personal injuries.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) in that this is a class action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, and in which any member of a class is a citizen of a State different from any defendant.

6. Venue in the District of Maine at Bangor is appropriate pursuant to 28 U.S.C. § 1391(a) and Rule 3(b) of the Rules of the United States District Court for the District of Maine. Defendants transact business in Maine, and at all relevant times designed

and manufactured cigarettes, including Marlboro Lights and Cambridge Lights, which they promoted, marketed, distributed and/or sold in Maine. Defendants have significant contacts with Maine and the activities complained of herein occurred, in whole or in part, in Maine. Plaintiffs reside in Penobscot County, Maine.

PARTIES

7. Plaintiff Stephanie Good is a resident of Bangor, Maine and has purchased and consumed (on average) approximately one pack of Marlboro Lights cigarettes every two to three days for approximately sixteen years.

8. Plaintiff Lori A. Spellman is a resident of Levant, Maine and has purchased and consumed (on average) approximately one to one and a half packs of Marlboro Lights cigarettes per day for approximately fifteen years.

9. Plaintiff Allain L. Thibodeau is a resident of Bangor, Maine and has purchased and consumed (on average) approximately ten packs of Marlboro Lights cigarettes every week for approximately fifteen years.

10. Defendant Altria, Group, Inc. ("Altria") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, New York. At all times relevant hereto, Altria, through its wholly owned subsidiary Philip Morris USA, Inc., engaged in the business of designing, manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights brand cigarettes.

11. Defendant Philip Morris USA, Inc. ("Philip Morris") is a Virginia corporation with its principal

place of business at 6601 West Broad Street, Richmond, Virginia. Philip Morris is a wholly owned subsidiary of Altria. At all times relevant hereto, Philip Morris engaged in the business of designing, manufacturing, promoting, distributing, and selling Marlboro Lights and Cambridge Lights brand cigarettes.

FACTS

12. Defendants, and/or their predecessors in name, have been in the business of designing, manufacturing, promoting, marketing, distributing, and selling tobacco products, including cigarettes, in the United States for over one hundred (100) years.

13. Prior to 1971, Defendants were aware that beginning in the 1950s, smokers had become increasingly concerned about health issues related to smoking.

14. Beginning in 1971, Defendants designed and manufactured a brand of cigarettes known as Marlboro Lights which they promoted, marketed, distributed, and sold throughout the United States, including Maine. Each pack of Marlboro Lights bore, in addition to the descriptor "Lights" in the brand name, the phrase "Lowered Tar and Nicotine" on the packaging.

15. Defendants intentionally marketed Marlboro Lights cigarettes in this manner with the intention of communicating to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes.

16. Beginning in 1986, Defendants designed and manufactured a brand of cigarettes known as Cambridge Lights which they promoted, marketed, distributed, and sold throughout the United States,

including Maine. Each pack of Cambridge Lights bore the descriptor "Lights" in the brand name.

17. Defendants intentionally marketed Cambridge Lights cigarettes in this manner with the intention of communicating to consumers that Cambridge Lights were less harmful or safer than regular Cambridge cigarettes.

18. Defendants introduced Marlboro Lights and Cambridge Lights into the market with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking and thereby allow them to continue to smoke cigarettes.

19. At all relevant times, Defendants sold and packaged Marlboro Lights and Cambridge Lights as "light" and as having decreased tar and nicotine.

20. Nicotine is the addictive ingredient in tobacco. Tar is the toxic ingredient in tobacco that causes most health problems related to smoking.

21. Evidence shows that consumers buying Marlboro Lights or Cambridge Lights cigarettes understood that tar and nicotine were the "bad" components in cigarettes and, therefore, lower levels of these components would reduce the negative health affects of the cigarette product.

22. The primary design distinction between Marlboro Lights and Cambridge Lights as compared to their regular counterparts is increased ventilation. Defendants increased the ventilation in Marlboro Lights and Cambridge Lights cigarettes by strategically placing rings of vent holes in the filter of each cigarette, such that air is mixed with and dilutes the smoke drawn through the filter.

23. This design distinction of ventilation provides for a lower measurement of tar and nicotine for "lights" as compared to regular cigarettes when undergoing standardized testing by the Federal Trade Commission ("FTC") testing apparatus — automated smoking machines used by the tobacco industry to measure tar and nicotine levels in cigarettes.

24. Defendants controlled the tar and nicotine delivery of Marlboro Lights and Cambridge Lights cigarettes under machine testing conditions to achieve apparent support for their representations that their Marlboro Lights and Cambridge Lights cigarettes are "light" and contain decreased tar and nicotine.

25. At all relevant times, Defendants knew that although the increased ventilation of the "light" cigarettes would result in lower machine test values of tar and nicotine, the consumer would receive the same delivery of tar and nicotine from the "lights" as from regular cigarettes.

26. Scientific research has shown that smokers of "light" cigarettes such as Marlboro Lights and Cambridge Lights cigarettes engage in compensatory smoking behavior due to the addictive nature of nicotine, so as to receive 100% of the tar and nicotine that would be received by the smoker from the regular cigarette. This is known as 100% compensation.

27. Compensatory smoking behavior consists of unconscious acts including, but not limited to: inhaling deeper; taking more frequent puffs and/or larger puffs; holding the smoke in the lungs for a longer period of time; covering the ventilation holes in the filter with the lips or fingers; and/or smoking

more cigarettes, thereby enabling the smoker to unconsciously regulate the amount of nicotine and tar received.

28. Defendants had conducted extensive research prior to launching Marlboro Lights and Cambridge Lights into the market, and knew smokers would unconsciously adjust their behavior to ensure they receive the same level of tar and nicotine from the "light" cigarettes as they would receive from their regular counterparts.

29. Defendants knew that Marlboro Lights and Cambridge Lights did not reduce the delivery of tar or nicotine to the consumer, and that these cigarettes were not designed to reduce actual delivery to smokers.

30. Defendants' representations that Marlboro Lights and Cambridge Lights cigarettes are "light" or have "lower tar and nicotine" than regular cigarettes are deceptive and misleading.

31. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Marlboro Lights and Cambridge Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than the smoke of regular cigarettes due to the increased ventilation.

32. Defendants knew, as a result of tests conducted by Philip Morris more than twenty-five years ago, that increased ventilation – the primary design distinction between "light" cigarettes and their regular counterparts – increases the specific mutagenicity of cigarette smoke.

33. Defendants also knew, from tests they conducted, that a smoker of Marlboro Lights or

Cambridge Lights cigarettes will receive higher levels of most of the toxic substances found in cigarette smoke from the "light" cigarettes than from their regular cigarette counterparts.

34. Defendants engaged in a course of unfair and/or deceptive business practices in connection with the design, manufacture, distribution, promotion, marketing and sale of Marlboro Lights and Cambridge Lights cigarettes by:

a. Falsey and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;

c. Intentionally manipulating the design and content of Marlboro Lights and Cambridge Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of greater amounts of tar and nicotine when

smoked under actual conditions than Defendants represent by use of the "light" description; and

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Marlboro Lights and Cambridge Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.

FRAUDULENT CONCEALMENT

35. Throughout the Class Period, Defendants effectively, affirmatively, and fraudulently concealed from consumers of their products, including Plaintiffs, their knowing misrepresentations about the nature and effect of their "light" cigarettes.

36. Defendants' wrongful conduct was carried out in part through means and methods that were designed and intended to avoid detection, and which, in fact, successfully precluded detection.

37. It was not until November, 2002, that Defendants publicly admitted that there is no such thing as a safe cigarette, including its "light" cigarettes, and launched an advertisement campaign to educate the public about the risks of smoking through information placed on their website, newspaper inserts, and "onserts" placed in their cigarette packages.

38. Plaintiffs Good, Spellman, and Thibodeau, and members of the Class could not have discovered Defendants' misrepresentations before November, 2002, and were without knowledge of the conduct by

Defendants alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendants were so acting, or which would have led to the discovery of such action, until at least November, 2002.

39. Plaintiffs could not have discovered their cause of action against Defendants earlier than November, 2002, because Defendants' fraudulent concealment of their deceptive conduct was effective.

40. By virtue of the fraudulent, concealment of their wrongful conduct by Defendants, the running of any statute of limitations has been tolled and suspended pursuant to 14 M.R.S.A § 859, with respect to any claims and rights of action that. Plaintiffs and the other Class Members have as a result of the deceptive trade practices alleged in this Complaint.

CLASS ACTION ALLEGATIONS

41. Plaintiffs bring this action against Defendants, pursuant to Federal Rule of Civil Procedure 23, individually and on behalf of the following Class.

42. The Class is defined as:

> All persons who purchased Defendants' Marlboro Lights and/or Cambridge Lights cigarettes in Maine for personal consumption from the first date the Defendants placed their Marlboro Lights and Cambridge Lights cigarettes into the stream of commerce through at least November, 2002.

> Excluded from the Class are Defendants, their subsidiaries and affiliates. Also excluded is any judge who may preside over this case.

43. Plaintiffs reserve the right to expand, modify or alter the class definition, including the time period, in response to information learned during discovery. Plaintiffs do not presently possess information identifying the exact size of the Class. Based upon the nature of the trade and commerce involved, Plaintiffs believe the total number of class members is sufficiently numerous such that joinder of all Class Members would be impracticable. Fed. R. Civ. P. 23(a)(1).

45. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Fed. R. Civ. P. 23(a)(2) and 23(b)(3). Common questions include, but are not limited to, the following:

a. Whether Defendants misrepresented the actual tar and nicotine delivered to consumers of "light" cigarettes they manufactured, marketed, and/or distributed;

b. Whether Defendants intentionally designed "light" cigarettes to register misleading tar and nicotine measurements on the testing apparatus utilized by the tobacco industry while delivering significantly higher quantities of tar and nicotine to human smokers;

c. Whether the Defendants violated Maine's Unfair Trade Practices Act through their

course of unfair and/or deceptive conduct as alleged herein;

d. Whether the Defendants were unjustly enriched at the expense of the Class members; and

e. Whether the Class has been damaged and, if so, the extent of such damages.

46. Plaintiffs in this proposed class action assert claims typical of those of the individual members of the proposed Class. The interests of Plaintiffs are consistent with, and not antagonistic to, those of other members of the Class, and Defendants have no defenses unique to Plaintiffs. Fed. R. Civ. P. 23(a)(3).

47. Plaintiffs are members of the Class and will fairly and adequately assert and protect the interests of the Class. Plaintiffs have retained attorneys who are experienced in class action litigation. Fed. R. Civ. P. 23(a)(4).

48. The prosecution of separate actions by individual members of the Class would create risk of:

a. Inconsistent or varying adjudications with respect to individual members of the Class; and

b. Adjudication with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication, or substantially impair or impede their ability to protect their interest.

49. The claims of Plaintiffs, and the anticipated defenses raised by Defendants, are

typical of the claims or defenses of the Class, and the class action method is appropriate for the fair and adequate prosecution of this action.

50. Individual litigation of all claims which might be assessed by all Class Members would produce a multiplicity of cases that the judicial system having jurisdiction of the claims would remain congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising out of the conduct of Defendants.

51. The certification of a Class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support separate actions.

COUNT I
VIOLATION OF MAINE'S UNFAIR TRADE PRACTICES ACT

52. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 51 as if set forth more fully herein.

53. Plaintiffs bring this action pursuant to the Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 205-A, *et seq*. This act, among other things, prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce.

54. Beginning the first date that Defendants placed their Marlboro Lights and Cambridge Lights cigarettes into the stream of commerce and continuing through the present, Defendants, individually and/or jointly, by and through their employees, agents and/or brokers, engaged in misrepresentations, unlawful schemes and courses of conduct intended to induce the Plaintiffs and

members of the Class to purchase Defendants' Marlboro Lights and Cambridge Lights cigarettes through one or more of the following deceptive acts and practices:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers "lowered tar and nicotine" in comparison to regular cigarettes;

b. Designing cigarettes to register lowered tar and nicotine levels under machine testing conditions while actually delivering higher levels of these compounds when smoked by consumers, thereby rendering the "light" product descriptor deceptive and misleading;

c. Placing ventilation holes on the filter of light cigarettes that are covered or blocked by the smoker's lips or fingers under normal use, thereby negating the represented effects of the light brand;

d. Manipulating the nicotine levels in their light cigarettes;

e. Employing techniques that purportedly reduce machine-measured levels of tar in their Marlboro Lights and Cambridge Lights cigarettes, including increased air dilution through the use of ventilation holes in or near the filter, but which actually increase the mutagenicity (genetic and chromosomal damage) of tar delivered to the consumer and thereby increase the level of harmful toxins per milligram of nicotine delivered to the consumer; and

f. Manipulating the design of their Marlboro Lights and Cambridge Lights cigarettes, including but not limited to, modifying the tobacco blend, weight, rod length and circumference; using reconstituted tobacco sheets and/or expanded tobacco; increasing smoke pH levels by chemical processing and additives, such as ammonia, in such a way that resulted in delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" product descriptor.

55. The facts which Defendants misrepresented as alleged in the preceding paragraph were material in that they concerned facts that would have been important to a reasonable consumer in making a decision whether to purchase Marlboro Lights and/or Cambridge Lights cigarettes.

56. Defendants' unfair and deceptive acts and practices directly and proximately caused damage to Plaintiffs and members of the Class in that Plaintiffs and members of the Class did not receive "light" or "Lower Tar and Nicotine" cigarettes when they purchased Marlboro Lights and/or Cambridge Lights cigarettes.

57. The conduct described above constitutes unfair and deceptive practices in the conduct of trade or commerce in violation of 5 M.R.S.A. § 207.

58. Defendants' deceptive acts and practices, as alleged herein, were committed with either express or implied malice.

59. Plaintiffs, in compliance with 5 M.R.S.A. § 213(1-A), sent letters of demand to Defendants at least thirty days prior to the filing of this Complaint.

COUNT II
UNJUST ENRICHMENT

60. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 59 as if set forth more fully herein.

61. As stated with more particularity above, Defendants embarked on and carried out a common scheme of marketing and selling "light" cigarettes by falsely and deceptively representing that the cigarettes were "Lights" or contained "Lowered Tar and Nicotine."

62. Defendants' practices resulted in Plaintiffs and members of the Class purchasing light cigarettes in order to receive a low tar, low nicotine alternative to regular cigarettes, but not getting perceived benefits of less tar and nicotine than in regular cigarettes.

63. Defendants' practices further resulted in Plaintiffs and members of the Class purchasing "light" cigarettes without understanding the true nature of Defendants' product or that Defendants manipulated their Marlboro Lights and Cambridge Lights cigarettes to increase their own ill-gotten profits.

64. The monies paid by Plaintiffs and members of the Class to Defendants in the purchase of Marlboro Lights and Cambridge Lights cigarettes conferred substantial benefits upon Defendants. Defendants knew of and appreciated the benefits conferred upon them by Plaintiffs and the Class and accepted and retained these benefits, which, in

justice and fairness, should be refunded and paid over to Plaintiffs and members of the Class, in an amount to be proved at trial but not less than $5,000,000, not including interest or costs.

PRAYER

WHEREFORE, Plaintiffs pray for judgment against Defendants, jointly and severally, and respectfully requests the Court:

1. Certify this action to proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, appoint them as Class Representatives, and their counsel as Class Counsel, and direct that reasonable notice be given to members of the Class;

2. Adjudge and decree that Defendants engaged in unfair and deceptive practices in the conduct of trade or commerce in violation of 10 M.R.S.A. § 207, and award Plaintiffs and the Class: (a) actual damages in an amount to be proved at trial as a result of the wrongful conduct alleged, plus interest and costs; (b) punitive damages; (c) reasonable attorneys' fees and costs of this action; and (d) all other damages available under the laws of Maine, including pre judgment and post judgment interest; and

3. Adjudge and decree that Defendants have been unjustly enriched and enter judgment on behalf of Plaintiffs and the Class in an amount to be proved at trial, plus interest and costs and all other damages available under the laws of

Maine including pre-judgment and post-judgment interest.

JURY DEMAND

Plaintiffs demand trial by jury on all claims for which they are entitled to a jury trial.

Dated: August 12, 2005

/s/ Samuel W. Lanham, Jr.
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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEPHANIE GOOD, LORI A. SPELLMAN, and ALLAIN L. THIBODEAU, individually and on behalf of all others similarly situated, Plaintiffs,	)	
v.	)	Case No. 05-127-B-W
ALTRIA GROUP, INC., and PHILIP MORRIS, USA, INC., Defendants.	)	

FIRST AMENDED COMPLAINT
JURY TRIAL DEMANDED

Plaintiffs, Stephanie Good, Lori A. Spellman, and Allain L. Thibodeau, by their attorneys, and for their Class Action Complaint and Jury Demand, state as follows:

INTRODUCTION

1. Plaintiffs, Stephanie Good, Lori A. Spellman, and Allain L. Thibodeau, individually and on behalf of the class of all consumers in Maine similarly situated, (collectively "Plaintiffs"), bring this action pursuant to 5 M.R.S.A. § 213, which provides a private right of action under Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.*, against Defendants Altria Group, Inc. and Philip Morris USA, Inc. (collectively "Defendants"). Plaintiffs also state a claim against Defendants for Unjust Enrichment.

2. This case arises out of the unfair and deceptive practices employed by Defendants from at least 1971 forward to induce cigarette smokers to continue smoking in spite of the growing public awareness of a connection between cigarette smoking and serious health problems including cancer, by designing, manufacturing, promoting, marketing and selling Marlboro Lights and Cambridge Lights cigarettes purporting to be "light" and having "Lowered Tar and Nicotine," all while Defendants knew those cigarettes would not deliver less tar or nicotine to the consumer.

3. Plaintiffs and the proposed Class, purchasers of Marlboro Lights and Cambridge Lights cigarettes in the State of Maine, suffered a loss of money because the cigarettes they purchased were misrepresented by Defendants to be "light" and lower in tar and nicotine, when in reality the cigarettes were not lower in tar or nicotine than regular cigarettes.

4. Plaintiffs and the proposed Class expressly disclaim any claim for damages for personal injuries.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) in that this is a class action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, and in which any member of a class is a citizen of a State different from any defendant.

6. Venue in the District of Maine at Bangor is appropriate pursuant to 28 U.S.C. § 1391(a) and Rule 3(b) of the Rules of the United States District Court for the District of Maine. Defendants transact business in Maine, and at all relevant times designed

and manufactured cigarettes, including Marlboro Lights and Cambridge Lights, which they promoted, marketed, distributed and/or sold in Maine. Defendants have significant contacts with Maine and the activities complained of herein occurred, in whole or in part, in Maine. Plaintiffs reside in Penobscot County, Maine.

PARTIES

7. Plaintiff Stephanie Good is a resident of Bangor, Maine and has purchased and consumed (on average) approximately one pack of Marlboro Lights cigarettes every two to three days for approximately sixteen years.

8. Plaintiff Lori A. Spellman is a resident of Levant, Maine and has purchased and consumed (on average) approximately one to one and a half packs of Marlboro Lights cigarettes per day for approximately fifteen years.

9. Plaintiff Allain L. Thibodeau is a resident of Bangor, Maine and has purchased and consumed (on average) approximately ten packs of Marlboro Lights cigarettes every week for approximately fifteen years.

10. Defendant Altria, Group, Inc. ("Altria") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, New York. At all times relevant hereto, Altria, through its wholly owned subsidiary Philip Morris USA, Inc., engaged in the business of designing, manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights brand cigarettes.

11. Defendant Philip Morris USA, Inc. ("Philip Morris") is a Virginia corporation with its principal

place of business at 6601 West Broad Street, Richmond, Virginia. Philip Morris is a wholly owned subsidiary of Altria. At all times relevant hereto, Philip Morris engaged in the business of designing, manufacturing, promoting, distributing, and selling Marlboro Lights and Cambridge Lights brand cigarettes.

FACTS

12. Defendants, and/or their predecessors in name, have been in the business of designing, manufacturing, promoting, marketing, distributing, and selling tobacco products, including cigarettes, in the United States for over one hundred (100) years.

13. Prior to 1971, Defendants were aware that beginning in the 1950s, smokers had become increasingly concerned about health-issues related to smoking.

14. Beginning in 1971, Defendants designed and manufactured a brand of cigarettes known as Marlboro Lights which they promoted, marketed, distributed, and sold throughout the United States, including Maine. Each pack of Marlboro Lights bore, in addition to the descriptor "Lights" in the brand name, the phrase "Lowered Tar and Nicotine" on the packaging.

15. Defendants intentionally marketed Marlboro Lights cigarettes in this manner with the intention of communicating to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes.

16. Beginning in 1986, Defendants designed and manufactured a brand of cigarettes known as Cambridge Lights which they promoted, marketed, distributed, and sold throughout the United States,

including Maine. Each pack of Cambridge Lights bore the descriptor "Lights" in the brand name.

17. Defendants intentionally marketed Cambridge Lights cigarettes in this manner with the intention of communicating to consumers that Cambridge Lights were less harmful or safer than regular Cambridge cigarettes.

18. Defendants introduced Marlboro Lights and Cambridge Lights into the market with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking and thereby allow them to continue to smoke cigarettes.

19. At all relevant times, Defendants sold and packaged Marlboro Lights and Cambridge Lights as "light" and as having decreased tar and nicotine.

20. Nicotine is the addictive ingredient in tobacco. Tar is the toxic ingredient in tobacco that causes most health problems related to smoking.

21. Evidence shows that consumers buying Marlboro Lights or Cambridge Lights cigarettes understood that tar and nicotine were the "bad" components in cigarettes and, therefore, lower levels of these components would reduce the negative health affects of the cigarette product.

22. The primary design distinction between Marlboro Lights and Cambridge Lights as compared to their regular counterparts is increased ventilation. Defendants increased the ventilation in Marlboro Lights and Cambridge Lights cigarettes by strategically placing rings of vent holes in the filter of each cigarette, such that air is mixed with and dilutes the smoke drawn through the filter.

23. This design distinction of ventilation provides for a lower measurement of tar and nicotine for "lights" as compared to regular cigarettes when undergoing standardized testing by the Federal Trade Commission ("FTC") testing apparatus — automated smoking machines used by the tobacco industry to measure tar and nicotine levels in cigarettes.

24. Defendants controlled the tar and nicotine delivery of Marlboro Lights and Cambridge Lights cigarettes under machine testing conditions to achieve apparent support for their representations that their Marlboro Lights and Cambridge Lights cigarettes are "light" and contain decreased tar and nicotine.

25. At all relevant times, Defendants knew that although the increased ventilation of the "light" cigarettes would result in lower machine test values of tar and nicotine, the consumer would receive the same delivery of tar and nicotine from the "lights" as from regular cigarettes.

26. Scientific research has shown that smokers of "light" cigarettes such as Marlboro Lights and Cambridge Lights cigarettes engage in compensatory smoking behavior due to the addictive nature of nicotine, so as to receive 100% of the tar and nicotine that would be received by the smoker from the regular cigarette. This is known as 100% compensation.

27. Compensatory smoking behavior consists of unconscious acts including, but not limited to: inhaling deeper; taking more frequent puffs and/or larger puffs; holding the smoke in the lungs for a longer period of time; covering the ventilation holes in the filter with the lips or fingers; and/or smoking

more cigarettes, thereby enabling the smoker to unconsciously regulate the amount of nicotine and tar received.

28. Defendants had conducted extensive research prior to launching Marlboro Lights and Cambridge Lights into the market, and knew smokers would unconsciously adjust their behavior to ensure they receive the same level of tar and nicotine from the "light" cigarettes as they would receive from their regular counterparts.

29. Defendants knew that Marlboro Lights and Cambridge Lights did not reduce the delivery of tar or nicotine to the consumer, and that these cigarettes were not designed to reduce actual delivery to smokers.

30. Defendants' representations that Marlboro Lights and Cambridge Lights cigarettes are "light" or have "lower tar and nicotine" than regular cigarettes are deceptive and misleading.

31. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but, the smoke produced by Marlboro Lights and Cambridge Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than the smoke of regular cigarettes due to the increased ventilation.

32. Defendants knew, as a result of tests conducted by Philip Morris more than twenty-five years ago, that increased ventilation — the primary design distinction between "light" cigarettes and their regular counterparts — increases the specific mutagenicity of cigarette smoke.

33. Defendants also knew, from tests they conducted, that a smoker of Marlboro Lights or

Cambridge Lights cigarettes will receive higher levels of most of the toxic substances found in cigarette smoke from the "light" cigarettes than from their regular cigarette counterparts.

34. Defendants engaged in a course of unfair and/or deceptive business practices in connection with the design, manufacture, distribution, promotion, marketing and sale of Marlboro Lights and Cambridge Lights cigarettes by:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;

c. Intentionally manipulating the design and content of Marlboro Lights and Cambridge Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of greater amounts of tar and nicotine when

smoked under actual conditions than Defendants represent by use of the "light" description; and

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Marlboro Lights and Cambridge Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.

FRAUDULENT CONCEALMENT

35. Throughout the Class Period, Defendants effectively, affirmatively, and fraudulently concealed from consumers of their products, including Plaintiffs, their knowing misrepresentations about the nature and effect of their "light" cigarettes.

36. Defendants' wrongful conduct was carried out in part through means and methods that were designed and intended to avoid detection, and which, in fact, successfully precluded detection.

37. It was not until November, 2002, that Defendants publicly admitted that there is no such thing as a safe cigarette, including its "light" cigarettes, and launched an advertisement campaign to educate the public about the risks of smoking through information placed on their website, newspaper inserts, and "onserts" placed in their cigarette packages.

38. Plaintiffs Good, Spellman, and Thibodeau, and members of the Class could not have discovered Defendants' misrepresentations before November, 2002, and were without knowledge of the conduct by

Defendants alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendants were so acting, or which would have led to the discovery of such action, until at least November, 2002.

39. Plaintiffs could not have discovered their cause of action against Defendants earlier than November, 2002, because Defendants' fraudulent concealment of their deceptive conduct was effective.

40. By virtue of the fraudulent concealment of their wrongful conduct by Defendants, the running of any statute of limitations has been tolled and suspended pursuant to 14 M.R.S.A § 859, with respect to any claims and rights of action that Plaintiffs and the other Class Members have as a result of the deceptive trade practices alleged in this Complaint.

CLASS ACTION ALLEGATIONS

41. Plaintiffs bring this action against Defendants, pursuant to Federal Rule of Civil Procedure 23, individually and on behalf of the following Class.

42. The Class is defined as:

> All persons who purchased Defendants' Marlboro Lights and/or Cambridge Lights cigarettes in Maine for personal consumption from the first date the Defendants placed their Marlboro Lights and Cambridge Lights cigarettes into the stream of commerce through at least November, 2002.

> Excluded from the Class are Defendants, their subsidiaries and affiliates. Also excluded is any judge who may preside over this case.

43. Plaintiffs reserve the right to expand, modify or alter the class definition, including the time period, in response to information learned during discovery. Plaintiffs do not presently possess information identifying the exact size of the Class. Based upon the nature of the trade and commerce involved, Plaintiffs believe the total number of class members is sufficiently numerous such that joinder of all Class Members would be impracticable. Fed. R. Civ. P. 23(a)(1).

45. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Fed. R. Civ. P. 23(a)(2) and 23(b)(3). Common questions include, but are not limited to, the following:

a. Whether Defendants misrepresented the actual tar and nicotine delivered to consumers of "light" cigarettes they manufactured, marketed, and/or distributed;

b. Whether Defendants intentionally designed "light" cigarettes to register misleading tar and nicotine measurements on the testing apparatus utilized by the tobacco industry while delivering significantly higher quantities of tar and nicotine to human smokers;

c. Whether the Defendants violated Maine's Unfair Trade Practices Act through their

course of unfair and/or deceptive conduct as alleged herein;

d. Whether the Defendants were unjustly enriched at the expense of the Class members; and

e. Whether the Class has been damaged and, if so, the extent of such damages.

46. Plaintiffs in this proposed class action assert claims typical of those of the individual members of the proposed Class. The interests of Plaintiffs are consistent with, and not antagonistic to, those of other members of the Class, and Defendants have no defenses unique to Plaintiffs. Fed. R. Civ. P. 23(a)(3).

47. Plaintiffs are members of the Class and will fairly and adequately assert and protect the interests of the Class. Plaintiffs have retained attorneys who are experienced in class action litigation. Fed. R. Civ. P. 23(a)(4).

48. The prosecution of separate actions by individual members of the Class would create risk of:

a. Inconsistent or varying adjudications with respect to individual members of the Class; and

b. Adjudication with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication, or substantially impair or impede their ability to protect their interest.

49. The claims of Plaintiffs, and the anticipated defenses raised by Defendants, are

typical of the claims or defenses of the Class, and the class action method is appropriate for the fair and adequate prosecution of this action.

50. Individual litigation of all claims which might be assessed by all Class Members would produce a multiplicity of cases that the judicial system having jurisdiction of the claims would remain congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising out of the conduct of Defendants.

51. The certification of a Class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support separate actions.

COUNT I
VIOLATION OF MAINE'S UNFAIR TRADE PRACTICES ACT

52. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 51 as if set forth more fully herein.

53. Plaintiffs bring this action pursuant to the Maine's Unfair Trade Practices Act, 5 M.R.S.A. § 205-A, *et seq*. This act, among other things, prohibits unfair or deceptive, acts or practices in the conduct of any trade or commerce.

54. Beginning the first date that Defendants placed their Marlboro Lights and Cambridge Lights cigarettes into the stream of commerce and continuing through the present, Defendants, individually and/or jointly, by and through their employees, agents and/or brokers, engaged in misrepresentations, unlawful schemes and courses of conduct intended to induce the Plaintiffs and

members of the Class to purchase Defendants' Marlboro Lights and Cambridge Lights cigarettes through one or more of the following deceptive acts and practices:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers "lowered tar and nicotine" in comparison to regular cigarettes;

b. Designing cigarettes to register lowered tar and nicotine levels under machine testing conditions while actually delivering higher levels of these compounds when smoked by consumers, thereby rendering the "light" product descriptor deceptive and misleading;

c. Placing ventilation holes on the filter of light cigarettes that are covered or blocked by the smoker's lips or fingers under normal use, thereby negating the represented effects of the light brand;

d. Manipulating the nicotine levels in their light cigarettes;

e. Employing techniques that purportedly reduce machine-measured levels of tar in their Marlboro Lights and Cambridge Lights cigarettes, including increased air dilution through the use of ventilation holes in or near the filter, but which actually increase the mutagenicity (genetic and chromosomal damage) of tar delivered to the consumer and thereby increase the level of harmful toxins per milligram of nicotine delivered to the consumer; and

f. Manipulating the design of their Marlboro Lights and Cambridge Lights cigarettes, including but not limited to, modifying the tobacco blend, weight, rod length and circumference; using reconstituted tobacco sheets and/or expanded tobacco; increasing smoke pH levels by chemical processing and additives, such as ammonia, in such a way that resulted in delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" product descriptor.

55. The facts which Defendants misrepresented as alleged in the preceding paragraph were material in that they concerned facts that would have been important to a reasonable consumer in making a decision whether to purchase Marlboro Lights and/or Cambridge Lights cigarettes.

56. Defendants' unfair and deceptive acts and practices directly and proximately caused damage to Plaintiffs and members of the Class in that Plaintiffs and members of the Class did not receive "light" or "Lower Tar and Nicotine" cigarettes when they purchased Marlboro Lights and/or Cambridge Lights cigarettes.

57. The conduct described above constitutes unfair and deceptive practices in the conduct of trade or commerce in violation of 5 M.R.S.A. § 207.

58. Defendants' deceptive acts and practices, as alleged herein, were committed with either express or implied malice.

59. Plaintiffs, in compliance with 5 M.R.S.A. § 213(1-A), sent letters of demand to Defendants at least thirty days prior to the filing of this Complaint.

COUNT II
UNJUST ENRICHMENT

60. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 59 as if set forth more fully herein.

61. As stated with more particularity above, Defendants embarked on and carried out a common scheme of marketing and selling "light" cigarettes by falsely and deceptively representing that the cigarettes were "Lights" or contained "Lowered Tar and Nicotine."

62. Defendants' practices resulted in Plaintiffs and members of the Class purchasing light cigarettes in order to receive a low tar, low nicotine alternative to regular-cigarettes, but not getting perceived benefits of less tar and nicotine than in regular cigarettes.

63. Defendants' practices further resulted in Plaintiffs and members of the Class purchasing "light" cigarettes without understanding the true nature of Defendants' product or that Defendants manipulated their Marlboro Lights and Cambridge Lights cigarettes to increase their own ill-gotten profits.

64. The monies paid by Plaintiffs and members of the Class to Defendants in the purchase of Marlboro Lights and Cambridge Lights cigarettes conferred substantial benefits upon Defendants. Defendants knew of and appreciated the benefits conferred upon them by Plaintiffs and the Class and accepted and retained these benefits, which, in

justice and fairness, should be refunded and paid over to Plaintiffs and members of the Class, in an amount to be proved at trial but not less than $5,000,000, not including interest or costs.

PRAYER

WHEREFORE, Plaintiffs pray for judgment against Defendants, jointly and severally, and respectfully request the Court:

1. Certify this action to proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, appoint them as Class Representatives, and their counsel as Class Counsel, and direct that reasonable notice be given to members of the Class;

2. Adjudge and decree that Defendants engaged in unfair and deceptive practices in the conduct of trade or commerce in violation of 10 M.R.S.A. § 207, and award Plaintiffs and the Class: (a) actual damages in an amount to be proved at trial as a result of the wrongful conduct alleged, plus interest and costs; (b) punitive damages; (c) reasonable attorneys' fees and costs of this action; and (d) all other damages available under the laws of Maine, including pre-judgment and post-judgment interest;

3. Adjudge and decree that Defendants have been unjustly enriched and enter judgment on behalf of Plaintiffs and the Class in an amount to be proved at trial, plus interest and costs and all other damages available under the laws of

Maine including pre-judgment and post-judgment interest; and

4. Grant such injunctive relief as may be appropriate in the circumstances.

JURY DEMAND

Plaintiffs demand trial by jury on all claims for which they are entitled to a jury trial.

Dated: September 21, 2005

/s/ Samuel W. Lanham, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

STEPHANIE GOOD, LORI A. SPELLMAN, and ALLAIN L. THIBODEAU, Individually and behalf of all others similarly situated, **Plaintiffs,** **v.** **ALTRIA GROUP, INC. and PHILLIP MORRIS USA, INC.,** **Defendants.**	Case No. 05-CV-127-JAW

* * *

I. BACKGROUND AND QUALIFICATIONS

1. My name is James C. Miller III, and I have just become Chairman Emeritus of The CapAnalysis Group, LLC, an economic, financial, and regulatory consulting firm with offices in Washington, DC, Los Angeles and San Francisco, California, and Brussels, Belgium. Among other professional services, CapAnalysis provides economic analysis and expert testimony about commercial business issues. Prior to my present position, I was

Chairman of The CapAnalysis Group (2002-2005), and prior to that I was affiliated with two other economic and financial consulting firms – Hagler-Bailly (1999-2000) and LECG – Economics-Finance (2001-2002). In addition, in the late 1980s and early 1990s I was affiliated with the economic consulting firm Capital Economics, which is now part of CapAnalysis.

2. I also serve as a Senior Fellow (by courtesy) of the Hoover Institution, located at Stanford University, and am a Distinguished Fellow at the Center for the Study of Public Choice at George Mason University. In addition, I serve on the boards of directors of several business enterprises and non-profit organizations, including the Board of Governors of the U.S. Postal Service, where I also serve as Chairman. During the 1990s, I was the John M. Olin Distinguished Fellow at Citizens for a Sound Economy Foundation, an economic research and education group located in Washington, DC, and from 1998 to 2002 I served a term on the Board of Visitors of George Mason University.

3. I served as Chairman of the Federal Trade Commission (FTC) from 1981 to 1985. I have also served in the federal government as Director of the Office of Management and Budget (OMB) and member of President Reagan's cabinet (1985-1988), as Administrator for Information and Regulatory Affairs at OMB (1981), as Assistant Director of the Council on Wage and Price Stability (1975-1977), as Senior Staff Economist at the Council of Economic Advisers (1974-1975), and as Senior Staff Economist at the Department of Transportation (1969-1972).

4. My appointment to the FTC was exceptional inasmuch as I was the first economist to

head the organization and the first non-attorney to be a commissioner in several decades. As documented in one of my books, *The Economist as Reformer: Revamping the FTC, 1981-1985*,[1] and in other writings, I led the commission to focus more clearly and consistently on the economic effects of its regulatory actions and to establish priorities that would result in greater enhancement of competition and protection of consumers.

5. In 1964 I received a B.B.A. in economics at the University of Georgia, and in 1969 a Ph.D. in economics at the University of Virginia. I have taught economics full-time at Georgia State University (1968-1969) and Texas A&M University (1972-1974). In addition, I have taught economics part-time at the University of Virginia, George Washington University, and George Mason University (various dates). I have taught both graduate and undergraduate courses, with my graduate teaching being concentrated on topics in industrial organization, regulation, and transportation. I am the author or co-author of over 100 articles in professional journals, and am the author, co-author, or editor of nine books, the most recent of which is *Monopoly Politics*, published in 1999 by the Hoover Institution.[2]

6. I have testified on numerous occasions – before Congress, regulatory agencies, and the courts.

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[1] 1 James C. Miller III, *The Economist as Reformer: Revamping the FTC, 1981 1985* (1989).

[2] This work consists of the application of competition theory and public choice theory to the organization of political markets.

In the last four years I have testified in two cases before the U.S. Court of Federal Claims, *Maritrans v. United States*, #96-483C and *American Pelagic Fishing Company v. United States*, #99-119C. I am compensated at a rate of $695 an hour for my work on this matter.

7. Additional information on my background is contained in Appendix 2 of this statement.

II. RETENTION AND ASSIGNMENT

8. I have been asked by counsel for Philip Morris USA, Inc. to describe and evaluate the regulation of cigarette advertising and marketing by the FTC, with particular attention to its regulation of advertising and marketing of "lights" and "low tar" cigarettes. Also, I have been asked to address the structure and objectives of FTC, its regulation of cigarette advertising and marketing, and its reliance in part on voluntary agreements, guidelines, and compliance as regulatory instruments.

9. In undertaking my evaluation, I have reviewed the documents that are listed in Appendix 1 of this statement.

10. My opinions and conclusions – all of which I hold to a reasonable degree of certainty – in this matter are set forth in this report, but I reserve the right to revise these opinions and conclusions should I become aware of information not presently available to me.

III. SUMMARY OF OPINIONS AND CONCLUSION

11. Congress and the President gave The Federal Trade Commission the power to prevent "unfair methods of competition" and "unfair or

deceptive acts or practices." Therefore, the FTC has the dual mandates of ensuring competitive markets in the U.S. and protecting consumers against deceptive and unfair business practices. It is the latter mandate that is of concern here.

12. A very important part of the FTC's consumer protection program is its regulation of advertising. In general, consumers make purchase decisions based on what they know about different products and services, and much of that information comes from advertising. By ensuring that advertisers do not lie or otherwise mislead, the FTC empowers consumers to make purchase decisions that maximize their own welfare. In the case of cigarette advertising, the FTC has done a tremendous amount of work and expended significant resources over the years to ensure that consumers receive reliable information about tar and nicotine so that they can decide for themselves, in light of epidemiological and other evidence on the health effects of smoking, whether to smoke and what to smoke if they choose to smoke.

13. The FTC requires that all objective assertions in advertising be substantiated. Companies are expected to have a reasonable basis for their advertised claims before advertisements are disseminated. In the case of substantiation for tar and nicotine claims, the FTC has set a very strict standard – all claims must be based on test results from a FTC-designated test called the FTC Method. Since 1967, when the FTC Method was first established, the FTC has never approved an alternative test method.

14. There is no doubt that the FTC has been regulating cigarette advertising for over half a

century. Starting with litigation over health claims in 1938, the FTC has continually regulated cigarette advertising by proposing TRRs, writing Industry Guides and Advisory Opinions, directing the cigarette industry to self-regulate on prescribed terms, engaging in litigation, and issuing policy statements. In addition to employing the standard regulatory tools it uses with other industries, the FTC took several extraordinary steps in its regulation of cigarette advertising.

15. As mentioned above, in 1967, for the purpose of regulating tar and nicotine claims in cigarette advertising, the FTC established a uniform test for tar and nicotine (and later also carbon monoxide), known as the FTC Method. It also set up a laboratory to conduct the test itself. Both of these actions were highly unusual, because the FTC does not normally specify a testing protocol, much less conduct product testing.

16. Soon after, the FTC compelled cigarette manufacturers to agree to include tar and nicotine numbers in all of their advertisements. This, once again, is an uncharacteristic act by the FTC, because the agency usually serves only as a screen to prevent companies from making deceptive and unfair claims. It rarely forces companies to include specific truthful information in their advertisements.

17. By taking these highly unusual steps, the FTC accomplished its direct goal of providing uniform machine-measured tar and nicotine information to consumers so that they can make comparisons among different brands of cigarettes. Furthermore, the FTC wanted to provide an incentive to cigarette manufacturers to innovate and produce more and progressively lower tar cigarettes.

While the FTC does not generally devote so many resources to a single industry, it has done so here because of the serious health effects involved.

18. The FTC has repeatedly re-evaluated the FTC Method and its regulation of tar and nicotine advertising, focusing on two main issues: (a) whether the FTC Method could properly rank relative tar and nicotine yields of cigarettes with new filter designs, assuming the cigarettes are smoked in the same manner; and (b) whether the test results are still correlated with the relative harmfulness to smokers if they engage in compensatory smoking behavior. Despite repeated investigations, studies, reviews of epidemiological evidence, and calls for public comment, the FTC made no significant changes to the FTC Method or to its regulation of tar and nicotine claims in cigarette advertising after 1967.

19. In addition to establishing standards and requirements for tar and nicotine disclosure, the FTC has ensured that its regulatory program be followed. The FTC has repeatedly used its investigative powers and litigated against cigarette manufacturers for making claims inconsistent with the FTC test results.

20. Since the implementation of the FTC Method in 1967, the FTC has allowed the use of cigarette descriptors such as "lights" and "low-tar", as long as their uses are substantiated by, and therefore consistent with, the underlying FTC test results. The descriptors "lights" and low-tar" generally have been understood by the FTC to mean 15 mg. of tar or less, as determined by the FTC Method.

21. In general, the FTC views descriptors as an efficient and effective means of conveying information to consumers. In the case of cigarette descriptors, they are an efficient and effective means of conveying relative tar yield and/or taste of cigarettes to consumers. For most consumers, descriptors are probably more helpful than the actual tar and nicotine numbers. A number such as 5 mg. will likely not mean very much to a consumer unless that consumer knows the tar ratings for most other cigarettes, whereas a descriptor such as "ultra-lights" tells a consumer that this cigarette has a relatively low tar rating.

22. Some have objected to cigarette descriptors because they believe these descriptors give misleading signals about the relative health risks of low-tar cigarettes. The FTC is aware of this view and has considered it very carefully. In particular, the FTC consulted with federal scientific agencies, received recommendations and advice from the U.S. Public Heath Service and various members of the public health community (for example, the American Cancer Society) and itself reviewed the pertinent epidemiology and related scientific literature. From 1967 forward, despite receiving complaints and requests for change, the FTC has chosen to continue to permit the use of cigarette descriptors as long as they are substantiated by the FTC Method.

23. The FTC opposed a proposal in Congress to ban cigarette advertising. The Commission also opposed a Congressional proposal to allow individual state regulation of cigarette advertising. The FTC believed that such initiatives would harm consumers by staunching the flow of useful information to them,

and/or creating inconsistent information and message about cigarettes. The FTC wanted a uniform national approach to cigarette advertising regulation.

24. The FTC's intent to enable consumers to be informed by means of a uniform national approach would be frustrated by state litigations that resulted in different cigarette advertising rules in some states. Such outcomes would conflict directly with the FTC's program of uniform regulations for the advertisement and substantiation of tar and nicotine yields. Damages awards predicated on the use of "lights" and "low tar" descriptors also would interfere with the FTC's policy that descriptors be allowed as a means of communicating tar and nicotine yields.

25. A regime in which individual states would be able to assert their own regulatory requirements creates the possibility of a fractured regulatory framework for cigarettes. If conflicting regulations were enacted, the resulting constraints on marketing and advertising of cigarettes would reduce the flow of information to consumers, directly contradicting the FTC's policy aim.

26. In conclusion, it is difficult to review the history of the FTC's involvement with the cigarette industry and not come away with a conviction that for the past six decades the agency has considered this industry deserving of extraordinary scrutiny. The FTC litigated against deceptive claims, proposed TRRs, wrote Industry Guides and Advisory Opinions, issued policy statements, and persuaded the industry to consummate voluntary agreements. It even took the extraordinary steps of choosing a uniform testing method and conducting cigarette tests itself for 20

years, to ensure that consumers are informed about tar and nicotine yield on a meaningful and consistent basis. Furthermore, despite having re-examined multiple times its policies towards cigarette advertising and the validity of the FTC Method, the FTC has stayed the course since the late 1960s.

27. My experience as the FTC's chairman for four years was certainly consistent with this long history of FTC's involvement in the cigarette industry. While concern with some industries came and went (for example, automobiles, health care, and petroleum), there was the one constant concern: tobacco. Although it is hard to quantify, I would say that no topic was mentioned with more frequency around the commission or galvanized the commission and its staff more readily than did the issue of smoking and the FTC's regulation of tobacco advertising.

IV. INTRODUCTION

28. The purpose of this report is to examine the FTC's regulation of cigarette advertising, with particular attention to its regulation of the advertising of tar and nicotine content. The report discusses why the FTC has taken unprecedented steps to regulate tar and nicotine advertising with extraordinary scrutiny, the regulations it imposed on the cigarette industry, and the FTC's goals. The report also describes how the FTC has continually re-examined and enforced its cigarette advertising rules. Finally, the report examines the role of cigarette descriptors and how the FTC feels about restricting tar and nicotine information to consumers.

29. Section V of this report provides an overview of the FTC's general responsibilities, its

oversight of all advertising, and the tools it uses to prevent deceptive and misleading advertising.

30. Section VI provides an early history of the FTC's involvement in cigarette advertising. This section demonstrates that the FTC has long been involved in regulating claims about cigarette tar and nicotine content.

31. Section VII discusses what motivated the FTC to implement its tar and nicotine testing method, which later became known as the FTC Method. The section also describes the process by which the cigarette manufacturers came to agree to disclose tar and nicotine yields in all cigarette advertisements.

32. Section VIII examines how the FTC has dealt with claims that the FTC Method is flawed because of either new cigarette designs or compensatory smoking behavior. The record shows that the FTC took such criticisms seriously, studied these difficult issues extensively, and chose in the end not to change the FTC Method.

33. Section IX focuses on the issue of tar and nicotine descriptors such as "light" and low tar". This section shows that the FTC deliberated about cigarette descriptors and then describes how the FTC permitted the use of descriptors. This section ends by discussing the FTC's generally favorable view on product descriptors.

34. Section X examines the FTC's past opposition to Congressional proposals to limit cigarette advertising and to allow individual states to regulate cigarette advertising. It explains how state litigation over allegedly misleading cigarette advertising could easily lead to conflicts with the

FTC's policy of ensuring that consumers are fully informed on tar and nicotine yields in cigarettes.

V. OVERVIEW OF THE FTC'S CONSUMER PROTECTION PROGRAM AND REGULATORY TOOLS

A. The FTC's Missions and Organization

35. The Federal Trade Commission Act of 1914 created the FTC as an independent agency, and Section 5 of the Act gave it responsibility to prevent "unfair methods of competition." In 1938, Congress expanded and clarified the FTC's Section 5 responsibilities by also directing it to prevent "unfair or deceptive acts or practices."[3] Other legislation directed the FTC to study and regulate specific industries and business practices above and beyond its general Section 5 responsibilities.[4]

36. The Commission's two primary enforcement functions are performed presently by its Bureau of Competition and its Bureau of Consumer Protection. The Bureau of Competition enforces antitrust laws and generally seeks to prevent anti-competitive business practices. The Bureau of Consumer Protection protects consumers against unfair, deceptive, or fraudulent practices. A third bureau, the Bureau of Economics, supports the other

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[3] *See* 15 U.S.C.A. § 45(a)(2) (West 2005) *(Exh. 301)*.

[4] For example, the *Federal Cigarette Labeling and Advertising Act of 1966* (and subsequent amendments) designated the FTC to supervise cigarette labeling requirements *(Exh. 085)*. *See* 15 U.S.C.A. § 1333(c) (West 2005) *(Exh. 323)*. *See also* http://www.ftc.gov/ogc/stats.htm for a list of legislation that give the FTC additional responsibilities *(Exh. 200)*.

two bureaus and also provides independent economic analyses and recommendations to the commissioners. Moreover, the Bureau of Economics also studies industry performance as well as the impact of FTC activities on the U.S. economy.[5]

37. The Division of Advertising Practices within the Bureau of Consumer Protection has a responsibility to protect consumers from deceptive (unsubstantiated) and unfair advertising, and oversees, among other things, the advertising and marketing of cigarettes. Like other parts of the Bureau of Consumer Protection, the Division of Advertising Practices often relies on the opinions of the professionals in the Bureau of Economics and outside experts when deciding on a course of action. The Bureau of Economics typically gets involved at an early stage in any consumer protection investigation in order to provide guidance to the attorneys as well as an independent view for the commissioners.[6] Throughout its history of regulating cigarette advertising, the Division of Advertising Practices has relied a great deal on the Bureau of Economics and outside public health experts.

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[5] Over time the structure and names of the various FTC Bureaus and Divisions have changed. For example, at one time most of the functions of the present Bureau of Consumer Protection were carried out by the Bureau of Consultation. Among the Bureaus that have existed in the past include the Bureau of Scientific Inquiry and the Bureau of Industry Guidance.

[6] Testimony of Dr. John Peterman at 27-31, *Miles v. Philip Morris Co., Inc.*, Case No. 00-L-112, Vol. XVI, Morning Sess., 3d Cir. Ct. Ill., (Feb. 13, 2003) *(Exh. 185)*.

B. The Importance of Enforcing Truth in Advertising

38. Over the years, the FTC has set the standard for determining deceptive advertising and has developed expertise in interpreting implied claims in advertising, including implied health claims. The FTC also has relied on the scientific community to help it evaluate the accuracy of advertising claims. Regulating advertising has always been a critical component of the FTC's consumer protection program, because consumers are not likely to make purchase decisions in their own best interests unless they receive truthful and useful information about product and service offerings.

39. In a competitive market, businesses usually have a strong incentive to describe their products and services accurately, because consumers will not become repeat customers when they feel cheated and the firm's reputation will be hurt. But this truth-telling mechanism does not work very well when a product contains attributes that cannot be detected through normal use.[7] For example, a consumer is not likely to be able to tell whether a serving of food has 100 calories or 200 calories simply by consuming it. In such a case, in the absence of some other corrective mechanism, it may be necessary for a governmental agency, as in this case, the Food and Drug Administration, to step in to

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[7] Another scenario under which the truth telling mechanism may fail is when a product or service is purchased infrequently (for example, a used car) so that a seller may not care very much about repeat business.

ensure that consumers receive truthful and useful information about such products.

40. Information is of greatest use to consumers when It is presented in a consistent and understandable manner. For example, most consumers care about the fuel efficiency of new cars. However, publicized efficiency information would be of little use if each car were not tested and reported using the same methodology. Furthermore, it would obviously confuse consumers if some automobile manufacturers were to publish fuel efficiency information in terms of miles per gallon while others presented the information in terms of yards per pint.

41. In most cases, information does not have to be perfect to be helpful to consumers. For example, even if fuel efficiency information does not accurately reflect the exact miles per gallon for every driver under every driving condition, such information is still of help to consumers because it provides information on the relative fuel efficiency of different cars.

42. In addition to helping consumers make better purchase decisions, making truthful and relevant information easily accessible enhances competitive market behavior. When consumers are enabled to make choices based on knowledge about a particular product attribute, producers gain an incentive to compete on that attribute. For example, the EPA established its Energy Star program to clearly identify energy efficient consumer devices – which, by giving consumers information on energy efficiency, gave producers additional incentive to improve the energy efficiency of their products.

43. Throughout its continuous regulation of cigarette tar and nicotine advertising, the FTC has

been motivated by all of the above considerations. The FTC believed that some smokers do care about tar and nicotine yields, but they cannot easily determine absolute or relative yields from smoking. Historically, cigarette manufacturers did not voluntarily reveal tar and nicotine information for all of their cigarettes, and there was no standard testing method used by all manufacturers–which made yield comparisons across different brands misleading. In light of compelling scientific studies in the mid to late 1960s suggesting the relative benefit of low over high tar and nicotine cigarettes, the FTC came to the conclusion that assuring the provision of uniform test results on tar and nicotine yields would benefit consumers even if such information did not perfectly reflect the actual amount of tar and nicotine ingestion for every smoker under all conditions. The FTC understood that its policy to enable the provision of tar and nicotine information would (as it did) stimulate consumer demand for low-yield cigarettes, which, in turn, would give cigarette manufacturers an incentive to produce lower-yield cigarettes.

C. The FTC Advertising Substantiation Standard

44. Given the importance of advertising as a source of information available to consumers, the FTC has been diligent in preventing deceptive and unfair advertising claims. Before 1972, the FTC prohibited advertising that had a "capacity and tendency" to deceive the public.[8] In the 1972 Pfizer

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[8] *U.S. Retail Credit Ass'n, Inc. v. FTC*, 300 F.2d 212, 221 (4th Cir. 1962) (*Exh. 192*).

decision,[9] the FTC modified its advertising standard, and this standard was refined further in 1984.[10]

45. A failure to meet the FTC's advertising substantiation requirement is an unfair and deceptive act in violation of section 5 of the FTC Act.[11] The FTC requires advertisers, prior to making any objective assertions about their products and services, to have a reasonable basis for both express and implied claims.[12] On the other hand, the FTC does not want its advertising substantiation policy to be so strict as to "impos[e] unduly burdensome restrictions that might chill information useful to consumers in making purchase decisions."[13]

> We believe that the best regulatory approach . . . should accomplish two main objectives. First, the approach should maximize the ability of sellers to disseminate truthful and non-misleading information to consumers, while adequately protecting consumers from false or misleading information. Second, because the approach must accommodate claims based on emerging science, it should be flexible enough to allow the claims to be

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9 *In re Pfizer Inc.*, 81 F.T.C. 23 (1972) *(Exh. 138)*.

10 *Policy Statement Regarding Advertising Substantiation Program*, 49 Fed. Reg. 30999 (Aug. 2, 1984) *(Exh. 167)*; *see also* http://www.ftc.gov/bcp/guides/ad3subst.htm *(Exh. 199)*.

11 49 Fed. Reg. at 31000.

12 *Id.*

13 Federal Trade Commission, *In the Matter of Food Labeling: Health Claims; Dietary Guidance Docket No. 2003-0496*, 2004 WL 230743, 1 (F.T.C.) *(Exh. 108)*.

modified as the science changes without the cost and delay of a formal rulemaking.[14]

46. The FTC showed its willingness to "accommodate claims based on emerging science" in *In the Matter of Steam Drug, Inc.* where the FTC agreed to modify its prior cease and desist order because of new scientific findings.[15] Conversely, new scientific findings could also prompt the FTC to order advertisers to cease making previously allowed claims. However, such a change in scientific opinion would not be used retroactively so as to render a previously-substantiated claim deceptive or unfair. Otherwise, advertisers would refrain from disseminating currently substantiated claims for the fear that they may be sanctioned by the FTC if subsequent scientific findings contradict those claims.[16]

47. If an advertisement contains express or implied statements regarding the level of support for its claims (for example, "doctors recommend"), then the company is expected to have substantiation for at least the level of support advertised. If an advertisement contains no representation of the level of support, the company Is expected to have a reasonable basis for the claims made In the advertisement.[17]

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[14] *Id.* at 3.

[15] *In the Matter of Sterling Drug, Inc.*, 101 F.T.C. 375 (1983) (modifying 1974 final order) *(Exh. 143)*.

[16] *See generally* Federal Trade Commission, *Enforcement Policy Statement on Food Advertising* (May 1994), at http://www.ftc.gov/bcp/policystmt/ad-food.htm *(Exh. 095)*.

[17] 49 Fed. Reg. at 31000 *(Exh. 167)*.

48. The substantiation necessary to establish "reasonable basis" depends on "a number of factors relevant to the benefits and costs of substantiating a particular claim." Some factors are: "the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable."[18]

49. Companies are unlikely to have substantiation of implied claims if they do not believe they made such claims. Nevertheless, they

> need to be aware of reasonable interpretations and will be expected to have prior substantiation for such claims. The Commission will take care to assure that it only challenges reasonable interpretations of advertising claims.[19]

50. The FTC set up guidelines requiring cigarette companies to support their tar and nicotine advertising claims with "competent scientific proof" as far back as 1955.[20] After the FTC designated an official test for tar and nicotine yield in 1966 – that is, the FTC Method – the FTC set a very specific substantiation standard for tar and nicotine claims in all cigarette advertising. In other words, when substantiating tar and nicotine claims, the only "reasonable basis" is the FTC Method. The FTC has not accepted any testing method other than the FTC

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18 *Id.*

19 *Id.*

20 *See* Cigarette Advertising Guides, *infra* para. 70.

Method since it adopted the protocol and began testing in 1967. This is an unusually strict substantiation policy, even after taking the factors mentioned in para. 48 into account, indicating that the FTC has scrutinized the advertising of cigarettes much more than the advertising of other products.

D. The FTC's Regulatory Tools

51. Although the FTC is commonly described as a law enforcement agency, it is also a regulatory agency. As part of its duty, by statute, to "prevent . . . unfair or deceptive acts or practices in or affecting commerce",[21] the FTC engages in a number of activities that are more of a regulatory nature than an enforcement nature. In the case of cigarette advertising, the FTC has emphasized its regulatory role.

> The Commission was established not as a simple law-enforcement agency, but as an administrative agency comparable to the Interstate Commerce Commission, in order to perform a positive role of policy formulation which the courts, it seemed, could not adequately play in the trade regulation area.[22]

52. With respect to its broad consumer protection mission, the FTC has a number of

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[21] *See* 15 U.S.C.A. § 45(a)(2) *(Exh. 301)*.

[22] Federal Trade Commission, *Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule*, at 141 (June 22, 1964) [hereinafter *TRR 1964*] *(Exh. 120)*. *See infra* Section VI.C for more on the 1964 TRR.

regulatory tools at its disposal. All major regulatory and enforcement actions start with an unofficial inquiry or an official investigation, usually based on public complaint, internal study, or Congressional inquiry. During an inquiry or investigation, the FTC can gather information from persons, businesses, or industries through either voluntary or compulsory means.[23] If the FTC deems it necessary to take action after an inquiry or investigation, it can, depending on the circumstances, litigate, promulgate new rules, issue guidelines, engage in business education programs, or otherwise work with businesses to deter the challenged behavior. In general, when a problem is widespread and not clearly forbidden by existing rules or interpretations, the FTC will write new rules, issue guidelines, or recommend an industry-wide voluntary agreement to stem the questionable business practice. On the other hand, if a business practice is clearly unfair or deceptive under existing rules, litigation and/or a consent order are the likely result.

53. The FTC has several ways to clarify and to establish rules on what are unfair or deceptive business practices. The formal method is to promulgate a Trade Regulation Rule (TRR). The TRR approach may be appropriate when the FTC wants to terminate prevalent questionable practices and where case-by-case adjudication would be inefficient. While the TRR is an effective way of establishing and clarifying rules to an entire industry, the rulemaking process itself can be quite lengthy, cumbersome, and complicated; moreover,

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[23] The FTC has the power to issue civil investigative demands. *See* 15 U.S.C.A. § 57b-1 (West 2005) *(Exh. 304)*.

such rules are often subject to judicial review and consequent further delay.[24] In 1987, my successor as chairman of the FTC, Daniel Oliver, said the following about formal rulemaking in Congressional testimony:

> [T]he FTC has discovered that rulemaking takes a very long time, and I think, therefore, it is more efficient to bring a single case against the first offender in order to stop the practice before we go to rulemaking.[25]
>
> I'm interested not in rulemaking; I'm interested in having an effect for the benefit of consumers. If I can have a faster and better effect by bringing a case instead of making a rule, I think it serves the consumers' interest better.[26]

54. Chairman Oliver then applied his view of the TRR to the regulation of cigarette advertising:

> In the case of the cigarette industry, . . . it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you

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24 The TRR rulemaking process is described in Federal Trade Commission, *FTC Operating Manual* ch. 7, at http://www.ftc.gov/foia/ch07rulemaking.pdf *(Exh. 102)*. *See also*, 15 U.S.C.A. § 57a (West 2005) *(Exh. 303)*.

25 *FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong. 17 (May 7, 1987) (testimony of FTC Chairman Daniel Oliver) *(Exh. 124)*.

26 *Id.* at 18. For a similar statement by another FTC Chairman. *See infra* para. 99.

> would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumers.[27]

55. The FTC employs alternative methods of informing businesses what they should and should not do – in effect, regulating industry behavior. The first method, as mentioned above, is using an exemplary lawsuit (actual or threatened) against an early offender – to send a signal to the rest of the industry about what not to do.[28] The FTC has the authority to initiate administrative adjudication or go directly to a federal district court to seek injunctive relief and/or monetary damages.[29] Often, the threat of FTC litigation alone is enough to result in a consent agreement that allows the FTC to secure a legally enforceable cease and desist order without expending the resources necessary to adjudicate a case. A consent agreement can also be negotiated

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[27] *Id.* at 19.

[28] *See supra* para. 54. *See also infra* para. 179 (R. J. Reynolds changed its *Doral* and *Vantage* low-tar advertising to conform with the cigarette advertising consent agreement between American Tobacco and the FTC).

[29] 15 U.S.C.A. §§ 45(1), 45(m), 53(b) (West 2005) (*Exh. 301, Exh. 302*).

during an investigation, before a complaint is filed.[30] Consent agreements must be published in the *Federal Register*, whereupon others in the industry are notified of the case and proposed ruling and given an opportunity to submit comments. The FTC may modify the agreement based on the comments received.[31] The final order is also published, so that the entire industry has access to the outcome of the case, permitting all industry participants to adjust or modify their conduct as necessary.

56. In the specific area of advertising regulation and enforcement, the FTC frequently has taken legal actions that culminated in cease-and-desist orders, requiring corrective advertising or other informational remedies, banning individuals from certain industries or requiring their posting of bonds before engaging in business, disgorging profits, and paying redress.[32] The FTC Act specifically bans false advertisements and states the FTC's authority to stop them.[33]

57. Second, the FTC can issue Industry Guides that are "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in

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30 *FTC Operating Manual* ch. 6 § .3, at http://www.ftc.gov/foia/ch06consents.pdf *(Exh. 101)*.

31 *FTC Operating Manual* ch. 6 §§ .11 - .15 *(Exh. 101)*.

32 Staff of the Division of Advertising Practices of the FTC, *Federal Trade Commission Advertising Enforcement* (2001) *(Exh. 205)*.

33 15 U.S.C.A. §§ 52-54 (West 2005) *(Exh. 305, Exh. 302, Exh. 306)*.

conformity with legal requirements." [34] Like the TRR, Industry Guides are usually issued when there are widespread questionable practices with a tendency to mislead or deceive, and the purpose of a Guide is often to "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry."[35] Industry Guides are especially useful when prior violations were due to a lack of understanding of, or confusion over, just what the law requires. The Industry Guide approach is an especially useful tool in getting firms to abandon deceptive practices simultaneously where each firm may be reluctant to do so unilaterally because of competition.[36]

58. Third, when a business has doubts about whether a course of action is consistent with FTC law and regulation, it can request an Advisory Opinion. The FTC will issue such an Opinion if it believes:

> (1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or (2) the subject matter of the request and consequent publication of Commission advice is of significant public interest.[37]

59. Such an Advisory Opinion is "binding upon the Commission with respect to the person or group

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[34] 16 C.F.R. § 1.5 (2004) *(Exh. 311)*.

[35] *Id.*

[36] *FTC Operating Manual* ch. 8 § .3.3, at http://www.ftc.gov/foia/ch08industryguidance.pdf *(Exh. 103)*.

[37] 16 C.F.R. § 1.1 (2004) *(Exh. 310)*.

to whom such opinion is issued with regard to the acts, practices, or conduct described in the request[.][38] If the FTC later rescinds the advice, it will not take enforcement action against the requester that acted in good-faith reliance upon the advice contained in the Opinion.[39]

60. Fourth, the FTC has long regulated by encouraging industries to agree voluntarily to prevent unfair or deceptive practices. Between 1919 and the 1960s, the FTC regularly held trade practice conferences to encourage industries to write their own rules, subject to final approval by the FTC.[40] In general, industries have incentives to self-regulate for fear of litigation or specific regulations such as a TRR. As mentioned above, promulgating a TRR typically costs the FTC, as well as industry, a great deal of time and resources; soliciting a voluntary agreement as a substitute for a TRR can often be the most efficient way for the FTC to achieve its regulatory objectives.[41]

61. Finally, the FTC often issues statements to inform industries of its regulatory and enforcement policies. These statements serve as guides to industries on what the FTC considers to be deceptive or unfair, with the implication that

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38 *FTC Operating Manual* ch. 8 § .4.3 *(Exh. 103)*.

39 *Id.* Other parties relying on the same Advisory Opinion will also not face enforcement actions "under ordinary circumstances." *Id.*

40 Federal Trade Commission 90th Anniversary Symposium – Program Brochure, 6-7 (Sept. 22-23, 2004), at http/www.ftc.gov/ftc/history/90thAnniv_Program.pdf *(Exh. 086)*.

41 *See infra* para. 99.

business practices outside the stated boundaries are likely to be challenged and result in litigation.

62. During the FTC's long history of cigarette advertising regulation, it has employed all of these regulatory tools. It litigated against tobacco companies for making misleading tar and nicotine claims; it provided Industry Guides for cigarette advertising; it issued Advisory Opinions on tar and nicotine claims; and it published policy statements in the *Federal Register* and in its *FTC News Release* concerning tar and nicotine advertising. While the FTC did not implement a TRR on cigarette advertising, it did initiate several TRR proceedings. These proceedings ended either because of voluntary industry agreements or legislation, with the end results typically being that the FTC achieved its stated goals without incurring the costs (including time) of promulgating a TRR.

VI. HISTORY OF CIGARETTE ADVERTISING REGULATION BEFORE 1966

A. Early Litigation

63. The FTC has a long history of suing cigarette companies for deceptive or misleading advertising. In 1938, it brought a case against the Julep Tobacco Company for making health claims about its products. The result was an agreement in which Julep committed

> to cease and desist from representing directly or otherwise: (a) that the mint in Julep cigarettes helps counteract the irritants present in tobacco or throat irritations due to heavy smoking, or has any other therapeutic action; (b) that Julep cigarettes never make the throat dry or

> parched; (c) that these cigarettes never tire the appetite; and (d) that Julep cigarettes 'banish' morning-after, stale mouth, taste.[42]

64. The FTC's first regulatory action involving the tar and nicotine content of cigarettes was the Benson & Hedges case in 1941, in which the manufacturer described the cigarette's mouthpiece as "non-nicotine." The FTC compelled Benson & Hedges to agree to cease and desist from suggesting that the mouthpiece "has the effect of either denicotinizing the cigarette tobacco or of appreciably removing the nicotine from tobacco smoke which passes therethrough."[43]

65. In 1943, the FTC filed multiple complaints against R.J. Reynolds (*Camel*), P. Lorillard Co. (*Old Gold*), and American Tobacco (*Lucky Strike*). In all three cases, cigarette companies had made deceptive and misleading claims about the health effects of cigarettes and nicotine yield. The Commission ruled against all three companies and ordered them to cease and desist from making these claims. To prove its case, the FTC relied on medical experts and FDA tests to show that the nicotine levels of these brands were not significantly lower than of competing brands.[44]

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42 *In re Julep Tobacco Co.*, 27 F.T.C. 1637 (1938) *(Exh. 136)*.

43 *In re Benson & Hedges*, 33 F.T.C. 1659, 1959-60 (1941) *(Exh. 133)*.

44 *In re R.J. Reynolds Tobacco Co.*, 46 F.T.C. 706, 729-31 (1950) *(Exh. 139)*; *In re P. Lorillard Co.*, 46 F.T.C. 735, 748-751 (1950), *aff'd* 186 F.2d 52 (4th Cir.) *(Exh. 137)*; *In re American Tobacco Co.*, 47 F.T.C. 1393 (1951) *(Exh. 132)*.

66. From the above, it is clear that the FTC regulated cigarette advertising before the 1950s and took legal actions against many, if not most, cigarette manufacturers for making unsubstantiated health claims and/or claims about nicotine yield. Pressure from the FTC forced cigarette manufacturers to change their advertising.[45]

B. Cigarette Advertising Guides, Tar Derby, and Subsequent Ban on All Tar and Nicotine Advertising

67. In the early 1950s the scientific community began to publish the results of studies showing a link between cigarette smoking and lung cancer, and this information began to disseminate to the general public.[46] The cigarette industry responded to the subsequent shift in smoker preferences by creating and marketing filtered cigarettes and lower tar and nicotine cigarettes.

68. At this time, the FTC was unsure about the health effects of tar and nicotine. It did not know whether tar caused cancer, nor did it know what

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45 *See, e.g.*, Correspondence from R.J. Reynolds to FTC, Division of Compliance, Aug. 26, 1952 (R.J. Reynolds agreed to discontinue its "More Doctors Smoke Camels" advertising campaign) *(Exh. 069)*; P. Lorillard, Kent Cigarettes, The Marketing Situation with 1957 Plans and Recommendations, at 4-5 (Nov. 1956) *(Exh. 163)*.

46 A summary of these scientific studies can be found in *False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcom. of the Comm. on Gov't Operations H.R.*, 85th Cong. First Session, 3-34 (July 18, 19, 23-26, 1957) (statement of Dr. E. Cuyler Hammond, Director of Statistical Research, American Cancer Society) *(Exh. 084)*.

level of tar was considered to be dangerous.[47] The FTC initially tried to deal with cigarette companies' questionable advertising claims about filters, tar, and nicotine by seeking to enjoin them. However, these lawsuits were difficult and slow–in part because the FTC was not equipped to test cigarettes, and there was no standardized test; hence, it was difficult to prove that cigarette companies' claims were deceptive or unfair.[48]

69. In 1954, in order to end deceptive or unfair claims, the FTC decided to work with the cigarette industry to establish an industry guideline for cigarette advertising. The guideline was based on precedents established by the FTC and courts, and aimed to protect the public.[49] In September 1955, the FTC formally adopted the Cigarette Advertising Guides, which subsequently was used by FTC staff in evaluating cigarette advertising.[50]

70. The Cigarette Advertising Guides permitted claims about tar, nicotine, and other ingredients of cigarette smoke, but only if the claims had been "established by competent scientific proof applicable at the time of dissemination that the claim is true, and [any claimed) differences are significant." The Guides also banned any representation of "the presence or absence of any

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47 *False and Misleading Advertising (Fitter-Tip Cigarettes), supra* note 46, 273-309, at 286 (statement of FTC Acting Chairman Robert T. Secrest) [hereinafter *Secrest*) *(Exh. 084)*.

48 *Id.* at 275-76.

49 Memorandum from David R. Reel, Attorney at the FTC, to File, at 1-2, Dec. 23, 1954 *(Exh. 159)*.

50 *Id.* at 276.

physical effect or effects of cigarette smoking in general or the smoking of any brand of cigarette."[51]

71. Because of the Guides, cigarette advertising shifted from making claims about health to claims about taste and flavor. By 1957, working under the Guides, the FTC had obtained voluntary discontinuance of 75 advertising claims it found objectionable, without having to institute any formal proceedings. Furthermore, because cigarette companies could consult with the FTC on whether their advertisements conformed to the Guides, many objectionable advertisements were abandoned before they ever reached the public.[52]

72. During his Congressional testimony, FTC Chairman Secrest expressed satisfaction with the effects of the Guides:

> [The] adoption and administration of the guides did more to prevent deceptive advertising of cigarettes and to fulfill the Commission's responsibility to the public than it could possibly have accomplished by any other means.[53]

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[51] *Id.* at 299-300. *See also*, Federal Trade Commission, Federal Trade Commission Press Release (Sept. 22, 1955) *(Exh. 099)*.

[52] Secrest, *supra* note 47, at 278-79 *(Exh. 084)*. A later count in 1963 showed that over 300 questionable advertising claims were eliminated because of the Guides. *See* Correspondence from Bryan H. Jacques, Director of FTC Bureau of Industry Guidance, to the Federal Trade Commission, at 2, Feb. 7, 1963 *(Exh. 031)*.

[53] Secrest, *supra* note 47, at 279-80 (Exh. 0841.

From the mid to late 1950s, cigarette companies continued competing to produce and advertise their low-yield cigarettes. During this "tar derby", as it became known, several cigarette brands claimed to have the least tar and nicotine.[54] Cigarette companies employed different tar and nicotine testing methods to substantiate their claims, and yield information was also provided by independent sources such as *Reader's Digest* and *Consumer Reports*.[55]

73. Because there was no uniform testing method and no proof of advantage to smokers, the FTC decided that these conflicting tar and nicotine claims were confusing and misleading.[56] The FTC concluded at this time that claims of reduced tar and nicotine yields constituted unsubstantiated health claims.[57] As a result, in December 1959, the FTC ended the "tar derby" by requesting the cigarette industry to stop making references to tar

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[54] Correspondence from Bryan H. Jacques, *supra* note 52, at 3-4 *(Exh. 031)*.

[55] *See e.g., Cigarettes: Report #1 in CU's continuing tests of 16 brands of cigarettes for nicotine and tar content in their smoke*, 22 Consumer Reports 460 (Oct. 1957) *(Exh. 019)*; Lois Mattox Miller and James Monahan, *The Facts Behind Filter-Tip Cigarettes, Reader's Digest*, July 1957, at 33-39 *(Exh. 154)*. *Consumer Reports* seems to have done its own testing, whereas *Reader's Digest* reports were based on results from a "leading testing laboratory."

[56] Statement of FTC Chairman Earl W. Kintner (Feb. 5, 1960) *(Exh. 182)*.

[57] Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to John Vance Hewitt, Attorney of Conboy, Hewitt, O'Brien and Boardman, Dec. 17, 1959 *(Exh. 077)*.

and.nicotine in their advertisements. According to FTC Chairman Paul Rand Dixon, this request

> constituted, in effect, Informal advice and guidance to industry with respect to the regulatory posture which the Commission had reason to believe would be established as a basis for issuance of complaints, and subsequent proceedings under Section 5(b) of the Federal Trade Commission Act . . . the Commission was informing the industry that in its opinion the evidence then available would support a complaint against any marketer that made any reference to tar or nicotine content, charging that such a reference was false and misleading.[58]

74. In its letters to firms in the industry, advising them of its conclusions, the FTC Bureau of Consultation stated, "This advice is being disseminated on an industry-wide basis and prompt, simultaneous compliance is *urgently requested*."[59] C. Lee Peeler, the current Deputy Director of the Bureau of Consumer Protection of the FTC, considered this action to be a ban on tar and nicotine claims in advertising.[60] In Its 1960 Annual Report,

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[58] Correspondence from Paul Rand Dixon, FTC Chairman, to Warren G. Magnuson, Chairman of U.S. Senate Committee on Commerce, at 2-3, Apr. 11, 1966 *(Exh. 066)*. [hereinafter *Dixon Magnuson*]

[59] Correspondence from Brain to Hewitt, *supra* note 57 (Emphasis added) *(Exh. 077)*.

[60] Peeler was the Director of the Division of Advertising Practices between October 1985 and August 2001. *See* C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A*

the FTC declared, "the seven major manufacturers agreed to delete all tar and nicotine claims from cigarette advertising."[61]

75. The FTC also implemented its new policy through litigation. In December 1959, the FTC filed a complaint against Brown and Williamson for advertising that its *Life* cigarettes filters absorbed more tar and nicotine than the competitors' filters and that the United States Government approved *Life* and found *Life* to be the lower in tar or nicotine than other filter cigarettes. The case resulted in a 1960 consent order prohibiting Brown & Williamson from making these claims.[62]

76. The events described above clearly show that the FTC regulated cigarette advertising in the 1950s by using a combination of Industry Guides, voluntary agreements, and exemplary litigation. The FTC succeeded in eliminating health claims with the 1955 Cigarette Advertising Guides, and

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[Footnote continued from previous page]

Historical Overview, in Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes 1, at iv and 2 (National Institutes of Health, National Cancer Institute, 1996), where Peeler refers twice to an "end" of the ban in 1966 *(Exh. 178)*.

61 Federal Trade Commission, Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1960, at 82 *(Exh. 093)*.

62 *In re Brown & Williamson Tobacco Corp.*, 56 F.T.C. 956 (1960) *(Exh. 134)*. Later on, after the FTC Method was established (see below), this consent order was modified in 1968 to allow Brown & Williamson to make "tar" and nicotine claims if based on FTC testing. *In re Brown & Williamson Tobacco Corp.*, 73 F.T.C. 439 (1968) *(Exh. 135)*.

then effectively banned all tar and nicotine claims in cigarette advertising in late 1959.

77. While the FTC was successful in ending the tar derby, not everyone in the public health community thought this was good policy, because the tar derby resulted in a lowering of the sales weighted average tar yields in the cigarette market. While there was no consensus on this point in the late 1950s, some scientists, such as Dr. Ernest L. Wynder of the Sloan-Kettering Institute for Cancer Research, believed that lowering tar and nicotine yields in cigarettes produced health benefits, even for a reduction as little as 10 to 15 percent (as measured by machine-based testing yields). They argued that the incentive for the cigarette manufacturers to produce lower tar cigarettes should not be destroyed.[63]

78. The FTC recognized that a fundamental problem of the tar derby was the lack of a uniform testing standard, and it started looking for a solution.[64] In 1958, the FTC announced that it was seeking "to end confusion arising from the widely varying tests conducted by cigarette manufacturers and private laboratories" by establishing a uniform

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63 *See* Correspondence from F.W. Irish, Chief of the Division of Scientific Opinions at the FTC to Acting Director of the Bureau of Consultation at the FTC, July 16, 1958 *(Exh. 040)*; Correspondence from John P. Sullivan, Attorney at the FTC, to File, Aug. 28, 1958 *(Exh. 053)*.

64 The FTC also had difficulties dealing with deceptive or unfair tar and nicotine claims on a case by case basis because of the lack of a uniform standard. *See supra* para. 68.

test of cigarette smoke.[65] Charles E. Grandey, Director of the FTC's Bureau of Consultation, stated that differences in testing "produce markedly varied results and make it virtually impossible to compare the results obtained by different companies . . . Uniform testing . . . would serve to prevent deception of the public[.]"[66] The FTC eventually did establish a uniform test in 1967.[67]

C. The 1964 TRR Proposal, Cigarette Advertising Code, and 1965 FCLAA

79. The FTC always has been sensitive to information about tobacco products generated by the scientific and public health communities. During the early 1960s, as evidence of smoking's hazardous health effects continued to mount, the FTC sought advice from the U.S. Public Health Service useful in establishing policies toward cigarette labeling and advertising. This request by the FTC was one of the factors that led the Surgeon General to release Smoking and Health: Report of the Advisory Committee to the Surgeon General on January 11, 1964.[68] The report concludes, "Cigarette smoking is a health hazard of sufficient importance in the

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65 Federal Trade Commission, *FTC Seeks Uniform Testing of Cigarette Smoke*, Federal Trade Commission Press Release (Feb. 16, 1958) *(Exh. 104)*.

66 *Id.*

67 *See infra*, Section VII.B.

68 *TRR 1964 supra* note 22, at 2 *(Exh. 120)*. The report citation is U.S. Department of Health, Education, and Welfare, Public Health Service, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, Publication No. 1103 (Jan. 1964) *(Exh. 191)*.

United States to warrant appropriate remedial action."[69]

80. One week later, on January 17, 1964, in response to this call for "remedial action," the FTC proposed a TRR that, among other things, (a) required a health warning on every pack of cigarettes and all cigarette advertisements; (b) banned health claims of any kind in cigarette advertisements, unless the advertiser had substantial and reliable evidence to prove such claims before making them; and (c) banned claims about the quantity of substances such as tar and nicotine in cigarette smoke which had not been verified in accordance with a uniform and reliable testing procedure approved by the Commission.[70]

81. In discussing its motivation for the proposed TRR, the FTC emphasized that because cigarettes are a very dangerous product, an affirmative disclosure of the danger is required in order to be in compliance with the general rule against unfair or deceptive advertising. The agency reasoned,

> if the dangers to health involved in cigarette smoking are so serious that knowledge and appreciation of them would be a material factor in influencing a person's decision whether, or how much, to smoke cigarettes or a particular brand of

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69 *Smoking and Health*, *supra* note 68, at 33 (*Exh. 191*).

70 *TRR 1964*, *supra* note 22, at 4-5, 22 (*Exh. 120*); *Advertising and Labeling of Cigarettes - Notice of Rule-Making Proceeding for Establishment of Trade Regulation Rules*, 29 Fed. Reg. 530, 531-32 (Jan. 22, 1964) (*Exh. 001*).

> cigarettes, affirmative disclosure of these dangers in cigarette advertising may be a necessary antidote to advertising which, by design or otherwise, may tend to cloud or obscure public consciousness of the health perils of cigarette smoking.[71]

82. Rule 2 in the proposed TRR allowed explicit or implicit health claims, but only if substantiated with substantial and reliable evidence. The FTC said the following about its motivation for this rule:

> [I]t is the Federal Trade Commission's policy to encourage the development of less hazardous cigarettes. Rule 2 accordingly permits the making of substantiated factual claims respecting the health consequences of cigarette smoking, but only under certain conditions which are necessary to protect the consumer from being misled.[72]

83. By the time it proposed the 1964 TRR, the FTC already had under consideration the establishment of a standardized test for tar and nicotine.[73] Rule 3 of the proposed TRR reflected this deliberation by mentioning "a uniform and reliable testing procedure approved by the Federal Trade Commission." However, at this time, the FTC did not believe there was sufficient scientific evidence to conclude that ingestion of less tar reduces the health hazard of smoking. Therefore, in its comments on

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71 29 Fed. Reg. at 531 *(Exh. 001)*.

72 *Id.* at 532.

73 *See infra* Section VII.B on the standardized test.

Rule 3, the FTC made clear that even if a cigarette manufacturer measured tar yield using the FTC approved method, claims about tar quantity would still have to be accompanied by a disclosure that there is no scientific proof that a reduction in tar reduces health risk.[74]

84. As an alternative to the TRR, the cigarette industry proposed and implemented a Cigarette Advertising Code designed to establish uniform standards for cigarette advertising and provide a means whereby compliance with the Code could be ascertained promptly and fairly on a consistent basis.[75] The Code contained essentially all the provisions of the TRR except for the health warning requirement.[76] It created an Independent organization under a "Code Administrator" that would prescreen and give "clearance" to cigarette advertising, and no member of the organization could be connected to the tobacco industry. Advertising could not be aimed at young people, and its content was otherwise restricted. For example, unsubstantiated health claims could not be made.[77]

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[74] *Id.*

[75] Hill and Knowlton, Inc., *Cigarette Manufacturers Announce Advertising Code* (Apr. 28, 1964) *(Exh. 127)*; *Cigarette Advertising Code* (Robert B. Meyner, Administrator, Cigarette Advertising Code, Inc.) *(Exh. 009)*.

[76] The FTC stated that the Cigarette Advertising Code was an acceptable substitute for Rules 2 and 3 of the proposed TRR (that is, rules which apply to advertising). *See TRR 1964*, *supra* note 22, at 124-25 *(Exh. 120)*.

[77] *Cigarette Advertising Code*, *supra* note 75 *(Exh. 009)*.

The Code was presented to Congress[78] and went into effect in January 1965.[79]

85. Prior to that, the FTC promulgated its TRR in June 1964 and announced that it would go in effect on January 1, 1965.[80] However, following the enactment of the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), the FTC vacated the TRR.[81]

86. Congress and the President enacted the FCLAA in July 1965. Its purpose was to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and heatlh[.]"[82] The law required manufacturers to place a health warning on packs of their cigarettes, using the phrase, "Caution: Cigarette Smoking May Be

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78 *Cigarette Labeling and Advertising, Hearings Before the Committee on Interstate and Foreign Commerce, H.R.*, 88th Cong., 2d Sess. 141-44 (June 23-25, 29, July 2, 1964) (Statements of Bowman Gray, Chairman of the Board of Directors, R.J. Reynolds Tobacco Co. and Henry Ramm, Vice President and General Counsel) *(Exh. 013)*.

79 *Cigaret Ad Code Goes into Effect Jan. 1: Meyner*, Advertising Age, Dec. 21, 1964, at 1 *(Exh. 007)*.

80 *Part 408 – Unfair or Deceptive Advertising and Labeling of Cigarettes In Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8325 (July 2, 1964) *(Exh. 164)*.

81 Federal Trade Commission, Federal Trade Commission News Release (July 28, 1965) *(Exh. 096)*. *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513-14 (1992) (postponing enforcing the TRR due to a congressional request) *(Exh. 020)*.

82 *Federal Cigarette Labeling and Advertising Act*, § 2, Pub. L No. 89-92, 79 Stat 282, 283 (1965) *(Exh. 085)* (current version at 15 U.S.C.A. § 1333 (West 2005) *(Exh. 323)*).

Hazardous To Your Health."[83] While this law preempted the warning message requirements in the TRR,[84] it did not change in any way the FTC's general authority to regulate cigarette advertising.[85] The FCLAA also explicitly gave the FTC the responsibility to report regularly to Congress "concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.[86] Subsequent amendments to the FCLAA also banned cigarette advertising in the broadcast media and changed the message on the warning label,[87] both of which the FTC had recommended.[88]

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83 *Id.* § 4.

84 *Id.* § 5; *see also* Federal Trade Commission News Release (July 28, 1965), supra note 81. *(Exh. 096)*; *Part 408 – Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking – Vacation of Warning Requirements in Trade Regulation Rules Concerning Advertising and Labeling of Cigarettes*, 30 Fed. Reg. 9484, 9485 (July 29, 1965) (vacating the warning label and advertising requirements of the TRR) *(Exh. 165)*.

85 *Federal Cigarette Labeling and Advertising Act* § 5 (stating that, other than what is specifically stated in this Act, "nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes[.]") *(Exh. 085)*.

86 *Id.*

87 *Public Health Cigarette Smoking Act of 1969*, §§ 4, 6, Pub. L. 91-222, 84 Stat. 87, 89 (1970) *(Exh. 171)*; *Comprehensive Smoking Education Act*, § 4, Pub. L. 98-474, 98 Stat. 2000,

87. While the TRR and the FCLAA were being considered, both the FTC and the Surgeon General opposed legislation that would have mandated the disclosure of tar and nicotine yield information on cigarette packages. They stated that because there was no scientific consensus on safe levels of tar and nicotine yields, such disclosure could be misleading to consumers.[89] In accordance with this view, both the 1964 TRR and the subsequent Cigarette Advertising Code made it very difficult for cigarette companies to disclose tar and nicotine yield information in their cigarette advertising.[90]

[Footnote continued from previous page]

2201-03 (1984) *(Exh. 025)*. *See generally*, 15 U.S.CA §§ 1331-41 (West 2005).

[88] Federal Trade Commission, Report to Congress Pursuant to The Federal Cigarette Labeling and Advertising Act, at 31 (June 30, 1968) (recommending banning cigarette advertising on television and radio) *(Exh. 112)*; Federal Trade Commission, Report to Congress Pursuant to The Federal Cigarette Labeling and Advertising Act, at 30 (June 30, 1967) (recommending making changes to warning label) *(Exh. 113)*; Matthew L. Myers et al., Staff Report on the Cigarette Advertising Investigation, at 5-31 to 5-33 (May 1981) (recommending rotational warning messages) *(Exh. 157)*. [hereinafter Myers]

[89] *Cigarette Labeling and Advertising, Hearings Before the Comm. on Commerce, United States Senate*, 89th Cong., 1st Sess., 34, 419 (Mar. 22-25, 29-30, Apr. 1, 2, 1965) *(Exh. 012)*.

[90] *TRR 1964*, *supra* note 22, at 5 *(Exh. 120)*; *Cigarette Advertising Code*, *supra* note 75, at 6-7 *(Exh. 009)*. *See also*, Correspondence from Robert B. Meyner, Administrator of Cigarette Advertising Code, Inc., to FTC Chairman Paul Rand Dixon, Apr. 21, 1966 *(Exh. 071)*.

VII. CHANGE OF FTC TAR AND NICOTINE ADVERTISING POLICY AND IMPLEMENTATION OF THE FTC METHOD

A. Policy Reversal Regarding Tar and Nicotine Yields in Cigarette Advertising

88. As research and discussions about tar and nicotine continued in the 1960s, the public health community eventually developed a consensus that lowering the tar and nicotine yields of cigarettes was a worthwhile goal. As the result of this emerging consensus, many in the scientific community recommended that the FTC lift its ban on the disclosure of tar and nicotine content in cigarette advertising and marketing.[91] For example:

> The National Interagency Council on Smoking and Health hopes that . . . [steps will be taken] to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages.[92]

And,

> I am writing to express the conviction of the American Cancer Society that the Federal Trade Commission can render a major service to the health of the public by

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91 *See, e.g.*, Dixon Magnuson, *supra* note 58, at 6-13 *(Exh. 066)*.

92 *Id.* at 8 (quoting The National Interagency Council on Smoking and Health when it held a meeting in Washington on January 13, 1966).

> rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes . . . There is clear evidence also that the tars in cigarette smoke [cause cancer in animals] and it has long been recognized that nicotine is one of the most powerful poisons known . . . [T]he consumer must have information as to the tar and nicotine content of cigarettes in order to make an intelligent decision as to which brands to smoke.[93]

89. The FTC responded to the public health community by reversing its ban of tar and nicotine yields in advertising in March 1966.[94] The FTC stated that it would allow factual numerical statements about tar and nicotine yields as long as no collateral representations were made about

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93 *Id.* at 8-9 (quoting W.T. Robbins, M.D., as representative for the American College Health Association on the National Interagency Council on Smoking and Health, Mar. 23, 1966). *See also* Correspondence from E. Cuyler Hammond, Vice President of Epidemiology & Statistics of American Cancer Society, to FTC Chairman Miles Kirkpatrick Oct. 29, 1970 (stating that The American Cancer Society is in favor of requiring the "the industry to list on packages and in advertising the tar and nicotine content in cigarettes.") *(Exh. 038)*.

94 Correspondence from Joseph W. Shea, Secretary of the FTC, to Philip Morris, Inc., Mar. 24, 1966 *(Exh. 054)*; Federal Trade Commission, Federal Trade Commission News Release (Mar. 25, 1966) *(Exh. 097)*. *See also* Dixon Magnuson, *supra* note 58, at 6-7 *(Exh. 066)*.

reductions in health risks *and* factual statements were supported by the Cambridge Filter Method:[95]

> On the basis of the facts now available to [the FTC], the Commission has determined that a factual statement of tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation of [the 1955 Cigarette Advertising Guides], or of any of the provisions of law administered by the Commission so long as (1) no collateral representations (other than factual statement of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method . . . It is the Commission's position that it is in the public interest to promote the dissemination of truthful information concerning cigarettes which may be

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95 Correspondence from Shea to Philip Morris, *supra* note 94 *(Exh. 054)*. The Cambridge Filter Method is a testing method for tar and nicotine yields. *See infra* Section VII.B. After this policy change, cigarette manufacturers eventually withdrew their participation in the Cigarette Advertising Code so that they could advertise tar and nicotine yields. The Code officially ended in July 1970. *See* John D. Morris, *Cigarette Code on Ads Dropped*, New York Times, Nov. 13, 1970, at 17 *(Exh. 149)*.

> material and desired by the consuming public.[96]
>
> In other words, the Commission is of the opinion that testimony and other pertinent evidence available today, with the caution presently appearing on the packages, would not support the contention that a truthful disclosure of tars and nicotine present in the mainstream smoke of cigarettes is *per se* false and misleading.[97]

90. As will be discussed below, this 1966 FTC policy reversal was only the first step taken by the FTC to help inform consumers about machine-measured tar and nicotine yields of cigarettes. Soon after, the FTC determined that tar and nicotine yield information was material and should be included in cigarette advertising.[98] Furthermore, other representations of tar and nicotine were determined by the FTC to be permitted, so long as the claims were substantiated by FTC Method results.[99]

B. Implementation of a Uniform Test – the "FTC Method"

91. An indispensable part of FTC's policy reversal regarding the advertising of tar and nicotine yields was its selection of a uniform testing method. Without a standardized test to rely on, the FTC

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96 Federal Trade Commission News Release (Mar. 25, 1966), *supra* note 94 *(Exh. 097)*.

97 Dixon Magnuson, *supra* note 58, at 13 (emphasis in original) *(Exh. 066)*.

98 *See supra* Section VII.C.

99 *See supra* Section IX.A.

would have serious difficulties verifying any tar and nicotine claims made by cigarette companies, just as it did during the tar derby in the late 1950s. The lack of a uniform test was a major reason for the FTC's decision to ban tar and nicotine advertising in late 1959.

92. The idea of establishing a uniform test started in the 1950s when the FTC deemed test results based on different testing methodologies to be deceptive and unfair to consumers.[100] Having a uniform test would therefore help fulfill the FTC's general mandate to prevent deceptive and unfair business practices. In addition, the FTC believed that giving consumers reliable tar and nicotine numbers was particularly important because it would spur consumer demand for lower-yield cigarettes, thereby prompting cigarette manufacturers to develop cigarettes with less tar and nicotine content.[101] Members of Congress also were aware of the connection between disclosure of tar and nicotine yields in cigarette advertising and low-yield cigarette production, and they also believed

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100 *See generally supra* Section VI.B.

101 Report to Congress 1968, *supra* note 88, at 17 (stating that, "based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes." *(Exh. 112)*. *See also* FTC comment on Rule 2 of the 1964 TRR in para. 82.

encouraging the production of low-yield cigarettes to be desirable.[102]

93. The FTC contacted Dr. Clyde L. Ogg, who was a referee on tobacco for the Association of Official Analytical Chemists, and asked him to work with tobacco companies to come up with a testing method for tar and nicotine.[103] By 1966, the FTC had concluded that some version of the Cambridge Fitter Method, developed by Dr. Ogg, would be the appropriate basis of a uniform test for tar and nicotine yields in cigarettes.[104] The FTC asked for written comments and held a public hearing on the Cambridge Filter Method.[105] Relying upon written comments and oral testimony, the FTC adopted a

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[102] *Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17270, 17271, 17275 (July 27, 1966) (Sens. Magnuson and Kennedy) *(Exh. 183)*. In May 1966, Sen. Magnuson made a personal request to the Secretary of Health, Education and Welfare and to the FTC to test "the major cigarette brands presently on the market for tar and nicotine content." The FTC subsequently agreed to this request. *Id.* at 17274-75.

[103] *In the Matter of: Methods to be Employed in Determining Tar and Nicotine Content of Cigarettes*, Official Transcript of Proceedings Before the Federal Trade Commission, at 36-37 (Nov. 30, 1966) (statement of Clyde L. Ogg) *(Exh. 144)*.

[104] Federal Trade Commission News Release (Mar. 25, 1966), *supra* note 94 (Exh. 097). The Cambridge Filter Method is described in C.L. Ogg, *Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke*, 47 Journal of the Association of Official Agricultural Chemists 356 (1964) *(Exh. 005)*.

[105] *In the Matter of: Methods to be Employed in Determining Tar and Nicotine Content of Cigarettes*, *supra* note 103 *(Exh. 144)*. *See also, Cigarette and Related Matters, Methods To Be Employed in determining Tar and Nicotine Content: Notice of Public Hearing*, 31 Fed. Reg. 14,278 (Nov. 4, 1966) *(Exh. 010)*.

modified version of the Cambridge Filter Method, which became known as the "FTC Method" as its protocol.[106] The FTC opened its own testing laboratory in May 1967, and started formal testing on August 1, 1967.[107]

94. Both of these actions – choosing a uniform testing method and the establishment of a testing laboratory – were highly unusual for the FTC, as product testing is customarily the province of the private sector. C. Lee Peeler, currently Deputy Director of the Bureau of Consumer Protection of the FTC,[108] has testified,

> the . . . operation of the cigarette lab was really something that was unique and . . .

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106 Federal Trade Commission, *FTC to Begin Cigarette Testing*, Federal Trade Commission News Release (Aug. 1, 1967) *(Exh. 107)*; *Cigarettes, Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11178 (Aug. 1, 1967) *(Exh. 018)*. The final test protocol specifies issues such as butt length of cigarettes, number of cigarettes tested per brand, random selection, and reporting methods.

107 Statement of Federal Trade Commission Chairman Paul Rand Dixon on Activation of Cigarette Testing Laboratory (May 15, 1967) *(Exh. 181)*; *FTC to Begin Cigarette Testing*, *supra* note 106 *(Exh. 107)*. In July 1980, the FTC added testing for carbon monoxide as well. *See Cigarette and Related Matters; Carbon Monoxide, "Tar" and Nicotine Content of Cigarette Smoke: Description of New Machine and Methods to be Used in Testing*, 45 Fed. Reg. 46483 (July 10, 1980) *(Exh. 011)*.

108 Peeler was the Director of the Division of Advertising Practices between October 1985 and August 2001. *See* Deposition of C. Lee Peeler, Vol. I, at 12-13, *United States v. Philip Morris, Inc.*, Civil Action No. 99-CV-02496 (GK) (D.D.C.) (July 30, 2002) *(Exh. 079)*. This division is responsible for issues related to cigarette advertising, *see* http://www.ftc.gov/bcp/bcpap.htm *(Exh. 198)*.

> was designed to prevent a certain type of deception but . . . as we said when we closed the lab it was unusual for a program like that to be maintained by the Commission.[109]

95. The FTC first published results under its new testing methodology and testing lab in November 1967.[110] By the following summer, 127 products had been tested – virtually all of those being sold in the U.S. at that time.[111] Subsequently, testing results using the FTC Method have been published almost annually.[112] Since 1970, the FTC

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109 Deposition of C. Lee Peeler, Vol. I, *supra* anote 108 at 96 *(Exh. 079)*.

110 Federal Trade Commission, *Report of Tar and Nicotine Content of the Smoke of 59 Varieties of Cigarettes* (Nov. 20, 1967) *(Exh. 109)*.

111 Federal Trade Commission, *Report of Tar and Nicotine Content of the Smoke of 127 Varieties of Cigarettes* (June 11, 1968) *(Exh. 110)*.

112 The last published report was in 2000. However, the FTC does have more recent results. *See, e.g.*, Correspondence from Joan E. Fina, Attorney at the FTC, regarding FOIA-2004-00020 Cigarette Tar, Nicotine, & Carbon Monoxide numbers for 1999-2002, Oct. 2003, at http:/vww.ftc.gov/foia/cigarette2004-00020.pdf *(Exh. 049)*. Moreover, the Commission still uses compulsory process to compel the cigarette manufacturers to test their products using the FTC Method and to report those results to the agency. *See, e.g.*, Correspondence from Michael Ostheimer, FTC Attorney, to Denise F. Keane, Senior Vice President and General Counsel of Philip Morris, Inc., Oct. 18, 2002 *(Exh. 062)*; Correspondence from Michael Osthelmer, FTC Attorney, to Denise F. Keane, Senior Vice President and General Counsel of Philip Morris, Inc., May 6, 2003 *(Exh. 063)*; Correspondence from Michael Osthelmer, FTC Attorney, to G. Penn Holsenbeck, Vice President, Associate General Counsel

has compelled cigarette manufacturers to use the results of these tests in their advertising and marketing instead of results from any other testing protocol.[113] Although the FTC closed its testing lab in 1987, the tests using the same FTC Method continue under close FTC supervision at the Tobacco Institute Testing Laboratory.[114]

96. Reversing its policy on tar and nicotine disclosure, selecting a standard tar and nicotine testing protocol, and establishing a tar and nicotine testing facility all were key elements of the FTC's cigarette advertising regulatory program. The FTC demonstrated that it was very serious about making sure consumers had reliable and comparable information on tar and nicotine yields. The FTC considered it very important that smokers who cannot or will not to quit have a basis for choosing low-tar cigarettes, and that this would prompt cigarette manufacturers to produce cigarettes lower in tar and nicotine.

[Footnote continued from previous page]

and Corporate Secretary of Altria Group, Inc., Aug. 13, 2004 *(Exh. 064)*.

[113] *See* para. 101.

[114] Correspondence from John P. Rupp, Attorney for cigarette manufacturers, to Judith P. Wilkenfeld, Program Director of Cigarette Advertising and Testing at FTC, June 30, 1987 *(Exh. 052)*. The Tobacco Institute Testing Laboratory is now called the Tobacco Industry Testing Laboratory. *See* Federal Trade Commission, *"Tar", Nicotine, and Carbon Monoxide of the Smoke of 1262 Varieties of Domestic Cigarettes For the Year 1996*, at 5, n. 6 (1999) *(Exh. 092)*.

C. The Cigarette Manufacturers' Agreement to Disclose Tar and Nicotine in Cigarette Advertising

97. The aforementioned FCLAA of 1965 barred the FTC and states from requiring specific disclosures in cigarette advertising until July 1, 1969.[115] *Under the Public Health Cigarette Smoking Act of 1969*, Congress broadened its restrictions on the state regulation of cigarette advertising, stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."[116] At the same time, the statute states that, except for limitations mentioned elsewhere within it, nothing in the Act should be construed to "limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes."[117] The U.S. Supreme Court held that, compared to the 1965 FCLAA, the 1969 Act has a broader preemptive effect on state law.[118] In another case, the Supreme Court stated, in reference to the 1969 Act, "to the extent that Congress contemplated

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115 *Federal Cigarette Labeling and Advertising Act* § 10 *(Exh. 085)*.

116 *Public Health Cigarette Smoking Act of 1969* § 5(b) *(Exh. 171)*.

117 *Id.* § 7(b).

118 *Cipollone*, 505 U.S. at 520 *(Exh. 020)*.

additional targeted regulation of cigarette advertising, it vested that authority in the FTC."[119]

98. Furthermore, and importantly, the statute also left open the possibility that the FTC could act on a then-pending trade regulation rule proceeding on cigarette advertising after July 1, 1971.[120] Thus, on August 8, 1970, the FTC formally proposed a TRR that would force all cigarette manufacturers to "disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties [of cigarettes] . . . based on the most recently published Federal Trade Commission test results."[121] That is, results based on the FTC Method.

99. On August 20, 1970, during a Congressional hearing, Senator Warren Magnuson advocated that an industry-wide agreement instead of a TRR or legislation would be the appropriate way to achieve tar and nicotine disclosure in cigarette advertising. FTC Chairman-designate Kirkpatrick agreed.[122]

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[119] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) *(Exh. 155)*.

[120] *Public Health Cigarette Smoking Act of 1969* § 7(a) *(Exh. 171)*.

[121] *Advertising of Cigarettes, Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule*, 35 Fed. Reg. 12671 (Aug. 8, 1970) (Exh, 002).

[122] *Nomination — 1970: Hearing Before the Committee on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, United States Senate*, 91st Cong., 2d Sess., at 172 (Aug. 20, 1970) (Exh. 162).

> Magnuson: I wanted to ask you if [the proposed TRR on tar and nicotine listing in advertising] can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?
>
> Kirkpatrick: In my judgment; yes, sir.[123]
>
> . . .
>
> Magnuson: [I]t seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.
>
> Kirkpatrick: It would be a highly desirable arrangement, sir; indeed, yes.[124]

100. On October 1, 1970, the FTC announced that it had directed the tobacco industry to submit a plan describing how it would agree to disclose tar and nicotine yields in cigarette advertising.

> The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate, the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the

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123 *Id.*

124 *Id.*

industry could be put into effect immediately.[125]

101. On October 23, 1970, eight cigarette manufacturers submitted such a proposal to the FTC.[126] The FTC rejected that proposal and threatened to continue the rulemaking process.[127] The cigarette industry then made further concessions, and on December 22, 1970, the FTC accepted the amended plan.[128] The FTC suspended the TRR proceeding indefinitely, thereby giving the tobacco industry an opportunity to implement the agreement. However, the FTC retained the unconditional right to reschedule the TRR

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[125] Federal Trade Commission, *FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content*, Federal Trade Commission News (Oct. 1, 1970) *(Exh. 100)*.

[126] Correspondence from Horace R. Komegay, President and Executive Director of Tobacco Institute, to Federal Trade Commission, Oct. 23, 1970 *(Exh. 046)*. The eight cigarette manufacturers were responsible for nearly all of the U.S. cigarette advertisements. *See* Correspondence from Horace R. Komegay, President and Executive Director of Tobacco Institute, to FTC Chairman Miles W. Kirkpatrick, Sept. 11, 1970 *(Exh. 047)*.

[127] Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection to Commission, Nov. 9, 1970 *(Exh. 029)*; Correspondence from FTC Chairman Miles W. Kirkpatrick to Commission, Nov. 24, 1970 *(Exh. 044)*.

[128] Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission, Dec. 21, 1970 *(Exh. 030)*; Correspondence from Joseph W. Shea, Secretary, to General Counsel, Director of Bureau of Consumer Protection, Director of Public Information, and Legal and Public Records, Dec. 22, 1970 *(Exh. 056)*.

proceeding if it deemed such action would be necessary to protect the public in the future.[129]

102. The history of the FTC's compelling cigarette manufacturers to disclose tar and nicotine yields as measured by the FTC Method shows that the agency was actively regulating the industry with respect to tar and nicotine disclosure in cigarette advertising. In its 1970 and 1971 *Report to Congress*, under the section titled "Regulatory Activity," the FTC detailed for Congress the events that led to the disclosure agreement and the subsequent compliance by cigarette manufacturers.[130]

VIII. REASSESSMENT OF THE FTC METHOD

A. Limitations of the FTC Method and the Importance of Uniformity

103. From the very beginning, the FTC recognized certain limitations inherent to the FTC Method.[131] The FTC stated that people smoke

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[129] Federal Trade Commission, *FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content In Cigarette Advertising After Industry Amends Voluntary Plan*, Federal Trade Commission News (Dec. 23, 1970) *(Exh. 106)*.

[130] Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 17-20 (Dec. 31, 1970) *(Exh. 114)*; Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, at 13-14 (Dec. 31, 1971) *(Exh. 115)*.

[131] Cigarette manufacturers also pointed out the shortcomings of the FTC Method to the FTC. *See* The American Tobacco Co. et al., *Before the Federal Trade Commission, Cigarettes and Related Matters –Methods To Be Employed In Determining Tar and Nicotine Content, Supplementary Observations Following November 30, 1966 Hearing*, at 1-3 (Dec. 20, 1966) (Five

differently in different situations, and that the FTC Method

> does not and cannot measure these many variations in human smoking habits . . . Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.[132]

Therefore,

> the testing method should not be considered defective because . . . it did not purport to duplicate an "average" smoker.[133]

104. The FTC also recognized that other testing methods could have been chosen as the standard test

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[Footnote continued from previous page]

cigarette manufacturers informed the FTC that its method of measuring tar and nicotine "does not measure the *volume* or smoke – or the [particulate matter] or nicotine in the volume of smoke – that any *human being* will draw from smoking any particular cigarette.") (emphasis original) *(Exh. 188)*.

[132] FTC to Begin Cigarette Testing, *supra* note 106, at 2 *(Exh. 107)*.

[133] *Id. See also, Remarks of Harold C. Pillsbury, Contractor to the Federal Trade Commission, before the National Cancer Institute Conference on the FTC Cigarette Test Method*, 1994 WL 698679 (F.T.C.) *(Exh. 174)*. In his deposition, Peeler was asked – "Q: So the FTC wasn't fooled into adopting the FTC test method based on any belief that the FTC test method results were predictive of tar and nicotine delivery to humans during smoking, was it? . . . A: No." Deposition of C. Lee Peeler, Vol. I, supra note 108, at 244 *(Exh. 079)*.

instead of the FTC Method – there is "no one method [that] can be said to be either 'right' or 'wrong.'"[134] The goal, according to the FTC, was to have "a reasonable standardized method [that was] capable of being presented to the public in a manner that is readily understandable."[135] Furthermore, the FTC stated, "the public interest *requires* that all test results presented to the public be based on a *uniform method* . . . Use of more than one testing method would produce different results which could only serve to confuse or mislead the public."[136]

105. The FTC demonstrated its emphasis on the importance of uniformity in the testing of cigarettes and in reporting the results when it issued an Advisory Opinion in 1978 to Lorillard Tobacco Company, stating that it cannot advertise a tar value *higher* than the FTC number.[137]

> Under the agreement submitted to the Commission by Lorillard and seven other cigarette companies, dated December 17, 1970, cigarette advertisements *must include tar and nicotine data from Commission test results most recently*

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134 FTC to Begin Cigarette Testing, *supra* note 106, at 1 *(Exh. 107)*. *But see* Harold C. Pillsbury, *supra* note 133 (stating that in 1967, the FTC Method "was clearly superior to all the other methods.") *(Exh. 174)*.

135 FTC to Begin Cigarette Testing, *supra* note 106, at 1 *(Exh. 107)*.

136 *Id.* at 1-2 (emphasis added).

137 *Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved*, 92 F.T.C. 1035 (1978) *(Exh. 169)*.

> *published in the Federal Register* . . . Lorillard's proposed advertisements would deviate from this industry agreement[.][138]
>
> In the Commission's view, it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure . . . consumer confusion might be generated . . . the Commission could not condone the practice of utilizing a higher headlined tar figure in the voluntary disclosure and labeling the figures "By FTC Method," since the figures would not actually be the result of the FTC method.[139]

B. Low-Tar Cigarette Designs and the FTC Method

106. One common method by which cigarette manufacturers lower the tar and nicotine yields of cigarettes is by creating vent-holes in cigarettes to dilute the smoke with outside air. The FTC was aware of this low-tar design feature before "lights" cigarettes were introduced in 1971. Harold C. Pillsbury, who was in charge of the FTC testing lab, published an article in May, 1969, stating that, "[c]igarettes manufactured with air vent holes must be inserted carefully to prevent covering holes while smoking [in the smoking test machine]."[140]

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138 *Id.* (emphasis added).

139 *Id.*

140 H. C. Pillsbury et. al., *Tar and Nicotine in Cigarette Smoke*, 52 Journal of the Association of Official Analytical Chemists 458, 460 (May 1969) *(Exh. 125)*.

107. In 1977, Lorillard developed a new ventilated filtration system for its *Kent Golden Lights* cigarettes and asked the FTC to vary the way it tests cigarettes to adapt to air dilution systems that employ invisible air vent holes.[141] More specifically, Lorillard asked the FTC to change the cigarette insertion depth from the standard 11 mm. to 5 mm. when testing *Kent Golden Lights* so that the cigarette holders of the testing machine would not block the cigarette's ventilated filtration system.[142] The FTC requested comments from the public generally and specifically from the seven major cigarette companies and from 78 individuals whom it thought might have important perspectives on the matter.[143]

108. In the end, the FTC decided to leave the insertion depth unchanged at 11 mm. It first reiterated the fact that

> [t]he purpose of testing is not to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to

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141 *Cigarette Testing, Tar and Nicotine Content Results*, 42 Fed. Reg. 21155 (Apr. 25, 1977) *(Exh. 014)*; Correspondence from Michael I. Gastman, Associate General Counsel of Lorillard, to Russell Hatchl, Attorney at the FTC, at 2 July 29, 1977 (stating that "Filter technology has continued its advance by the development of air dilution systems that do not employ visible air vent holes. Lorillard believes that the present inserting depth standard does not provide the flexibility with which to deal with this technology advance.") *(Exh. 061)*.

142 42 Fed. Reg. at 21155 *(Exh. 014)*.

143 *Cigarette Advertising and Other Promotional Practices, Announcement of Decision*, 43 Fed. Reg. 11856 (Mar. 22, 1978) *(Exh. 008)*.

> determine the amount of 'tar' and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.[144]

109. The FTC then stated that a human smoker could block either more or less ventilation areas than the testing machine. Therefore, "in the absence of information indicating that a new inserting depth would be more consistent with the manner in which smokers insert cigarette in actual use[,]" the FTC chose not to change the insertion depth in order to preserve continuity with previous test results.[145]

110. There is no doubt that the FTC was aware of the existences of different types of ventilation systems in cigarettes, including invisible ones. This knowledge, however, did not cause the FTC to change its testing method to adapt to different fitter technologies.[146] The FTC believed that applying the FTC Method uniformly to all cigarettes and ensuring continuity of test results over time were important to the credibility and usefulness of its tar and nicotine testing program.

C. Barclay Challenge to the FTC Method

111. A serious challenge to the FTC Method came in 1981 when R.J. Reynolds alleged to the FTC that the latter's testing method underestimated the tar and nicotine yields of Brown & Williamson's *Barclay* cigarettes and argued that a different

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144 *Id.* at 11856.

145 *Id.* at 11857.

146 *See also* Section VIII.C.

cigarette holder should be used in the FTC testing machine to correct this problem.[147] The FTC informed other cigarette manufacturers of R.J. Reynolds' allegations and asked them to comment.[148]

112. Philip Morris conducted extensive studies and disclosed the results to the FTC.[149] Philip Morris also disclosed to the FTC its Puff Parameter Analyzer (PPA), a device that measures variable puffing profiles, yielding information that can be used to program a smoking machine in a way that more closely mimics human smoking behavior.[150] After testing, Philip Morris agreed with R.J.

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147 Correspondence from Matthew L. Myers, Attorney in FTC Division of Advertising Practices, to G. Carlton Adkins, Assistant General Counsel of Philip Morris, June 11, 1981 *(Exh. 060)*.

148 *See, e.g., Id.*

149 *See, e.g., Memorandum of Philip Morris Incorporated to the Federal Trade Commission in Reply to Questions Raise by the Commission's Staff In Connection with the Investigation of the Barclay Filter* (Feb. 16, 1982) (stating that an independent testing organization, United States Testing Company, Inc., had conducted a cigarette dilution study involving 500 smokers; and it had concluded that the Barclay filter was "duplicitous in its design and operation.") *(Exh. 160)*

150 *Id.*; Correspondence from Hadrian R. Katz, Outside Counsel of Philip Morris, to Matthew L. Myers, attorney at the FTC Division of Advertising Practices, Aug. 31, 1981 *(Exh. 045)*; United States Testing Company, Inc., Consumer Research Division, *In Vivo Air Dilution Test of Ventilated Cigarettes* (Feb. 1982) *(Exh. 193)*. *See also* Testimony of Barbro Goodman at 264, *Miles v. Philip Morris Co., Inc.*, Case No. 00-L-0112, Vol. XIX(b), Afternoon Sess., 3d Cir. Ct. Ill. (Feb. 19, 2003) *(Exh. 184)*; Deposition of C. Lee Peeler, Vol. I, *supra* note 108, at 314-21 *(Exh. 079)*.

Reynolds that the *Barclay* filter had a unique channel design that reduced tar yield in FTC machine testing, but not when smoked by humans.[151] Philip Morris also warned that, unless the FTC were to take immediate action, other cigarette manufactures would likely use a similar filter in their cigarettes and "[t]his development [would] destroy the trustworthiness and credibility of the Commission's long-standing and heretofore successful 'tar' testing program."[152] Other cigarette manufacturers also commented on this issue, but no consensus emerged.[153]

113. As a part of its investigation of R.J. Reynolds' claim, the FTC consulted three outside independent experts to review the scientific studies on *Barclay* submitted by cigarette manufacturers.[154]

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[151] Correspondence from Abe Krash, Outside Counsel of Philip Morris, to FTC Chairman David Clanton, July 10, 1981 *(Exh. 027)*; Correspondence from Abe Krash et al., Outside Counsel of Philip Morris, to James H. Sneed, Director of FTC Bureau of Consumer Protection, July 10, 1981 *(Exh. 026)*.

[152] Correspondence from Abe Krash to David Clanton, *supra* note 151 *(Exh. 027)*.

[153] *See, e.g.*, Correspondence from Matthew L. Myers, Acting Deputy Assistant Director of Division of Advertising Practices to Abe Krash et al, July 20, 1981 (in addition to Brown & Williamson, Liggett and Myers Tobacco Company and American Brands, Inc. opposed modifying the cigarette testing protocols) *(Exh. 059)*.

[154] *Commission Determination Re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications*, 48 Fed. Reg. 15953 (Apr. 13, 1983) *(Exh 023)*. The experts were Michael R. Guerin, Fred G. Bock, and Lynn T. Kozlowski. *See* Correspondence from

Their conclusions, as summarized by the FTC, were consistent with the allegations of R.J. Reynolds and Philip Morris:

> The experts, working independently, all arrived at the same ultimate conclusion – that the Barclay cigarette is not properly ranked by the FTC testing method and yields substantially more "tar" than other cigarettes rated 1 mg "tar." Each concluded that, unlike other ventilated cigarettes, the ventilating air in the Barclay is unavoidably reduced – and the "tar" delivery substantially increased – when the cigarette is mouth-smoked as compared to when it is machine-smoked. Each expert also declared that the type of reduction in ventilation that unavoidably occurs when Barclay is smoked by humans is a phenomenon unique to Barclay, distinguishing it from any increased "tar" delivery that may occur through compensatory behavior of the smoker.[155]

[Footnote continued from previous page]

Michael R. Guerin, Head of Bio/Organic Analysis Section, Analytical Chemistry Division of Oak Ridge National Laboratory, to Andrew Sacks, Attorney in FTC Division of Advertising Practices, Mar. 12, 1982 *(Exh. 065)*; Fred G. Bock, *Report on the Appropriateness of FTC Tar and Nicotine Assays of Barclay Cigarettes*, Mar. 16, 1982 *(Exh. 123)*; and Correspondence from Lynn T. Kozlowski of Addiction Research Foundation to Andrew Sacks, Attorney in FTC Division of Advertising Practices, Mar. 10, 1982 *(Exh. 058)*.

[155] Federal Trade Commission Trial Brief, at 3, *Federal Trade Commission v. Brown and Williamson Tobacco Corp.*, Civil Action No. 83-1940 (D.D.C.), Sept. 12, 1983 *(Exh. 087)*.

114. In other words, unlike other ventilated cigarettes where a smoker might or might not block vent holes (or some of them) while smoking, *Barclay* was unique in that reduced ventilation occurred inevitably except by use of the testing machine's cigarette holder.[156] In response to this finding, in June, 1982, the FTC decided that Brown & Williamson could not rely on the FTC Method to substantiate its "1 mg of tar" claim for *Barclay*, because the FTC Method could not properly measure the relative tar and nicotine yields of *Barclay* with respect to other cigarettes. The FTC consultants believed that *Barclay* should have a tar rating between 3 and 7 mg.[157]

115. The FTC also announced that it would publish a notice in the *Federal Register* about its findings, but Brown & Williamson immediately obtained a temporary restraining order to prevent the FTC from publishing such a notice or take any enforcement action against Brown & Williamson.[158] On April 1, 1983, the Sixth Circuit dissolved the injunction, and on April 13, 1983, the FTC published a notice about *Barclay* in the *Federal Register*.[159] In the notice, the FTC asked for comments on possible modifications to its test method so that it could more

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156 48 Fed. Reg. at 15954 *(Exh. 023)*.

157 Federal Trade Commission, *Barclay Cigarettes' "Tar," Nicotine and Carbon Monoxide Higher Than Measured by Current FTC Tests*, FTC News (June 25 1982) *(Exh. 094)*.

158 Brief for Plaintiff-Appellee Federal Trade Commission, at 12-13, *Federal Trade Commission v. Brown and Williamson Tobacco Corp.*, No. 83-2129 (D.C), Mar. 1984 *(Exh. 004)*.

159 *Id.* at 13-14; 48 Fed. Reg. 15953 *(Exh. 023)*.

accurately measure the tar yield of cigarettes such as Barclay.[160]

116. The FTC gave Brown & Williamson several options to revise its *Barclay* advertisements. For example, Brown & Williamson "could omit any reference to tar and nicotine in Barclay advertising, simply claim 'low tar,' or use an estimated yield of 3 mg. to 7 mg. tar."[161] But instead of following one of the FTC's suggestions, Brown & Williamson chose to continue advertising Barclay as 1 mg., except it replaced "by FTC method" with "by a recognized method used by B&W and supported by independent laboratories."[162] On July 7, 1983, the FTC filed suit against Brown & Williamson, seeking to enjoin it permanently from continuing to advertise *Barclay* as "1 mg tar".[163] The FTC believed that the "1 mg tar" claim was deceptive because the FTC Method could not measure the tar content of *Barclay* accurately, and other evidence indicated that *Barclay* was similar in yield to a 3 - 7 mg. tar cigarette.[164]

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160 48 Fed. Reg. at 15954 *(Exh. 023)*.

161 Brief for Plaintiff-Appellee Federal Trade Commission, *supra* note 158, at 15 *(Exh. 004)*.

162 *Id.*; *Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, 580 F.Supp. 981, 984 (D.D.C. 1983) *(Exh. 088)*.

163 580 F.Supp. at 982; *Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 38 (D.C. Cir. 1985) *(Exh. 089)*.

164 The FTC also sought to enjoin the advertising of *Barclay* as "99% tar free." The "99% tar free" claim was deceptive, in the FTC's view, because it implied the false message that *Barclay* was "virtually tar free." Federal Trade Commission Trial Brief, *supra* note 155, at 15 *(Exh. 087)*; 580 F. Supp. at 984 *(Exh. 088)*. However, the District Court allowed Brown & Williamson to

117. Brown & Williamson argued in response that the FTC's testing protocol was itself deceptive because it did not measure the actual amount of tar and nicotine ingested by smokers. Brown & Williamson also argued that its 1 mg. tar claim was not deceptive, because *Barclay* did deliver the same amount of tar as other 1 mg. cigarettes.[165]

118. Brown & Williamson relied on one study by Drs. Gio Gori and Cornelius Lynch and another by Dr. Neal Benowitz to show that the amount of nicotine absorbed by the body (in the form of cotinine, a metabolite of nicotine) from smoking did not vary in the same way that FTC tar and nicotine ratings varied for different cigarettes. The studies suggested that the cause of this discrepancy between FTC ratings and cotinine levels is that when smoking lower tar cigarettes, smokers compensate by changing their smoking habits. Therefore, Brown & Williamson concluded, the FTC Method was an unreliable measure of actual ingestions of tar and nicotine.[166]

119. The District Court rejected Brown & Williamson's argument that the FTC Method was deceptive:

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continue using the "99% tar free" claim, holding that the FTC did not prove its contention that "99% tar free" is perceived by consumers to mean "virtually free of tar" or to imply that *Barclay* is among the lowest-rated cigarettes. 580 F. Supp. at 990 *(Exh. 088)*.

165 580 F. Supp. at 984 *(Exh. 088)*.

166 *Id.* at 984-85.

> The evidence . . . is not sufficient to lead the Court to hold that the FTC system is meaningless or deceptive. First, the Gori study does in fact validate the FTC system at least to a certain extent by demonstrating that a positive relationship exists between nominal FTC ratings and blood levels of nicotine.[167]
>
> A second reason exists for finding that B&W has failed to demonstrate that the FTC system is not of value to consumers. The FTC system attempts only to determine how much relative tar and nicotine a smoker would get in his mouth were he to smoke two cigarettes in the same manner. B&W has utterly failed to show that the system does not do this . . . [T]he Court concludes that the system does provide legitimate comparative information to consumers who wish to reduce the health hazards the Surgeon General has concluded are inherent in cigarette smoking.[168]

120. The Court also rejected Brown & Williamson's claim that *Barclay* delivered the same amount of tar as other 1 mg. cigarettes and permanently enjoined Brown & Williamson from making "any claim of a specific milligram tar content rating, unless such rating is approved by the FTC or

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167 *Id.* (citations deleted).

168 *Id.* at 985-86.

derived using a test methodology approved by the FTC for measuring Barclay."[169]

121. Brown & Williamson later appealed. The Court of Appeals upheld the District Court's ruling that the "1 mg. tar" claim was false and deceptive.[170] However, the Court of Appeals also directed the District Court to modify the injunction so that the FTC's burden of proof in future Section 5 claims would not shift to the advertiser in cases where the advertiser wished to make claims based on a test other than the FTC Method.[171] However, the Court of Appeals suggested that such an alternative testing system and related advertising would have to "provid[e] information about competing brands prominently enough and in sufficient quantity to allow consumers to make informed decisions without confusing figures from disparate testing systems."[172] In light of these qualifying conditions, no alternative testing system has ever been approved by the FTC or by any court as an acceptable alternative to the FTC Method, nor has any cigarette manufacturer been allowed to advertise tar and nicotine yields determined by any different test method for cigarettes sold in the United States.

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169 *Id.* at 990.

170 778 F.2d at 43 *(Exh. 089)*.

171 *Id.* at 44-45 (stating that [b]ecause the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule, . . . one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." The FTC "must bear the affirmative burden of demonstrating any inadequacy, and thus deceptiveness, of the results obtained under [an alternative] system.")

172 889 F.2d at 45 *(Exh. 089)*.

122. The *Barclay* case showed that the FTC is very serious about maintaining the integrity of its tar and nicotine testing program so that consumers will not be deceived or misled. In addition, this case prompted the FTC to seek public comments on possible modifications to the FTC Method to make it better able to assess *Barclay*-type cigarettes.[173] After receiving comments, the FTC suggested specific cigarette holder modifications, new testing procedures, and asked for additional feedback from the public.[174] In the end, the FTC did not make any changes to the FTC Method because none of the other testing methodologies proved to be satisfactory.[175]

D. Compensatory Smoking Behavior

123. In addition to prompting the FTC to seek ways to improve its cigarette testing protocol, the *Barclay* case raised the issue of compensatory smoking behavior.[176] Compensatory smoking behavior refers to smokers' changing the ways they smoke when they switch from high-yield to low-yield cigarettes, for the purpose of increasing nicotine

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[173] 48 Fed. Reg. 15953 *(Exh 023)*; *Reopening of Comment Period To Consider Possible Modifications Regarding the FTC Cigarette Testing Program*, 49 Fed. Reg. 23120 (June 4, 1984) *(Exh. 175)*.

[174] *Commission Proposal To Introduce New Procedure Into the FTC Cigarette Testing Methodology and To Solicit Comments*, 50 Fed. Reg. 41589 (Oct. 11, 1985) *(Exh. 024)*.

[175] Federal Trade Commission, *"Tar," Nicotine and Carbon Monoxide of the Smoke of 370 Varieties of Domestic Cigarettes*, at 8 (1990) (Exh. 090).

[176] *See supra* para. 118.

intake.[177] Examples of compensatory smoking behavior include "inhaling more often, inhaling deeper, smoking the cigarette closer to the filter, or simply smoking more cigarettes."[178] Smokers can also increase tar and nicotine intake by accidentally or intentionally blocking the vent holes on cigarette filters, thereby reducing the dilution of smoke with outside air.[179]

124. The FTC had known about compensation long before 1980 and the *Barclay* case. In 1962, it learned about the "serious doubts" held by Assistant Surgeon General James W. Hundley:

> On the question of whether cigarettes are safer by reason of lower "tar" and nicotine content, Dr. Hundley has serious doubts. He feels that the number of cigarettes each individual smokes per day is determined by smoking until a certain level of something is reached. If this is so, cutting down on the contents of the mainstream smoke from one cigarette would be compensated for by smoking more cigarettes.[180]

125. On June 1, 1966, Public Health Service and the U.S. Surgeon General convened a one-day meeting to discuss tar and nicotine content of

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177 *See, e.g.*, Myers, *supra* note 88, at 1-54 to 1-55 *(Exh. 157)*.

178 *Id.*

179 *Id.*

180 Correspondence from Bryan H. Jacques, Director of FTC's Bureau of Industry Guidance, to The Commission, June 1, 1962 (discussing Dr. Hundley's view on filter cigarettes and low-tar cigarettes) *(Exh. 032)*.

cigarettes.[181] After the meeting, Public Health Service released a *Technical Report on "Tar" and Nicotine* which states the following conclusions:[182]

> 1. The preponderance of scientific evidence strongly suggests that the lower the "tar" and nicotine content of cigarette smoke, the less harmful would be the effect.
>
> 2. We recommend to the Surgeon General that action be encouraged which will result in the progressive reduction of the "tar" and nicotine content of cigarette smoke.[183]

126. The *Technical Report* also states that,

> This judgment was arrived at with full recognition of the following:
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> . . .
>
> The potential benefit to the individual consumer who might shift to a lower tar and nicotine cigarette would be negated if this shift were accompanied by an increase in the number of cigarette consumed, or in the length of each cigarette used. There is evidence that, by-and-large, this does not occur; that the shift to low "tar" and nicotine cigarettes tends to be accompanied by the same level of consumption or an even

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[181] Correspondence from Public Health Service, May 9, 1966 (inviting 14 scientists to attend a one-day meeting on tar-nicotine content) *(Exh. 068)*.

[182] Public Health Service, *Technical Report on "Tar" and Nicotine* (1966) *(Exh. 172)*.

[183] *Id.* at 2.

lower level rather than by an increased consumption.[184]

127. Dr. George Dobbs of the FTC was one of the invitees of this June 1 conference.[185] This conference proved that both the FTC and the Surgeon General were not only aware of the compensation issue, but were actively studying and thinking about it back in 1966.

128. The issue of compensation was also raised in November 1966 by a tobacco company when the FTC was still in the process of adopting a uniform tar and nicotine testing method. During a FTC public hearing on the FTC Method, the president of Continental Tobacco stated, "by lowering the nicotine content, the smoker may increase his consumption of cigarettes in search of nicotine satisfaction."[186]

129. Similarly in 1970, as the FTC was considering promulgating the TRR to require disclosures of tar and nicotine yields in all cigarette advertising,[187] Pittsburgh Activated Carbon pointed out to the FTC possible evidence of compensatory smoking behavior by citing data that show the number of smokers had decreased yet the number of

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184 *Id.* at 3.

185 Correspondence from Public Health Service, *supra* note 181 *(Exh. 068)*.

186 *In the Matter of: Methods to be Employed in Determining Tar and Nicotine Content of Cigarettes*, *supra* note 103, at 131 (Testimony of James K. Sorenson, President of Continental Tobacco Company of South Carolina, Inc) *(Exh. 144)*.

187 *See supra* Section VII.C.

cigarettes consumed had increased.[188] Pittsburgh Activated Carbon also cited a survey published in the *British Medical Journal* which "shows that smokers of low 'tar-nicotine' cigarettes tend both to smoke more cigarettes and to puff more often."[189]

130. In 1976, the FTC began a major study of cigarette advertising, and the results were published in the 1981 *Staff Report on the Cigarette Advertising Investigation*.[190] One of the topics discussed in the report concerned low-tar cigarettes and the issue of compensation. The FTC staff found no conclusive

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188 Statement for Delivery from Pittsburgh Activated Carbon (Division of Calgon Corp., Subsidiary of Merck & Co., Inc.) to the Federal Trade Commission, "Advertising of Cigarettes", On a Proposed Trade Regulation Rule Relating to Disclosure of Tar and Nicotine Content in All Cigarette Advertising, at 4 (Oct. 16, 1970) *(Exh. 179)*.

189 *Id.* The *British Medical Journal* article mentioned is most likely the following: Heather Ashton and D.W. Watson, *Puffing Frequency and Nicotine Intake in Cigarette Smokers*, The British Medical Journal, 679-681 (Sept. 19, 1970) (Exh. 126).

190 Myers, *supra* note 88 *(Exh. 157)*. This report was sent to Congress by vote of the Commission. The report addressed five major issues – "(1) In light of the substantial growth of medical information in recent years, what are the known health consequences of smoking? (2) What health information does cigarette advertising contain about the nature, probability and severity of the dangers of smoking? (3) Does the public already known these facts, or does a substantial portion of the population lack knowledge of or hold false beliefs about the dangers of smoking? (4) Is the current warning effective in alerting the public about the health hazards of smoking? (5) Is remedial action necessary? If so, what remedial measures, if any, are likely to result In the public being provided with sufficient health information to avoid any possible deception in cigarette advertising?" *Id.* at 7.

evidence on the extent of compensatory smoking behavior and vent-hole blocking:

> [T]here is evidence that some smokers who switch to low "tar" cigarettes compensate for the reduced level of nicotine by a variety of methods that increase their intake of "tar" and nicotine to levels substantially above those indicated by machine testing. Some smokers compensate by inhaling more often, inhaling deeper, smoking the cigarette closer to the filter, or simply smoking more cigarettes . . . Although the evidence suggesting that many smokers of low "tar" and nicotine cigarettes compensate for the reduced delivery of these constituents is not conclusive, it is also not possible to conclude at this time that compensation does not occur.[191]

131. In the 1979 Surgeon General Report on Smoking and Health, the effects of low-tar cigarettes in connection to various diseases were discussed.[192] The report also discussed the possibility of compensation.[193] The 1981 Surgeon General report on the health consequences of smoking focused entirely on issues related to low-tar cigarettes,

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191 *Id.* at 1-54 to 1-55.

192 U.S. Department of Health, Education and Welfare, *Smoking and Health, a report of the Surgeon General*, at 5-15 to 5-16 (1979) *(Exh. 190)*.

193 *Id.* at A-17 to A-24.

Including compensation.[194] The FTC cited both the 1979 and 1981 Surgeon General reports in its 1981 *Staff Report on the Cigarette Advertising Investigation*.[195]

132. When Brown & Williamson raised the issue of compensation during the *Barclay* case, the FTC sought public comments:

> Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hole blocking by smokers of different ventilated filter cigarettes? How does behaviorally reduced air dilution affect the relative rankings of various brands? Are there problems regarding compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of

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194 U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, a Report of the Surgeon General*, at 174-237 (1981) *(Exh. 189)*.

195 Myers, *supra* note 88, at 3, 1-50 *(Exh. 157)*.

> categories or "bands" or "tar" content rather than specific numerical estimates? Also, should consumers be advised that the cigarettes' actual "tar" delivery depends on how it is smoked?[196]

133. Around the same time that the FTC was soliciting public comments about compensation, the Fourth Scarborough Conference on Preventive Medicine was held in Maine, focusing on low-tar cigarettes and compensation. The discussions and conclusions from the conference were summarized in an article published in the renowned British medical journal *The Lancet*.[197] The conference concluded that U.S. and U.K. government policies to encourage the decline in cigarette tar yield had been beneficial.[198] According to the report in The Lancet, participants of the conference held the following general view on compensatory smoking:

> The importance of compensatory smoking should not be overemphasised. Even If further reductions In tar yields produce proportionately less benefit, any benefit

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196 48 Fed. Reg. at 15955 *(Exh. 023)*. See also 49 Fed. Reg. 23120 (extending comment period to July 5, 1984) *(Exh. 175)*. In his deposition, Peeler was asked - "Q: Okay. In fact, I think you said that certainly by the end of the Barclay investigation the FTC was intimate with the concept of investigation – of compensation, rights? A: Compensation as a major issue in the Barclay litigation, rights?" Deposition of C. Lee Peeler, Vol. I, *supra* note 108, at 246 *(Exh. 079)*.

197 Participants of the Fourth Scarborough Conference on Preventive Medicine, *Is There a Future for Lower-Tar-Yield Cigarettes?*, The Lancet, 1111 (Nov. 16, 1985) (Exh. 166).

198 *Id.* at 1111.

> would be worthwhile. Concerns that a lower-tar policy will encourage smoking do not seem to be well grounded and tar-reduction programmes may actually help people to give up smoking. In both the U.S. and the UK, which have active tar-reduction programmes, there have been notable reductions in general smoking rates and cigarette consumption. In the American Cancer Society Survey, people who had switched to lower-tar cigarettes at the start of the study were more likely to have become ex-smokers by the end, irrespective of the number of cigarettes originally smoked.[199]

134. The conference also addressed the theories that changes in cigarette design might increase the risk of certain diseases and that government-measured tar-yield may mislead smokers:

> [A]lthough it is possible that certain toxic smoke components may be increased in cigarettes with otherwise lower yields, there is at present no satisfactory evidence that lower-tar cigarettes materially increase the risk of cardiovascular or chronic obstructive lung disease In comparison with current higher tar brands.[200]
>
> Canadian and British data and the results of unpublished studies by the UK Government Chemist largely counter the

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199 *Id.* at 1112.

200 *Id.* at 1113.

> argument that the tar-tables mislead smokers. Altering the machine-smoking conditions does not materially affect the ranking of different brands. As intended, the figures are therefore fair indications of relative yields, although they do not reflect the absolute yields to the smokers.[201]

135. The Fourth Scarborough Conference on Preventive Medicine was attended by Judith Wilkenfeld who was the Program Advisor for cigarette advertising and testing at the Division of Advertising Practices at the FTC.[202]

136. The public comments received by the FTC showed no consensus on how the FTC should modify the FTC Method to account for compensatory smoking behavior.[203] The FTC therefore determined to leave the FTC Method unchanged:

> [T]here was no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method. At the same time, abandoning the testing system without instituting another method of "tar" testing would have been premature because then-

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201 *Id.* at 1113.

202 *Id.* at 1111 (Neal Benowitz who was an expert for Brown & Williamson in the *Barclay* case also attended the conference).

203 *Cigarette Testing and the Federal Trade Commission: A Historical Overview*, *supra* note 60, at 6-7 *(Exh. 178)*. *See also* Correspondence from Judith Wilkenfeld, Program Advisor Cigarette Advertising and Testing Division of Advertising Practices, and Susan Cohn, Attorney at Division of Advertising Practices, to Commission (No Date) *(Exh. 057)*.

> current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average "tar" levels that had occurred since the 1950's . . . Accordingly, at that time the Commission made no change to its cigarette test method to address compensatory smoking.[204]

E. Recent Investigations into Compensation and the FTC Method

137. In 1992, the Coalition on Smoking OR Health ("COSH") petitioned the FTC to stop cigarette manufacturers from stating or implying that low-tar cigarettes are a safer alternative to the use of higher-tar filtered cigarettes.[205] Quoting from the 1989 Report of the Surgeon General, COSH stated that,

> There is no conclusive evidence that the lower yield of cigarettes are associated with reduced risks of overall mortality, cancers other than lung, chronic obstructive pulmonary disease, or heart disease . . . Compensatory smoking behavior in response to lower nicotine intake might actually increase the intake of tobacco smoke toxins in some individuals.[206]

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[204] *Cigarette Testing and the Federal Trade Commission: A Historical Overview*, *supra* note 60, at 7 *(Exh. 178)*.

[205] Coalition on Smoking OR Health, Petition Before the Federal Trade Commission, at 12 (1992) *(Exh. 021)*. COSH was formed by the American Heart Association, the American Lung Association and the American Cancer Society. *See* Section IX.D for a more detailed description on the COSH Petition.

[206] *Id.* at 6.

138. The FTC closed its COSH investigation on August 8, 1994 without agreeing to the requests made by COSH.[207] However, the FTC informed COSH that it had asked the National Cancer Institute (NCI) to convene a conference that would be involved "in assessing possible alternatives to, or modifications of, the present system of ratings and in evaluating other available options for addressing tar and nicotine claims in future cigarette advertising and promotions."[208]

139. The 1994 NCI conference had been prompted by Congressman Henry Waxman's request that the NCI convene such a conference, working with the National Institute on Drug Abuse and the FTC, to study the "accuracy and appropriateness" of the FTC Method.[209] Congressman Waxman stated that his interest in this matter was due to a "growing concern over the current testing method because many public health and addiction experts believe it

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[207] Correspondence from John D. Graubert, FTC's Deputy General Counsel, to Lucia M. Valente, Counsel to New York Attorney General, Sept. 10, 1998 *(Exh. 050)*; *see also* Deposition of C. Lee Peeler, Vol. II, at 484-502, *United States v. Philip Morris, Inc.*, Civil Action No. 99-CV-02496 (GK) (D.D.C.) (July 31, 2002) *(Exh. 080)*.

[208] Correspondence from C. Lee Peeler, Associate Director of the Division of Advertising Practices, to Matthew L. Myers, Counsel to Coalition on Smoking OR Health, Aug. 8, 1994 (quoting correspondence from Steiger to Broder, *infra* note 211) *(Exh. 033)*.

[209] Correspondence from Congressman Henry Waxman to Samuel Broder, Director of National Cancer Institute, June 7, 1994 *(Exh. 034)*.

may mislead smokers about the relative safety of a low tar, low nicotine product."[210]

140. The FTC followed up on Congressman Waxman's request and wrote to the NCI suggesting that the conference examine issues relating to compensation, testing methodology, and the health benefits of low tar cigarettes.[211] The FTC's letter to the NCI showed the FTC was very much aware of the criticisms regarding the FTC rating system, and that the FTC would not hesitate to act if the rating system proved not to be beneficial to consumers:

> Over the past few years, public and private health groups and others have questioned the usefulness of [FTC] ratings and have suggested that they may mislead consumers with respect to the relative risks of continuing to smoke and of smoking cigarettes with various levels of tar and nicotine ratings.[212]
>
> [I]f a consensus [were to be] reached by the panel that the current rating system is sufficient flawed as to pose harm to consumers who rely on the ratings[,] . . . the Commission [would] consider formally or publicly withdrawing its imprimatur from the rating system. Following such Commission action, the agency may need to consider whether cigarette advertising that

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210 *Id.*

211 Correspondence from FTC Chairman Janet D. Steiger to Samuel Broder, Director of National Cancer Institute, July 20, 1994 *(Exh. 043)*.

212 *Id.* at 1.

> continues to make use of the (hypothetically) discredited ratings is likely to mislead reasonable consumers regarding the health hazards associated with smoking cigarettes.[213]

141. The NCI conference focused on three questions:

> 1. Does the evidence presented clearly demonstrate that changes are needed in the current FTC protocol for measuring tar, nicotine, and carbon monoxide? If yes, what changes are required?
>
> 2. Should constituents other than tar, nicotine, and carbon monoxide be added to the protocol?
>
> 3. Does the FTC protocol provide information useful to smokers in making decisions about their health?[214]

142. Regarding the first question, the conference committee concluded that smoking cigarettes with a lower tar rating based on the FTC Method has some, albeit limited, health benefits: "The smoking of cigarettes with lower machine-measured yields has a small effect in reducing the

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213 *Id.* at 2.

214 Statement from the Ad Hoc Committee of the President's Cancer Panel to Consider the FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Levels In Cigarettes, Dec. 6, 1994 *(Exh. 180)*; *see also* National Institutes of Health National Cancer Institute Ad Hoc Committee of President's Cancer Fund *Conference on: The FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Levels in Cigarettes*, Dec. 5 and 6, 1994 *(Exh. 196)*.

risk of cancer caused by smoking. . ." Furthermore, the conference concluded "[s]mokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior which may negate potential health benefits."[215]

143. Regarding the second question, one presenter at the conference recommended that the testing protocol measure and disclose more than just tar, nicotine, and carbon monoxide.[216] The presenter stated that many chemicals in cigarette smoke are toxic, and the amounts of those chemicals are not perfectly correlated with the amount of tar, nicotine, and carbon monoxide.[217] Therefore, the presenter recommended a much more elaborate disclosure of cigarette smoke contents. The conference committee, however, rejected this suggestion:

> [i]n order to avoid confusing smokers, no smoke constituents other than tar, nicotine, and carbon monoxide [should] be measured and published at the present time. Smokers should be informed of the presence of other hazardous smoke constituents with each package and with all advertisements.

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215 Statement from the Ad Hoc Committee, *supra* note 214 *(Exh. 180)*.

216 Jeffrey E. Harris, *Cigarette Smoke Components and Diseases: Cigarette Smoke is More Than a Triad of Tar, Nicotine, and Carbon Monoxide, in Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* 59 (National Institutes of Health, National Cancer Institute, 1996) *(Exh. 178)*.

217 *Id.* at 66-67.

> These constituents should be classified by toxic effects.[218]

144. Regarding the third question, the committee concluded that:

> Information from the testing system . . . should be made available to all smokers, including those who smoke generic brands and other brands not widely advertised.
>
> Brand names and brand classifications such as "light" and "ultra light" represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer.
>
> The available data suggest that smokers misunderstand the FTC test data. This underscores the need for an extensive public education effort.[219]

145. The presentations made at the NCI conference were published in *Smoking and Tobacco Control Monograph 7*, in August 1996.[220] In one of the chapters, Dr. Jonathan M. Samet stated that epidemiologic studies on the benefits of low-yield cigarettes "inherently consider compensatory changes in inhalation patterns or in numbers of cigarettes smoked". He then discussed several

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218 Statement from the Ad Hoc Committee, *supra* note 214 *(Exh. 180)*.

219 *Id.*

220 *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* (National Institutes of Health, National Cancer Institute, 1996) (Exh. 178).

epidemiologic studies that showed how smoking low instead of high-yield cigarette reduced lung cancer risk.[221]

146. Based on the recommendations made by the NCI conference committee, the FTC investigated possible improvements to the FTC Method.[222] In September 1997, the FTC proposed new testing protocols and requested public comment.[223]

147. In the 1997 request for public comment,[224] the FTC proposed several changes to the FTC Method and asked the public to comment on different

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221 Jonathan M. Samet, *The Changing Cigarette and Disease Risk: Current Status of the Evidence, in Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* 77, 79-82 (National Institutes of Health, National Cancer Institute, 1996) *(Exh. 178)*.

222 *See, e.g.*, Joan Z. Bernstein, *Federal Trade Commission Solicits Consumer Research*, 23 Advances In Consumer Research 313 (1996) (soliciting research on what tar and nicotine ratings and descriptors such as "ultra light" mean to consumers) *(Exh 148)*; Correspondence from Shira D. Modell, Attorney at Division of Advertising Practices of FTC to David H. Remes, Attorney at Covington & Burling, July 26, 1996 (soliciting comments on a draft proposal to replace the FTC Method) *(Exh. 075)*. Ms. Modell helped plan the NCI conference. *See Smoking and Tobacco Control Monograph 7, supra* note 220, at ix *(Exh. 178)*.

223 *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48158 (Sept. 12, 1997) *(Exh. 017)*.

224 The comment period was subsequently extended to February 1998. *See Cigarette Testing: Extension of Deadline for Submission of Public Comments*, 62 Fed. Reg. 58972 (Oct. 31, 1997) *(Exh. 015)*; *Cigarette Testing: Extension of Deadline for Submission of Public Comments*, 63 Fed. Reg. 3575 (Jan. 23, 1 998) *(Exh. 016)*.

options. For example, one proposal was to have two tests of tar and nicotine yields, one with the existing test parameters, and another with parameters simulating a more intensive level of smoking. Another proposal was to add a disclosure statement to cigarette advertising to inform consumers that smoking behavior affects tar and nicotine intake, and to start a consumer education campaign on the issue of compensation.[225]

148. In making its request, the FTC acknowledged that in recent years public and private health groups had questioned the usefulness of the FTC Method because of compensatory smoking behavior. The FTC also expressed concern that "some consumers may [mistakenly] believe that the existing machine-measured yields are literal indicators of how much tar and nicotine they will get from particular brands of cigarettes . . . [and thereby] underestimate the risk associated with lower rated brands by assuming that a very low tar yield necessarily translates into a correspondingly low health risk."[226]

149. The FTC asked for comments on many general and specific issues. Some of these included: (a) proposed changes to the testing method; (b) whether different types of cigarettes (in other words, low v. high tar) should be tested differently to account for compensatory smoking behavior; and (c) how to educate and inform smokers about compensatory smoking behavior, such as the fact

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[225] 62 Fred. Reg. at 48159-62 (*Exh. 017*).

[226] *Id.* at 48159.

that a cigarette's yield depends on how it is smoked.[227]

150. The FTC received many comments from cigarette manufacturers, public health organizations, and other government agencies.[228] The comments ranged from partial acceptance of the FTC proposal to asking the FTC to suspend the proposal because of inadequacies with the suggested testing methodologies. Several comments asked the FTC to transfer its tar and nicotine testing responsibility to the U.S. Food and Drug Administration. In response to these comments, the FTC decided to ask the Department of Health and Human Services (HHS) for assistance,[229] and also asked Congress to give "authority over cigarette testing to one of the Federal

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227 *Id.* at 48161-62. The FTC also asked for comment on cigarette descriptors. *See* Section IX.B.

228 *See, e.g.*, Comments of Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporations, and Lorillard Tobacco Company on the Proposal Entitled FTC Cigarette Testing Methodology, FTC File No. P944509 Request for Public Comment (62 Fed. Reg. 48,158) (Feb. 5, 1998) *(Exh. 022)*; Correspondence from David Rosenthal, M.D., President of American Cancer Society, to Office of the Secretary, Federal Trade Commission, Jan. 15, 1998 *(Exh. 036)*; Correspondence from John Garrison, CEO of American Lung Association, to Federal Trade Commission, Jan 15, 1998 *(Exh. 051)*; Correspondence from Richard D. Klausner, M.D., Director of National Cancer Institute, to C. Lee Peeler, Esq., Associate Director of Division of Advertising Practices at the FTC, Jan. 30, 1998 *(Exh. 070)*.

229 Correspondence from Donald S. Clark, Office of the Secretary at the FTC, to Donna E. Shalala, Secretary at the Department of Health and Human Services, Nov. 19, 1998 *(Exh. 037)*.

government's science-based, public health agencies."[230] Wrote the FTC to the HHS:

> The comments we received in response to our [1997] proposal raised a number of significant technical and health policy issues . . . Because of their scientific nature, these issues fall more within the expertise of HHS rather than the FTC. For this reason, the Commission is requesting that your Department initiate a further review into the FTC's cigarette testing method, and include recommendations on whether the system should be continued, and if It should be continued, what specific changes should be made to the testing methodology to correct the limitations identified by the NCI.[231]

151. In November 2001, the NCI released *Monograph 13 – Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine.* The NCI stated that it intended to continue working on correcting the limitations of the FTC Method.[232] The FTC recognized this monograph to represent the "first step" in HHS's response to the

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[230] Federal Trade Commission, Report to Congress For 1997 Pursuant to The Federal Cigarette Labeling and Advertising Act, at 6 (1999) *(Exh. 111)*.

[231] Correspondence from Donald S. Clark to Donna E. Shalala, *supra* note 229 *(Exh. 037)*.

[232] Federal Trade Commission, Statement of the Federal Trade Commission's Bureau of Consumer Protection On the National Cancer Institute's Report on Cigarette Testing Method (Nov. 27, 2001), at http://www.ftc.gov/opa/2001/11/ncistudy.htm *(Exh. 119)*.

FTC's 1998 request for assistance.[233] The FTC's 1997 Proceeding is still ongoing.[234]

152. HHS is continuing to research this issue. In February 2005, HHS published in the *Federal Register* its intent to collect data to study the "patterns of human smoking behavior across several of the most popular cigarette categories (ultralight, light, full flavored menthol and full-flavored non-menthol) and to determine the level of exposure to smoke toxins delivered by these cigarette categories."[235] The notice said, in part:

> This is important because the current method of measuring constituents [of] smoke is via the Federal Trade Commission's machine smoking method, which does not accurately reflect human smoking patterns. Although there is ample evidence of the inadequacies and biases inherent in machine-smoking protocols, they serve the purpose of ranking cigarettes smoked under standardized conditions. Comparison of cigarette smoke emissions using machine-smoking methods will persevere until something superior is developed.

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233 *Id.*

234 *See* Federal Trade Commission's Corrected Written Direct Examination of Joseph Mulholland at 38-40, *United States vs. Philip Morris USA Inc.*, (D.D.C.) Civil No. 99-CV-02496 (GK) (D.D.C) *(Exh. 122)*.

235 *Proposed Data Collections Submitted for Public Comment and Recommendations*, 70 Fed. Reg. 6878 (Feb. 9, 2005) *(Exh. 170)*.

> The goals of this project are to characterize the range of human smoking behavior for a variety of cigarette categories and machine-smoked yields, and to estimate the levels of biomarkers of exposure with the various cigarette styles. This study will assess known indicators of smoking behavior (ventilation pore-blocking behavior, puff volume, puff duration, puff velocity and inter-puff interval) to determine typical patterns of smoking behavior.[236]

153. In summary, there is no doubt that the FTC has been aware from the very beginning of its tar and nicotine testing program that compensatory smoking behavior might cause problems for the FTC Method's ability to rank relative tar and nicotine yields of cigarettes. By the early to mid 1980s, during the time of the *Barclay* case and the Fourth Scarborough Conference, the FTC recognized that compensatory smoking behavior could be a serious issue; but the scientific evidence at the time still showed that the FTC Method could properly rank relative tar and nicotine yields regardless of compensatory smoking behavior. By the mid 1990s, some members of the public health community began to view the FTC Method as seriously flawed, and the FTC took steps to ascertain whether any new or different system would provide better information to smokers, as evidenced by its 1997 Request for Public Comment and its 1998 request to the HHS.

154. Because there was some possibility that lower yields corresponded with some reduction in

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[236] *Id.*

health risk, the FTC deemed it appropriate to continue testing cigarettes for tar and nicotine yield and to require use of those results in advertising. Mr. C. Lee Peeler, representing the FTC in deposition, stated: "if the Federal Trade Commission had reached a decision that a hundred percent compensation was occurring with respect to smoking, it would not continue the system because there would be no value in it at all."[237] Dr. Joseph Mulholland of the FTC's Bureau of Economics recently testified that if the FTC determined that compensation were complete, "I, myself, would not see a reason why the FTC would continue the tar and nicotine rating."[238]

F. The Decline of Tar and Nicotine Yields

155. During the period the FTC has been regulating the cigarette industry, tar and nicotine yields have fallen dramatically. As noted by the Surgeon General in 1981,

> Great changes have taken place in the cigarette product in recent decades. In 1954, the average "tar" yield of the sales-weighted average cigarette was 37 mg and the average nicotine yield was 2 mg. In 1980, the comparable figures are expected to be less than 14 mg of "tar" and less than 1 mg of nicotine. No cigarette marketed in

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237 Deposition of C. Lee Peeler, Vol. II, *supra* note 207, at 589 *(Exh. 080)*.

238 Testimony of Dr. Joseph Mulholland at 19943-44, *United States v Philip Morris USA, et al.*, CA No. 99-2496 (GK), Vol. 97, Afternoon Sess. (D.D.C.) (Apr. 25, 2005) *(Exh. 187)*.

the United States in 1979 yielded more than 30 mg of "tar."[239]

156. Since the FTC's first report on cigarette yields in 1968, there has been a substantial drop in the sales-weighted average tar and nicotine yields in cigarettes sold in the U.S. According to the latest FTC yield report, the sales-weighted average tar yield of cigarettes in the U.S. dropped from 21.6 mg. in 1968 to 12.0 mg. in 1998, a substantial 44 percent decline. Similarly, the sales-weighted average nicotine yield dropped from 1.35 mg. to 0.88 mg., a 35 percent decline. According to the latest report, "nearly 82% of all cigarettes sold have machine-measured tar yields of 15 mg. or less."[240] In 1967, less than 2 percent of all cigarettes sold had yields of 15 mg. or less.[241]

157. Thus, the FTC's regulatory policies to inform consumers regarding tar and nicotine yield and to encourage manufacturers to create new lower tar products have led to a substantial reduction in

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239 *The Health Consequences of Smoking: The Changing Cigarette*, *supra* note 194, at 5 *(Exh. 189)*. *See also* David M. Burn and Neal L. Benowitz, *Public Health Implications of Changes in Cigarette Design and Marketing, in Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 1, 2, Figure 1-1 (National Institutes of Health, National Cancer Institute, 2001) *(Exh. 197)*.

240 Federal Trade Commission, *"Tar," Nicotine, and Carbon Monoxide of the Smoke of 1294 Varieties of Domestic Cigarettes for the Year 1998*, at 1, 9 (2000) *(Exh. 091)*.

241 Report to Congress 1968, *supra* note 88, at 18-19 *(Exh. 112)*.

average tar and nicotine yields of cigarettes bought and sold in the U.S.

IX. CIGARETTE DESCRIPTORS

A. Cigarette Descriptors and Substantiation by the FTC Method

158. The purpose of descriptors in advertising is to convey information to consumers. In the case of cigarettes, descriptors are often used to convey information about tar and nicotine yields and/or taste. In the early days, the FTC believed that the word "filter" conveyed the message of reduced tar and nicotine.[242] Today, terms such as "low", "lights", "ultra-low", and "ultra-lights" are used to convey to consumers information about taste and about tar and nicotine yields as measured by the FTC Method.[243]

159. When the FTC reversed its policy in March 1966 and allowed the advertising of tar and nicotine yields,[244] it was not clear whether non-numerical representations of tar and nicotine yields, including descriptors such as "low" and "lights", were permitted:

> [T]he Commission has determined that a factual statement of tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would [be allowed] . . . so long as (1) *no collateral representations* . . . are made, expressly or by implication, as to reduction or

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242 Report to Congress 1967, *supra* note 88, at 19 *(Exh. 113)*.

243 *See infra* para. 171

244 *See infra* para. 89.

> elimination of health hazards, and (2) the statement of tar and nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method.[245]

160. Soon after this policy change, confusion arose regarding exactly what kinds of representations of tar and nicotine yields were permitted. Robert B. Meyner, Administrator of the Cigarette Advertising Code, Inc,[246] wrote to the FTC asking it to clarify the meaning of collateral representations.[247] He also suggested that the FTC "promulgate regulations specifying what are prohibited 'collateral statements' in this field."[248] Within the FTC, Commissioner Philip Elman wrote his fellow commissioners stating that the Commission's March 1966 statement "presents a serious problem":[249]

> It should be the Commission's policy not only to permit but to encourage tobacco companies to manufacture and promote cigarettes which are low, or lower, in tar

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245 Federal Trade Commission News Release (Mar. 25, 1966), *supra* note 94 (emphasis added) *(Exh. 097)*.

246 *See supra* para. 84.

247 Correspondence from Robert B. Meyner, Administrator of Cigarette Advertising Code, Inc., to Mr. Charles A. Sweeny, Director of Bureau of Deceptive Practices, FTC, June 28, 1966 *(Exh. 072)*.

248 Correspondence from Robert B. Meyner, Administrator of Cigarette Advertising Code, Inc., to Chairman Paul Rand Dixon, FTC, Dec. 7, 1966 *(Exh. 073)*.

249 Correspondence from Philip Elman to The Commission, Sept. 18, 1967 *(Exh. 067)*.

> and nicotine . . . the prohibition on collateral representations appears to work an unjustifiable detriment [to producers of low-tar cigarettes].[250]

161. Two days after Elman's memorandum, the Director of The Code Authority of the National Association of Broadcasters, Howard H. Bell, also wrote to the FTC asking for clarification on its tar and nicotine advertising policy.[251] The FTC clarified its position to Bell,[252] and later publicized their correspondence:[253]

> [T]he Commission's current enforcement policy in regard to statements of, and *representations relating to*, tar and nicotine content of cigarettes may be formulated as follows: As a general rule, *the Commission will not challenge such statements of representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission* . . . Advertisements which correctly report official FTC tar and

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250 *Id.*

251 Correspondence from Howard H. Bell, Director of The Code Authority, National Association of Broadcasters, to Chairman Paul Rand Dixon, FTC, Sept. 20, 1967 *(Exh. 048)*.

252 Correspondence from Joseph W. Shea, Secretary, FTC, to Howard H. Bell, Director of The Code Authority, National Association of Broadcasters, Oct. 25, 1967 *(Exh. 055)*.

253 Federal Trade Commission, Federal Trade Commission News Release (Oct. 26, 1967) *(Exh. 098)*.

> nicotine yield data are within this category. On the other hand, having no official or governmental sanction would tend to confuse and mislead the public.[254]
>
> [A] cigarette testing relatively high or not among the lowest in tar and nicotine yield should not be represented to be otherwise, either expressly or by innuendo. By the same token, *a cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public*, provided that the basis for comparison is fully and fairly stated.[255]

162. The FTC repeated its position on this issue in its 1968 Report to Congress:

> On October 26, 1967, the Commission issued a policy statement which indicated that as a general rule the Commission would not challenge statements or representations of *or relating to* tar and nicotine content of cigarettes 'where they are shown to be accurately and fully substantiated by tests conducted in accordance with the standardized testing

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[254] Correspondence from Shea to Bell, *supra* note 252, at 3 (emphasis added) *(Exh. 055)*.

[255] *Id.* (emphasis added).

> methods and procedures used by the Federal Trade Commission".[256]

163. The FTC's October 1967 policy statement and its 1968 Report to Congress clearly indicate that the agency deliberately permitted non-numerical representations of or relating to tar and nicotine yields, but only under the strict condition that such representations were substantiated by the official FTC testing method. Cigarette descriptors such as "low" and "lights" clearly fall within the category of permitted representations of tar and nicotine yields as long as their use is substantiated by the FTC Method.

B. Definitions of Cigarette Descriptors

164. The FTC stated that the use of descriptors (or any other representations of tar and nicotine) must be tied to the underlying FTC test results. The FTC has defined "low tar" to mean 15 mg. or less of tar, as measured by the FTC Method. This definition is well known by cigarette manufacturers and by those in the public health community. There is also evidence that "ultra-low tar" and similar terms are generally used to mean 6 mg. or less of tar.

165. The convention of using "low tar" to mean 15 mg. or less tar can be traced back to as far as 1968:

> An analysis of sales data provided by cigarette manufacturers indicates that sales of comparatively low yield cigarettes,

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256 Report to Congress 1968, *supra* note 88, at 18 *(Exh. 112)* (emphasis added) (quoting correspondence from Shea to Bell, *supra* note 252, at 3 *(Exh. 055)*).

> e.g., for purposes of this report only, those having 15 milligrams (mg.) of tar or less, have not been extensive thus far. Three categories of cigarettes, classified according to tar yields, divided the market in 1967 as follows: 15 mg. and under – 2%; 16-21 mg. – 59%; 22 mg. and over – 39%.[257]

166. By 1979, the FTC acknowledged without reservation this definition of "low tar", and this acknowledgment was reaffirmed in 1980:

> The FTC has not defined "ultra-low tar", or any term related to "tar" level except for "low tar", which the FTC defines as 15.0 mg or less tar. As a result advertisers use a variety of terms to distinguish among "tar" levels.[258]

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[257] Report to Congress 1968, *supra* note 88, at 18-19 *(Exh. 112)*.

[258] Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act - For the Year 1979, at 11 n. 8 *(Exh. 116)*; Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act - For the Year 1980, at 18 n. 11 *(Exh. 117)*. *See also* Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74*, at 35, Staff Report to the Federal Trade Commission (June 1979) (stating that, "[Tar and Nicotine] reports began in early 1967 and signaled the beginning of a new submarket trend based upon the FTC's *official definition* of low-tar cigarettes (15 or less milligrams of tar)") (emphasis added) *(Exh. 145)*.

In its 1997 *Federal Register* Request for Public Comment, the FTC made a seemingly contradictory statement to its 1979 and 1980 *Report to Congress* regarding the definition of the low tar" descriptor by stating that "[t]here are no official definitions for [cigarette descriptors]." However, even in this case, the FTC

167. In its 1981 Staff Report,[259] the FTC "formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of "tar" and also used "ultra-low tar" to describe cigarettes with 6 mg. or less tar.[260]

168. In its 1994 letter to the NCI,[261] the FTC once again used the terms "low-tar" and "ultra low-tar" to refer to cigarettes with less than 15 mg. and 6 mg. of tar, respectively.[262] Another government agency, the FDA, also has used these terms in the same way as the FTC.[263]

169. These definitions of "low-tar" and "lights" are well understood in the public health community. The 1981 *Summon General Report* stated, "[l]ower 'tar' cigarettes conventionally have been defined as yielding 15 mg of 'tar' or less per cigarette."[264] In *Monograph 13*, one of the papers stated that:

[Footnote continued from previous page]

reiterated its understanding that "low tar" means 7 to 15 mg. of tar and "ultra low tar" means 6 mg. or less of tar. 62 Fed. Reg. at 48163 *(Exh. 017)*.

259 *See supra* para. 130.

260 Myers, *supra* note 88, at 1-50, 1-50 n. 175 *(Exh. 157)*.

261 *See supra* para. 139.

262 Correspondence from FTC Chairman Janet D. Steiger, *supra* note 211 *(Exh. 043)*.

263 *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44396, 44952 (Aug. 28, 1996) (stating that "Approximately 80% of the cigarettes on the market today are either low-tar (6 to 15 mg tar) or ultra-low-tar (less than 6 mg tar).") *(Exh. 173)*.

264 The Health Consequences of Smoking: The Changing Cigarette, *supra* note 194, at 23 *(Exh. 189)*.

> In the United States, cigarette brands yielding approximately 1-5 or 6 mg tar by [the FTC] method are generally called 'Ultra-Light'; brands yielding between approximately 6 or 7-15 mg tar are called 'Light'; and brands yielding more than 15 mg tar are called 'Regular' or 'Full Flavor'. By convention, cigarettes yielding 15 mg tar by the FTC method are called 'low tar'.[265]

170. Cigarette manufacturers have used the descriptors "light" and "low-tar" for cigarettes with 15 mg. or less tar.

171. The terms "light[s]" and "low tar" are generally viewed as interchangeable by the FTC and by the cigarette manufacturers. In the late 1960s, "light" was viewed as a descriptor of flavor and taste;[266] but soon after, "light" was associated with both lighter taste and low tar. In its 1971 *Report to Congress*, the FTC noted that advertising for Marlboro Lights emphasized lower yields of both tar and nicotine (and thereby impliedly relieving health concerns), and claimed the product is for people "who

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265 Lynn T. Kozlowski, Richard J. O'Connor, and Christine T. Sweeney, *Cigarette Design, in Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 13 (National Institutes of Health, National Cancer Institute, 2001) *(Exh. 197)*.

266 Report to Congress 1968, *supra* note 88 at 14; Federal Trade Commission, Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, Appendix D, at 7 (June 30, 1969) *(Exh. 112)*.

prefer the lighter taste of a low tar smoke."[267] Today, the FTC generally does not distinguish between "light" and "low tar" descriptors.[268]

172. In 1996, when the FTC was considering how to modify the FTC Method, the FTC's Division of Advertising Practices recommended that the Commission tighten the definitions of cigarette descriptors, but made no distinction between the descriptors "low-tar" and "light".[269] The Division recommended that the Commission

> Limit the use of the descriptors "ultra low tar," "ultra light," "extra light," or "ultima" to cigarettes yielding 3 milligrams or less of tar under the current FTC testing protocol.
>
> Limit the use of the descriptors "low tar" or "light" to cigarettes yielding 8 milligrams or less of tar under the current FTC testing protocol.
>
> Limit the use of the descriptor "lowest" to cigarettes that test lowest for tar under the current FTC testing protocol. In addition,

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267 Report to Congress 1971, *supra* note 130, at 10, 12 *(Exh. 115)*.

268 *See, e.g.*, Deposition of Joseph P. Mulholland at 282-83, *United States of America v. Philip Morris, Inc.*, Civil Action No. 99-CV-02496 (GK) (D.D.C.) (Sept. 4, 2002) (stating that he tends to use the terms "low tar" and "lights" interchangeably.) *(Exh. 082)*; and Deposition of C. Lee Peeler, Vol. II, *supra* note 207, at 534-36 (stating that when the FTC staff reviewed tar and nicotine data, "lights" and "low tar" are used for the same group of cigarettes) *(Exh. 080)*.

269 Correspondence from Shira D. Modell to David H. Remes, *supra* note 222 *(Exh. 075)*.

> the term "lowest" would be used only with respect to a particular length of cigarette.[270]

173. In the 1997 Request for Public Comment, the FTC once again did not distinguish between the descriptors "low-tar" and "light":

> Do consumers believe they will get significantly less tar from cigarettes described as "light" or "low tar" than from regular or full flavor cigarettes, and do they believe they will get significantly less tar from cigarettes described as "ultra low tar" or "ultra light" than from "light" or "low tar" cigarettes?[271]

174. To summarize, there is no doubt that the FTC, the cigarette manufacturers, and the public health community all understand that the descriptors "low tar" and "light" mean 15 mg. or less tar as measured by the FTC Method.

C. FTC Regulation of the Use of Cigarette Descriptors

175. As described above, the FTC permitted the use of descriptors as long as the FTC Method substantiated such representations of tar and nicotine. Three cases, described below, illustrate the FTC policy regarding descriptors. The first case, American Brands *Pall Mall* cigarettes, illustrates that the FTC does not permit the use of descriptors that are not substantiated by the FTC Method. The second case, Brown & Williamson *Barclay* cigarettes,

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270 *Id.*

271 61 Fed. Reg. at 48163 *(Exh. 017)*.

illustrates that the FTC sees descriptors as serving the same purpose as the tar and nicotine numbers – that is, to provide information on relative tar and nicotine yields. The third case, American Tobacco *Carlton* cigarettes, illustrates the FTC's view that using descriptors in cigarette advertisements is consistent with the FTC's policy that cigarette advertisement cannot use the FTC test results to suggest the actual amount of tar and nicotine ingestion.

176. In September 1969, the FTC filed an administrative complaint against American Brands, because it did not properly substantiate its use of descriptors in its advertisements of *Pall Mall* and *Lucky Filter* cigarettes. American Brands made claims such as "The new U.S. Government figures show *Pall Mall* (Sic) *Gold* lower in tar than ever before. Lower in tar than the best selling filter king . . . [a]nd the average puff gives you 26 percent less "tar" than a non-filter cigarette."[272] In truth, these cigarettes ranked 56th and 77th in "tar" among the 122 brands tested. The FTC found that American Brands "practiced falsehood and deception" by creating the impression that "its cigarettes [are] low in tar when in fact they contain five times the amount of tar found in the lowest yielding brand tested and ranked above the midpoint [among the cigarette tested]."[273]

177. In July 1971, American Brands agreed to a consent order to cease and desist from "[s]tating in

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[272] *In re American Brands, Inc.*, 79 F.T.C. 255, 256-57 (1971) *(Exh. 131)*.

[273] *Id.* at 257.

advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," unless it clearly discloses the "tar" and nicotine yields in milligrams as measured by the FTC Method. Furthermore, the consent order said that if comparisons to other cigarettes are made, the "tar" and nicotine content of those cigarettes and the lowest yield domestic cigarette must also be disclosed.[274] Later that year, the FTC reported to Congress about this consent order as a "[r]egulatory activity."[275]

178. The FTC sent a strong message to the rest of the cigarette industry with the 1971 consent decree with American Brands – that the FTC would not allow indiscriminate use of tar and nicotine descriptors such as "low", "reduced", or "like qualifying terms".[276] The current Deputy Director of the FTC's Bureau of Consumer Protection, C Lee Peeler, stated that one of the reasons the FTC pursued the consent decree in the American Brands case was "to give guidance to other industry members about what type of conduct [the FTC] would challenge."[277]

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[274] *Id.* at 258-59.

[275] Report to Congress, *supra* note 130, at 13-14 *(Exh. 115)*.

[276] *In re American Brands, Inc.*, 79 F.T.C. at 258 *(Exh. 131)*.

[277] Deposition of C. Lee Peeler, Vol. II, *supra* note 207, at 464-65 (Peeler was asked whether the publication of the decision and order in American Brands was intended to guide the industry regarding the use of the words "low," "lower," "reduced," or like qualifying terms in cigarette advertising. Peeler responded "it would be designed to do that.") *(Exh. 080)*

179. Other cigarette manufacturers complied with the FTC's message. During the 1971 American Brands case, the FTC was also investigating R.J. Reynolds for making similar advertising claims. Specifically, R.J. Reynolds claimed in advertisements that its *Doral* and *Vantage* cigarettes were "low" in tar and nicotine but did not disclose tar and nicotine numbers. After the American Brands case settled, R.J. Reynolds complied with the requirements set out in the American Brands consent order, and the FTC closed its R.J. Reynolds investigation.[278]

180. The *Barclay* case in the early 1980s illustrates how the FTC perceives the role of descriptors in cigarette advertising.[279] The FTC commenced an investigation of *Barclay* cigarettes when it learned that smokers of *Barclay* cigarettes, which advertised to have only 1 mg. of tar, might be systematically ingesting more tar than other 1 mg. cigarettes due to *Barclay's* unique filter design. After the FTC verified its suspicion and concluded that *Barclay* was only comparable to cigarettes rated between 3mg. to 7mg. of tar, it gave Brown & Williamson, the manufacturer of *Barclay*, the option of opting out of its 1970 agreement to disclose tar and nicotine yields in its *Barclay* advertisements. But if B&W wanted to mention tar and nicotine yields, the FTC permitted B&W to use either the

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[278] Correspondence from Allen F. Brauninger, Attorney at the Bureau of Consumer Protection, to Commission, Oct. 5, 1971 *(Exh. 028)*; Memorandum from Charles A. Tobin, FTC Secretary, to Director of Bureau of Consumer Protection et. al., Oct. 22, 1971 *(Exh. 028, page 7)*.

[279] For a detailed discussion of the *Barclay* case, *see supra* Section VIII.C.

"low tar" descriptor or a tar number between 3 mg. and 7 mg. for its *Barclay* cigarettes.[280] The fact that the FTC explicitly permitted both "low tar" and a numerical disclosure implies that the FTC saw them as serving the same function – that is, providing consumers information on relative tar and nicotine yields.

181. In the 1995 American Tobacco *Carlton* case, the FTC made clear that it does not allow cigarette companies to use FTC tar and nicotine ratings for purposes other than to show relative tar and nicotine ranking. American Tobacco highlighted the extremely low tar yield of its *Carlton* cigarettes by making comparisons, based on the FTC ratings, between one pack of *Carlton* and ten packs of competing brands.[281] For example, an ad would state, "10 packs of *Carlton* have less 'tar' than 1 pack of these brands."[282] The FTC believed that these advertisements suggested to smokers that they actually would get less "tar" from smoking ten packs of *Carlton* than from one pack of the competitor brands. The FTC filed an administrative complaint under Section 5 of the FTC Act, stating that such claims were unsubstantiated, thereby false and misleading.[283]

182. The FTC stated that its tar numbers are obtained through smoking machine tests that do not

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280 Brief for Plaintiff-Appellee Federal Trade Commission, *supra* note 158, at 15 *(Exh. 004)*.

281 *In re The American Tobacco Co.*, 119 F.T.C. 3 (1995) *(Exh. 140)*.

282 *Id.*

283 *Id.*

take into account smoker compensatory behavior; therefore, American Tobacco could not use them to substantiate its implied claim on "tar" ingestion by human smokers.[284] In the consent order, American Tobacco agreed to stop making comparisons of yields across brands "as a numerical multiple, fraction, or ratio," which gives the impression that "consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar."[285]

183. On the other hand, the consent order explicitly stated that American Tobacco would be allowed to present in its advertisements the FTC test results of its and competitors' brands, "with or without an express or implied representation that [American Tobacco's] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine[.]"[286] This order reaffirmed that cigarette descriptors, like the FTC test results, are explicitly permitted by the FTC when substantiated by FTC Method results. It also showed that the FTC believed that descriptors, unlike the banned *Carlton* advertisements, should be allowed even in light of the existence of compensatory smoking behavior.[287]

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284 *Id.*

285 *Id.*

286 *Id.*

287 The *Carlton* case happened after the FTC had already studied, during the COSH investigation, whether descriptors should be banned in light of compensatory smoking behavior.

D. FTC Investigation of Cigarette Descriptors

184. In 1992, the Coalition on Smoking OR Health ("COSH") petitioned the FTC to ban the "advertising [of] lower yield tobacco products in any manner which implies that these products will reduce a consumer's health risk from tobacco use[.]"[288] COSH stated that the use of descriptors such as "low tar," "light," "ultra low tar," or "lower in tar" in cigarette advertising is deceptive because they imply a substantial health benefit over other tobacco products, and these health claims are unsubstantiated.[289]

185. Quoting the 1989 Report of the Surgeon General, COSH stated that,

> There is no conclusive evidence that the lower yield of cigarettes are associated with reduced risks of overall mortality, cancers other than lung, chronic obstructive pulmonary disease, or heart disease . . . Compensatory smoking behavior in response to lower nicotine intake might actually increase the intake of tobacco smoke toxins in some individuals.[290]

[Footnote continued from previous page]

See infra Section IX.D. The outcome of the COSH investigation is consistent with what the FTC did in this case.

288 COSH Petition, *supra* note 205, at 2 *(Exh. 021)*.

289 *Id.* at 1, 2, 10.

290 *Id.* at 6.

186. COSH asked the FTC to ban the use of cigarette descriptors:

> Order that . . . American tobacco manufacturers cease and desist in running advertisements which state or imply that use of cigarettes lower in tar are a safe alternative to the use of higher tar filtered cigarettes or that the use of these lower tar yield cigarettes dramatically reduces the overall health risks from smoking[.][291]

187. As the result of this petition, the Director of the Bureau of Economics, Dr. John Peterman, assigned FTC economist Dr. Joseph P. Mulholland to study the issue.[292] Dr. Joseph P. Mulholland had previously worked extensively on cigarette matters at the FTC, including low tar and lights cigarette advertising.[293] He had discussed reduced risk cigarettes with scientists,[294] and reviewed literature on consumer perception of low-tar cigarettes.[295] For the COSH assignment Dr. Mulholland reviewed the literature on compensation,[296] reviewed statistics

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291 *Id.* at 12.

292 Testimony of Dr. John Peterman at 55, *Miles v. Philip Morris Co., Inc.*, Case No. 00-L-112, Vol. XVI(b), Afternoon Sess., 3d Cir. Ct. Ill. (Feb. 13, 2003) *(Exh. 185)*.

293 *Id.*; Deposition of John Peterman at 55, *Miles v. Philip Morris Co., Inc.*, Case No. 00-L-112, 3d Cir. Ct. Ill. (Sept. 27, 2002) *(Exh. 081)*.

294 Deposition of Joseph P. Mulholland, *supra* note 268, at 116 19 *(Exh. 082)*.

295 *Id.* at 199-240.

296 Testimony of Dr. John Peterman, *supra* note 292, at 61 *(Exh. 185)*.

underlying the epidemiological literature,[297] and conducted original research on compensatory smoking behavior and consumer risk perception of low tar cigarettes.[298] His work was based in part on the 1986 Adult Use of Tobacco Survey, which contains data from over 13,000 current, former, and never smokers.[299]

188. Dr. Mulholland performed several different types of analyses. In conducting cross-sectional regression analysis of survey data, Dr. Mulholland found no systematic relationship between the average number of cigarettes smoked and the tar yield of cigarettes.[300] In a related regression, he did find that those who smoke low-tar cigarettes had a significantly lower average tar intake.[301] From brand-switching analyses, Dr. Mulholland found that those who switched to low-tar cigarettes had a *lower* probability of smoking more

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297 *Id.*, at 57-60.

298 Deposition of Joseph P. Mulholland, *supra* note 268, at 253 *(Exh. 082)*; Testimony of Dr. John Peterman, *supra* note 292, at 61 *(Exh. 185)*.

299 Joseph P. Mulholland, *Behavior and Risk Perception among Smokers of Low-Yield Cigarettes: An Analysis of the 1986 Adult Use of Tobacco Survey* at 4, Bureau of Economics, Federal Trade Commission (Aug. 4, 1992) *(Exh. 152)*.

300 *Id.* at 14.

301 *Id.* at 17-18. The proxy measure for tar intake was "the product of the machine-estimated tar content of a subject's brand and the number of cigarettes he or she smoked per day. (*Id.* at 17.) (Note that if compensation were complete, there should be no difference in average tar intake between smokers of low-tar v. high tar cigarettes).

cigarettes after switching.[302] He concluded that his analysis "fails to document the existence of a pervasive compensatory smoking pattern"[303]

189. Dr. Mulholland also analyzed whether low-tar cigarettes lull smokers into underestimating the risk of smoking, finding little support for this hypothesis. In fact, he concluded that low-tar smokers are *less* likely to discount the risk of smoking than high-tar smokers.[304] He also concluded that new smokers are not more likely to choose low-tar cigarettes than long time smokers,[305] and that quit rates are not significantly different between smokers of low- v. high-tar cigarettes.[306] Dr. Mulholland observed,

> The results suggest significant resistance [among smokers] to the idea of a "less hazardous" cigarette based on lowered amounts of tar and nicotine. Among users of low-tar brands (<=15mg), only 45% state that their current brand exhibits lower than average risk. This rate is predictably

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302 *Id.* at 26, 83.

303 *Id.* at 28. *See also* Deposition of C. Lee Peeler, Vol. II, *supra* note 207, at 588-589 (Peeler stating that, if the Federal Trade Commission had reached a decision that a hundred percent compensation was occurring with respect to smoking, it would not continued the [tar testing] system because there would be no value in it at all.") *(Exh. 080)*.

304 Joseph P. Mulholland, *supra* note 299 at 50-51 *(Exh. 152)*.

305 *Id.* at 61 (This suggests that non-smokers are not lured into smoking low-tar cigarettes thinking low-tar cigarettes poses less health risk than high-tar cigarettes.)

306 *Id.* at 61 (This suggests that low-tar cigarettes do not make non-smokers less likely to quit.)

> higher for lower tar brands, but even for the lowest tar group (<=3mg), 43.3% do not attribute a risk advantage to their brand.[307]

190. Dr. Mulholland concluded that, "[t]he principal finding is that neither smoking behavior nor perceptions about smoking risk appear to be systematically related to the tar level of a smoker's current brand of cigarette."[308]

191. Dr. Mulholland also summarized his review of the scientific literature on compensation:

> Considering the present state of the evidence, the most reasonable inference from the combined findings of epidemiological, survey, and experimental research is that some degree of compensatory smoking does take place, but switching to cigarettes of lower tar content can reduce tar and nicotine consumption to a significant degree. This is the finding of a broad spectrum of medical researchers who participated in the Fourth Scarborough Conference on Preventive Medicine. It is also the conclusion of the Independent Scientific Committee on Smoking and Health, an official British organization that monitors that country's program to reduce the tar and nicotine content of cigarettes.[309]

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[307] *Id.* at 68.

[308] *Id.* at 67.

[309] *Id.* at 70 (internal citations omitted).

192. The FTC investigated the allegations in the COSH petition for nearly a year. In its deliberation, the Commission considered, among others, data submitted by COSH and the Mulholland study.[310] In the end, the FTC closed its investigation on August 8, 1994 without changing its policy regarding the use of cigarette descriptors.[311] The FTC continued to permit the use of descriptors, and even suggested their use as a part of the remedy against false and deceptive cigarette advertising in the 1995 American Tobacco case.[312]

193. The issue of cigarette descriptors was raised again during the 1994 NCI conference where participants, including the FTC, gathered to discussed the FTC Method.[313] One of the conference's conclusions was that "[b]rand names and brand classifications such as 'light' and 'ultralight' represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer." [314]

194. Comments from the NCI conference contributed to the FTC's 1997 Request for Public Comment where the FTC, in addition to seeking

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310 Testimony of Dr. John Peterman, *supra* note 292, at 63-64 *(Exh. 185)*.

311 Correspondence of John D. Graubert, *supra* note 207 *(Exh. 050)*; Testimony of Dr. John Peterman, *supra* note 292, at 68 *(Exh. 185)*. *See also* Correspondence from C. Lee Peeler to Matthew L. Myers, *supra* note 208 *(Exh. 033)*.

312 *See supra* paras. 181-183.

313 *See supra* paras. 139-145.

314 Statement from the Ad Hoc Committee, *supra* note 214 *(Exh. 180)*.

comments on its proposals to modify the FTC Method, also sought comments on the use of descriptors.[315] Specifically, the FTC asked for evidence on consumer interpretation of descriptors, including expected relative tar intake and implied health claims. The Commission also asked about the extent to which consumers are informed by descriptors instead of by numerical yield ratings, and the implications this may have on test method revision and advertising disclosure.[316]

195. As described earlier,[317] because of the scientific nature of the problem, the FTC has asked HHS for assistance regarding cigarette tar and nicotine. The FTC has not yet announced any policy changes regarding its tar and nicotine program.

196. In November 1998, Senator Frank Lautenberg urged the FTC restrict the use of cigarette descriptors:

> I am writing to urge you to begin a proceeding to suspend the right of tobacco companies to market any cigarettes as "Light" or "Ultra Light" or list supposed nicotine and 'tar' ratings on their products and advertisements until and unless an accurate system of measuring the health implications of cigarettes is established.[318]

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315 *See supra* paras. 147-150.

316 62 Fed. Reg. at 48163 *(Exh. 017)*.

317 *See supra* paras. 150-152.

318 Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky, Nov. 24, 1998 *(Exh. 074)*.

197. The FTC did not suspend the use of cigarette descriptors in response to Senator's Lautenberg's letter. Instead, the FTC cited an ongoing review of related issues pursuant to its 1997 Request for Public Comment and its formal request to HHS to assist it in reviewing the entire system.[319] The FTC also stated that it would start a public education campaign on the limitations of the FTC test method.[320]

198. In conclusion, the FTC has been very much aware of objections to the use of cigarette descriptors. It investigated their use in response to the COSH petition and also after the NCI conference. The FTC has received and considered comments on descriptors from the public health community and from a U.S. Senator. So far, it has not changed its policy regarding cigarette descriptors. Cigarette manufacturers continue to be permitted by the FTC to use descriptors to inform consumers about the relative tar and nicotine yields of cigarettes, as long as they are substantiated by the FTC Method.

E. The FTC's General Perspective on Descriptors and Application to Cigarette Advertising

199. The FTC wants consumers to receive truthful information from product labeling, advertising, and descriptors, believing that such

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319 Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998) *(Exh. 105)*.

320 *See, e.g.*, Federal Trade Commission, *Up in Smoke — The Truth About Tar and Nicotine Ratings*, FTC Consumer Alert (May 2000) *(Exh. 121)*.

information enables consumers to make more informed decisions and thereby increases their welfare. Its view on this issue are summarized succinctly in the comments it submitted to the FDA on the issue of labeling trans fatty acids:

> FTC staff research suggests that labeling and advertising regulations have a strong effect on the type and amount of health information that consumers receive. Specifically, labeling and advertising regulations that permit sellers to disseminate truthful and nonmisleading information about diet and health are likely to lead to better informed consumers, more competition on health attributes of food, and formulation of healthier products.[321]

200. In its comments, the FTC also advocated that the FDA allow descriptors:[322]

> "Nutrient content descriptors may catch the attention of consumers who might not

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321 *In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling; Consumer Research to Consider Nutrient Content and Health Claims and Possible Footnote or Disclosure Statements; Reopening of the Comment Period*, Docket No. 03N-0076, Comments of the Staff of the Bureau of Economics, the Bureau of Consumer Protection, and the Office of Policy Planning of the Federal Trade Commission, at 2 (Apr. 15, 2004) *(Exh. 141)*.

322 The descriptors here are "Trans Fat Free" and "Reduced Trans Fat". The FDA views Trans Fat as increasing the risk of coronary heart disease.

> otherwise read the Nutrition Facts panel."[323]
>
> "[A] descriptor is likely to be valuable, because it can help consumers identify relatively healthful products more easily, and therefore enhance the benefits of providing Facts Panel information."[324]

201. The view described above is very much consistent with how the FTC has viewed cigarette descriptors. Cigarette descriptors such as "low tar" and "lights" disseminate truthful and nonmisleading information about relative tar and nicotine yields. By heightening consumer awareness of tar and nicotine numbers, descriptors also lead to more competition among cigarette manufacturers to produce low-tar cigarettes.

202. Furthermore, similar to the view expressed above, cigarette descriptors also help catch the attention of consumers who might not otherwise read the tar and nicotine numbers in cigarette advertisements. They help consumers identify *relatively* less harmful cigarettes more easily, and therefore enhance the benefits of providing FTC test results.[325] In economic terms, descriptors lower the

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[323] *Id.* at 6, n. 23.

[324] *In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims and Health Claims; Proposed Rule*, Docket No. 94P-0036, Comments of the Staff of the Bureau of Economics and Consumer Protection of the Federal Trade Commission (Apr. 17, 2000) (emphasis added), at http://wwvv.ftagov/bc/v000003.htm *(Exh. 142)*.

[325] *See also*, Judith Wilkenfeld et. al, *It's Time for a Change: Cigarette Smokers Deserve Meaningful Information About Their*

costs of communicating truthful and useful information to consumers.

203. The FTC's general policy is to let the marketplace determine the content of advertising, assuming claims are truthful. In the case of cigarette tar and nicotine, the FTC did see a market failure where the lack of a uniform testing method created confusion among consumers. The FTC therefore mandated numerical tar and nicotine disclosure by a standardized testing method. Once that was done, the source of the information failure was corrected, and the FTC's policy was to permit but not mandate the use of cigarette descriptors based on FTC Method results. Where descriptors were used, the standard was that all claims had to be substantiated by the FTC Method and that there could be no explicit or implied claims of the actual amount of tar or nicotine ingestion. This treatment of descriptors in cigarette advertising remains in place after years of review.

[Footnote continued from previous page]

Cigarettes, 92 Journal of National Cancer Institute 90, 91 (Jan. 19, 2000) (acknowledging that, "even though most smokers do not know the tar/nicotine yield of their cigarettes[,] they do know very clearly whether their cigarette brand is 'light; 'low tar,' or 'ultra-light.'") *(Exh. 153)*.

X. THE FTC'S OPPOSITION TO RESTRICTING THE DISSEMINATION OF TAR AND NICOTINE INFORMATION TO CONSUMERS

A. The FTC's Opposition to a Complete Ban on the Advertising and Promotion of Cigarettes

204. In the mid to late 1980s, Congress considered various bills to limit cigarette advertising and promotion. In general, the FTC opposed such legislation.

205. In August 1986, FTC Chairman Daniel Oliver wrote to Congressman Thomas J. Bliley, Jr. expressing his opposition to H.R. 4972, which proposed to ban all advertising and promotion of cigarettes.[326] Chairman Oliver first reminded Congressman Bliley that the Commission had significant expertise in this area.

> The Commission has, over several decades, documented the scale and nature of cigarette advertising, monitored the scientific basis for the tar and nicotine program, and produced numerous scholarly reports on cigarette advertising and the tobacco industry – in addition to bringing dozens of health-related deception cases against all the major companies. It is fair to say, I believe, that the Commission's expertise in this area is unique.[327]

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326 Correspondence from FTC Chairman Daniel Oliver to Congressman Thomas J. Bliley, Aug. 1, 1986 (Exh. 041).

327 *Id.*

206. Chairman Oliver then stated that the FTC did not believe consumer health could be advanced by denying consumers truthful information. Such a ban would likely "discourage cigarette companies from attempting to improve their products. It also seems likely to make the Surgeon General's warnings less prominent."[328] He also stated that "Low Tar" and "Ultra Low Tar" advertisements serve the purpose of reminding consumers that tar and nicotine are things about which they should be concerned.[329]

207. In April 1987, Chairman Oliver voiced his opposition to yet another bill that proposed to ban tobacco advertising.[330] He emphasized the importance of advertisements as a conduit of information to consumers:

> I oppose these attempts to deprive citizens of information necessary to make their own decisions. Informed choice is the essence of our economic as well as political system, and advertising is a fundamental part of the process by which consumers become informed.[331]
>
> We have learned at the FTC to view prohibitions of information with deep

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328 *Id.*

329 *Id.*

330 Prepared Statement of Daniel Oliver, Chairman, Federal Trade Commission on Cigarette Advertising Bans Before the Transportation Subcommittee, Committee on Energy and Commerce, U.S. House of Representatives, Apr. 3, 1987 (opposing H.R. 1532) *(Exh. 168)*.

331 *Id.* at 2.

> suspicion. They have repeatedly been found to impede competition, thus making producers less, rather than more, responsive to the needs of consumers. Where bans of truthful advertising are removed, consumers are better off.[332]

208. He then proceeded to discuss whether a restriction on cigarette advertising to promote public health would be a good idea. He first stated that because cigarette manufacturing is a mature industry, aggregate demand was unlikely to be affected by advertising. Furthermore, because cigarette advertisements contain both the Surgeon General warning and tar and nicotine disclosures, these advertisements are even less likely to increase aggregate demand, because they constantly remind consumers of the unhealthy consequences of smoking tobacco. Therefore, the likely effect of cigarette advertising is limited to affecting consumers' selection among competing brands.[333]

209. Chairman Oliver also pointed out that cigarette advertising helped accelerate the shift to lower tar and filtered cigarettes. A ban on cigarette advertising, he said, could actually injure public health by causing consumers to switch back to higher tar cigarettes:[334]

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332 *Id.* at 3.

333 *Id.* at 12-13.

334 *See* Section VIII.F on how cigarette tar and nicotine yields have decreased over time. Tar and nicotine fell dramatically during the tar derby during the late 1950s. The falling trend came to a halt when the FTC banned tar and nicotine in cigarette advertising in 1960. The trend resumed in 1964 after

> The historic movement from high tar non-filtered cigarettes to progressively lower tar filtered brands corresponds closely with the intensity of cigarette advertising with its tar and other health-related claims, and the addition of warnings in advertisements. . . . Imposing a prohibition on tobacco advertising and promotion could well inhibit future changes in cigarettes such as wider use of ultra-low tar brands, adoption of new designs that reduce fire hazards, or other as yet unforeseen product developments. Worse still, it could erode past gains. When consumers stop hearing the health warnings as often as they do now, how long will it take before the stronger taste of higher tar lure them away from newer low tar brands? A prohibition on tobacco advertising could have the unintended effect of injuring, rather than promoting, public health.[335]

210. It is clear that FTC chairman Daniel Oliver was very much against banning cigarette advertising. In addition to the FTC's general stance against keeping truthful information away from consumers, its primary concern specific to a cigarette advertising ban was that if consumers were deprived

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[Footnote continued from previous page]

the FTC lifted the ban. *See* Correspondence from Oliver to Bliley, *supra* note 326 *(Exh. 041)*.

335 Prepared Statement of Daniel Oliver, *supra* note 330, at 14-15 *(Exh. 168)*.

of truthful information about tar and nicotine, they would revert back to smoking higher tar cigarettes.

B. The FTC's Opposition to Relaxing Federal Preemption of State Regulation of Cigarette Labeling and Advertising

211. When the FCLAA of 1965 and its subsequent amendments were enacted, the goal of a national uniform policy for cigarette labeling and advertising was stated explicitly:

> It is the policy of the Congress . . . to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby . . . commerce and the national economy . . . [would not be] impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[336]

212. To achieve this goal, Congress explicitly, in both the original FCLAA and in subsequent amendments, preempted states from imposing additional regulations on cigarette labeling and advertising:

> No statement relating to smoking and health, other than the statement required

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336 *Federal Cigarette Labeling and Advertising Act* § 2 *(Exh. 085)*; 15 U.S.C. § 1331 *(Exh. 321)*.

> by section 1333 of this title, shall be required on any cigarette package.[337]
>
> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.[338]

213. In 1988, Congressmen Thomas A. Luken and Bob Whittaker introduced a bill (H.R. 4543) that would have repealed the above FCLAA preemption clauses.[339]

214. Congressman Luken stated that the goals of this legislation were (a) to remove the protection from tort claims that the preemption clauses had provided the cigarette industry (for example, product liabilities, misrepresentation, false advertising, and other breach of warranties), and (b) to permit States to require more stringent warnings than the Federal law requires.[340] Congressman Luken also stated that this bill was endorsed by COSH, whose members believed that "the advertisements for 'low tar' cigarettes are deceptive because they imply that

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337 15 U.S.C.A. § 1334(a) *(Exh. 324)*.

338 15 U.S.C.A. § 1334(b) *(Exh. 324)*.

339 Correspondence from Thomas A. Luken, Chairman of Subcommittee on Transportation, Tourism, and Hazardous Materials, to FTC Chairman Daniel Oliver, May 23 1988 *(Exh. 202)*.

340 *Extensions of Remarks, Cigarette Testing and Liability Act of 1988*, 134 Cong. Rec. 11,372 (May 17, 1988) (Statement by Hon. Thomas A. Luken) *(Exh. 083)*.

smoking such cigarettes is safer when in fact there is no medical evidence to support such a claim."[341]

215. Congressman Luken asked the FTC to comment on the proposed legislation.[342] In response, the FTC opposed repeal of the FCLAA preemption, stating that,

> we note the potential for inconsistent health warnings that might take place if the current preemption provision were deleted entirely . . . states would be free not only to require more stringent warnings, but to require inclusion of warnings that detract from the four rotational warnings currently mandated by the FCLAA.[343]

216. The FTC also warned of the consequences if states were allowed to require different warnings in cigarette advertising,

> This would make it virtually impossible to advertise cigarettes on a national basis. As a general matter, the Commission does not favor advertising bans, and achieving such

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341 *Id.*

342 Correspondence from Luken to Oliver, *supra* note 339 *(Exh. 202)*.

343 Correspondence from Emily H. Rock, Secretary of the FTC to Thomas A. Luken, Chairman of Subcommittee on Transportation, Tourism and Hazardous Materials, at 1, 6, June 17, 1988 (letter was sent by direction of the Commission) *(Exh. 203)*.

> a ban indirectly, in our view, does not enhance its merit.[344]

217. Congressmen Luken and Whittaker wrote back, asking the FTC to provide "additional comments on whether Congress should permit state and local governments to regulate [cigarette advertising]."[345] The FTC responded,

> For advertising that is interstate in nature, allowing [states to regulate cigarette advertising] could result in circumstances in which a single state imposes its decisions on citizens of other states or the entire country.[346]
>
> [I]f one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict for advertising that appeared in both states. We believe that results such as these are *very real possibilities*, and urge the Subcommittee to

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344 *Id.* at 6-7. On the other issue of tort liability, the FTC replied that, "[b]ecause the issue of tort liability is beyond the Commission's jurisdiction, we express no view on it." *Id.* at 6.

345 Correspondence from Congressmen Thomas A. Luken and Bob Whittaker to FTC Chairman Daniel Oliver, July 6, 1988 *(Exh. 204)*.

346 Correspondence from FTC Chairman Daniel Oliver to Congressmen Thomas A. Luken and Bob Whittaker (undated) (responding, by direction of the Commission, to a follow up inquiry, *supra* note 345) *(Exh. 042)*.

carefully analyze the potential results of this proposal.[347]

218. Chairman Oliver was asked by Congressman Luken to comment directly on whether cigarette advertisements that claimed to be "lowest" in tar were deceptive within the meaning of Section 5 of the FTC Act.[348] Chairman Oliver replied,

> First let me say that as a general matter I believe that advertisement that accurately conveys information on tar and nicotine content can be valuable source of information to consumers. Advertising that provides *comparative information* on different tar and nicotine levels can be *especially useful*. Conversely, where such advertisements misrepresent a cigarette's tar or nicotine content, consumer injury may occur. The Commission has in the past, and will in the future, take appropriate action in those cases in which cigarette advertisements deceptively advertise tar and nicotine content of various brands.[349]

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347 *Id.* (emphasis added).

348 *Advertising, Testing, and Liability: Hearings Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the Comm. on Energy and Commerce*, House of Representatives, 100th Cong. 2d Sess., at 123 (May 4, June 8 and 29, 1988) (Correspondence from Congressman Thomas A. Luken to FTC Chairman Daniel Oliver, inviting him to testify at a Congressional hearing) *(Exh. 003)*.

349 *Id.* at 120 (Prepared statement of FTC Chairman Daniel Oliver) (underlining added).

> In conclusion, the Commission has devoted and continues to devote substantial resources to implementing programs and policies directed to the advertising and marketing of tobacco products. We will continue our approach of encouraging truthful advertising that ensures that consumers are informed in their decisions whether or not to smoke.[350]

219. The FTC opposed state regulation of cigarette labeling and advertising. It believed that state regulation could significantly reduce the extent of cigarette advertising because of conflicting regulations, and the FTC opposed such restraints on the communication of truthful information about this important product. The FTC also believed that truthful comparative advertising such as "lowest in tar" is especially useful and valuable to consumers and clearly did not support banning such descriptors as long as they were substantiated by underlying FTC tar and nicotine test results.

C. Other Determinations That "Lights" and "Low Tar" Descriptors Are Deceptive or Unfair: Conflict With the FTC's Uniform, National Policies

220. The two preceding sections illustrate the FTC's past opposition to restrictions that may impede the flow to consumers of truthful information on the tar and nicotine yield of cigarettes (in other words, the FTC Method results). This opposition arose from the FTC's ongoing conclusion, based on extended investigation and deliberation, that a

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350 *Id.* at 121.

uniform national advertising policy for cigarettes was needed to enable consumers to become more fully informed.

221. The FTC's goal of enabling consumers to become more fully informed could be frustrated by state rules, whether adopted via legislation, administrative regulation, decrees, or court damages awards ("state actions"). State actions concerning how tar and nicotine yields are measured and subsequently disclosed in cigarette advertising would undermine the FTC's uniform national policy regarding cigarette advertising and could very well leave consumers less informed and manufacturers less willing to develop low tar and nicotine products.

222. First, state actions of the sort described by Congressman Luken would conflict directly with the policies of the FTC, which has taken extraordinary steps to implement a single, uniform program for regulating cigarettes, including the establishment of a testing procedure for tar and nicotine yields, the creation of its own testing laboratory, and the promulgation of a national standard for substantiation of cigarette advertising claims. If a state court determined that a cigarette manufacturer could be held liable and subject to damages (or injunctive relief) for deceptive or unfair advertising under that state's laws, despite compliance with the FTC's standards, then the FTC's efforts would be contradicted in that state.

223. Recall that the FTC's policies include permitting the use of descriptors, if substantiated by the FTC Method, as a means of communicating product characteristics to smokers. If cigarette manufacturers could be held liable under state actions for using the very descriptors (substantiated

by the FTC Method) that the FTC permits, then the agency's efforts to make sure that consumers are fully informed would be undermined. In such a case, state law would constrain the marketing of low tar brands and hinder consumers' ability to compare tar measurements across brands.

224. Such an outcome also ignores the obvious connections between descriptors and the reporting of tar and nicotine yields as determined by the FTC Method. While it may be possible to eliminate the use of descriptors, themselves a "shorthand notation" for tar and nicotine yields, while retaining the reporting of those yields directly, such a separation of the two sources of information would be illogical. Descriptors are directly linked to, and substantiated by, the yields determined by the FTC Method. If descriptors were declared deceptive, consumers could very well question the validity of the underlying FTC test results – an outcome that would contradict explicitly with the FTC policy on cigarette advertising.

225. Second, this problem would not likely be limited to the disagreement between a single state and the FTC. If one state court could determine that a cigarette manufacturer could be held liable and subject to damages (or injunctive relief) for deceptive or unfair advertising under that state's laws, then so could every other state. Each state could have its own views as to the proper method for tar and nicotine yield testing and substantiation and the use of descriptors, and so manufacturers could face numerous different, conflicting regulatory regimes.

226. Such a situation would make interstate marketing of cigarettes much more difficult. Cigarette advertising in certain venues cannot be

customized for different states. Meeting different, incompatible state standards would be difficult if not impossible. Furthermore, even if customization were possible, manufacturers would incur the added costs of creating multiple advertising designs in order to conform to varying state actions. As a result, manufacturers would be dissuaded from using certain advertising venues in favor of other, less efficient venues and would reduce the flow of truthful information reaching customers.

227. n an extreme but possible outcome, a single state (the most restrictive state) would be able tb impose its will, *de facto*, on all national advertising for cigarettes. For example, if a state determined descriptors such as "light" or low tar" to be *per se* deceptive or unfair, the result could be an effective national ban on the use of descriptors. Such a result would be in direct conflict with FTC policy. The FTC recognized such folly and for this reason expressly informed Congress that it opposed any exception from the FCLAA that would allow states (through law or litigation) to regulate low tar advertising claims.[351]

228. The FTC was aware that, as a result of likely state-FTC conflict, consumers would not be as informed regarding the consequences of their smoking behavior. In particular, state actions leading to a ban or restriction on the use of descriptors would remove an efficient and effective channel of communication of information to consumers. As discussed in Section IX.E, consumers often do not pay attention to numbers but do pay

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351 *See supra* Section X.B.

attention to descriptors. Furthermore, whereas a descriptor by itself can provide useful relative yield information, a number by itself cannot convey relative yield information unless consumers happen to know the yield information of other cigarettes. Banning cigarette manufacturers from using this effective means of communicating relative yield information would force them to resort to other less effective means which would mean a reduction in the quantity and efficacy of advertising, and that, in turn, would result in less informed consumers, contrary to the FTC's expressed goal.

229. Unintended consequences would also fall on manufacturers. State actions of the sort described would curtail, if not prevent, the marketing of low tar brands and hinder consumers' ability to compare tar measurements across brands. Thus, manufacturers would have less reason and ability to compete in low tar products, which directly contradicts the FTC's goal of encouraging such competition.[352]

230. In conclusion, allowing state actions which would have the effect of constraining cigarette advertising would conflict directly with the FTC's goal to ensure that consumers are more fully informed on the tar and nicotine yields of cigarettes. Whether advertising costs are raised, informative advertising content is restricted, or, in the extreme, advertising is made impossible, the same effect occurs, though to different degrees. Both the amount

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352 *See supra* para. 82 regarding such encouragement. *See also* Deposition of C. Lee Peeler, Vol. I, supra note 108, at 167, 189 *(Exh. 079)*; and Deposition of C. Lee Peeler, Vol. II, *supra* note 207, at 450 *(Exh. 080)*.

and effectiveness of cigarette advertising that communicates tar and nicotine yield to consumers would be reduced, as would the incentive of manufacturers to create and promote new low-tar cigarettes.

* * *

PROPOSED RULE MAKING

FEDERAL TRADE COMMISSION

[16 CFR Part 428]

ADVERTISING OF CIGARETTES

Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 18 U.S.C. 41, et seq., and the provisions of Part 1, Subpart B of the Commission's procedures and rules of practice, 18 CFR 1.11, et seq., has initiated a proceeding for the promulgation of a Trade Regulation Rule regarding the advertising of cigarettes.

Accordingly, the Commission publishes this notice and proposes the following Trade Regulation Rule:

§ 428.1 The Rule

In connection with the sale, offering for sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties in milligrams of tar (to the nearest whole milligram) and nicotine (to the nearest one-tenth milligram) per cigarette, based on the most recently published Federal Trade Commission test results.

The testing methodology currently used by the Federal Trade Commission is the Cambridge Filter Method specified in the FEDERAL REGISTER notice of November 4, 1968 (31 F.R. 14278), as described in an article entitled "Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C.L. Ogg, Journal of Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964, and as modified by the Federal Trade Commission in accordance with the FEDERAL REGISTER notice of August 1, 1967 (22 F.R. 11178).

Where a finally adopted Trade regulation Rule is relevant to any issue involved in any adjudicative proceeding thereafter instituted, the Commission may rely upon the Rule to resolve the issue; *Provided*, That the respondent shall have been given opportunity for a fair hearing on the applicability of the Rule to the particular case.

All interested persons, including the consuming public, are hereby notified that they may file written data, views or arguments concerning the proposed Rule with the Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection, Federal Trade Commission, Pennsylvania Avenue and Sixth Street NW, Washington, D.C. 20580, not later than October 8, 1970. To the extent practicable, persons wishing to file written presentations in excess of two pages should submit 20 copies.

All interested persons are also given notice of opportunity to make oral presentations of data, views, or arguments with respect to the proposed Rule at a public hearing to be held at 10 a.m., e.d.t., on Thursday, October 15, 1970, in Room 532 of the Federal Trade Commission Building, Washington, D.C.

Any person desiring to present his views orally at the hearing should so inform the Assistant Director for Food and Drug advertising, Bureau of Consumer Protection not later than October 8, 1970, and state the estimated time required for his oral presentation. Reasonable limitations upon the length of allotted to any person may be imposed. In addition, all parties desiring to deliver a prepared statement at the hearing should file such statement with the Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection, on or before October 8, 1970.

The data, views, or arguments presented with respect to the proposed Rule will be available for examination by interested parties at the office of the Assistant Secretary for Legal and Public Records, Federal Trade Commission, Washington, D.C., and will be considered by the Commission in the establishment of a Trade Regulation Rule.

All interested persons, including the consuming public, are urged to express their approval or disapproval of the proposed Rule, or to recommend revisions thereof, and to give a full statement of their views in connection therewith.

Issued: August 8, 1970.

By The Commission.

[SEAL] JOSEPH W. SHEA.

Secretary.

[F.R. Doc. 70-10357; Filed, Aug. 7, 1970; 8:47 a.m.]

CIGARETTES: ADVERTISING, TESTING, AND LIABILITY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON

TRANSPORTATION, TOURISM, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

INCLUDING

H.R. 4543

A BILL TO AMEND THE FEDERAL TRADE COMMISSION ACT TO AUTHORIZE A CONTINUING STUDY OF TOBACCO SMOKE, AND FOR OTHER PURPOSES

MAY 4, JUNE 8 AND 29, 1988

* * *

Pages 178-186

Mr. LUKEN. Thank you, Chairman Oliver. You have just said something to the effect that I said something—I'm not sure I can capture it verbatim—that you believe and consistently believed that the amount of tar in a cigarette is important as to its health effects, is that right?

Mr. OLIVER. I believe the current understanding, certainly of the Public Health

Service, is that while it is best if you stop smoking altogether, if people are going to smoke, they should smoke lower tar cigarettes.

Mr. LUKEN. Well, you heard Dr. McAfee's testimony and I believe one of the other witnesses to the effect that the health benefits and the tar content of a cigarette tested below 5 milligrams tar, that there's no appreciable difference. Isn't that what they testified to, the previous witnesses?

Mr. OLIVER. I did not hear all the testimony.

Mr. LUKEN. All right. We have from your shop, from Judith Wilkenfeld, program advisor, cigarette advertising and testing, Bureau of Consumer Protection—I am told this is one of those confidential memorandums, but I can't imagine this is confidential information—that there is no evidence that there's any real appreciable difference either in taste or health benefits in the tar content of a cigarette tested at 0.5 or one tested below 0.5 milligrams tar.

Would you agree with that, that there's no appreciable difference when you get down to that lower level?

Mr. OLIVER. I'm not a scientist, Mr. Chairman. All I know is that the Public Health Service recommends smoking lower tar cigarettes.

Mr. LUKEN. But there is a difference between lower tar and lower tar is what the witnesses are saying and below a certain level there is no appreciable health effect.

Mr. OLIVER. That may be. I am not a scientist. I can't give you that answer. I understand that lower tar is better than higher tar.

Mr. LUKEN. Well, what is the basis for your understanding that there is a valid difference? You have just testified that there is a valid differentiation between the health effects of smoking cigarettes depending upon the tar content. I am asking you, when it gets down to a certain level, do you alter your statement, or is your statement still to the effect that there is a distinction in health effects depending upon the amount of tar in the cigarette.

Mr. OLIVER. I have to repeat, I am not a scientist. The Public Health Service encourages people to smoke lower tar cigarettes.

MR. LUKEN. You just made a statement that would depend upon evaluation of scientific information. You just said that in your opinion there is a difference in the health effects in smoking cigarettes that had different levels of tar, depending on the levels of tar, that those with the lower level of tar had less deleterious health effects. Isn't that what you said?

Mr. OLIVER. I think not. I think what I said was, and certainly what I meant to say, was we continue to rely on the Department of Health and Human Services, the Public Health Service, which encourages people to smoke lower tar cigarettes. I presume that is because it has better health effects than the experience in smoking higher tar cigarettes. I presume that is the rationale.

Mr. LUKEN. I think that's right.

From the same report that I referred to, from the Federal Trade Commission, there is a statement that there is in fact some concern expressed in medical literature that the ultralow tar brands may produce adverse health consequences of their own,

and I specifically referred to the Smoking Tobacco and Health from the U.S. Department of Health and Human Services, which says in part, and I am not quoting out of context, "A cigarette found to be in the 1 to 5 milligrams tar range can become a 15 to 20 milligrams tar cigarette if the smoker takes more or deeper puffs" and so on. Do you agree with that statement?

Mr. OLIVER. My understanding is that consumers will receive more tar or nicotine if they take deeper puffs. I don't smoke. I don't know how you do it, but that they can receive more of those substances if they smoke differently, yes.

Mr. LUKEN. Then that means that the evaluation that smoking a lower tar cigarette is safer is a chancy thing to conclude for a smoker, isn't it?

Mr. OLIVER. I guess I wouldn't myself make that statement because it may be that not all people smoke that way. Maybe only a few people smoke that way, or some people, or half or a minuscule percentage, and nonetheless there is a fact that those cigarettes contain that amount of those substances, and that presumably is useful for the consumer to know.

Mr. LUKEN. Let me ask you this question, a different tack, the Federal Cigarette Labeling and Advertising Act requires the FTC to make an annual report to Congress on proposed legislation. The Commission's most recent report, dated February 1988 and covering the year 1985, makes no recommendations. Is that right?

Mr. OLIVER. Makes no recommendations as to what?

Mr. LUKEN. As to cigarettes. Any proposed legislation on tobacco? The Federal Cigarette Labeling Act that we have been talking about asks the FTC to advise Congress on what we should be doing.

Mr. OLIVER. I don't believe it is a requirement.

Mr. LUKEN. No, it isn't a requirement—well, I don't know.

Mr. OLIVER. I think it is not.

Mr. LUKEN. You're saying it isn't a requirement?

Mr. OLIVER. I believe-

Mr. LUKEN. I don't know that you can be prosecuted for not doing so, but I believe it is a requirement. The legislation says that's what you should do.

Mr. OLIVER. I believe in 1981 the Commission made a number of recommendations.

Mr. LUKEN. In what? 1981?

Mr. OLIVER. Yes. Some of which were accepted by Congress and some of which were not.

Mr. LUKEN. This is 1988. The law says an annual report. That is 7 years ago, 1981.

You take issue with the fact that I took you to task in my statement for inaction, shall we say? There is evidence of inaction on the part of the Federal Trade Commission with regard to this subject, and I could go through the whole history of what the Federal Trade Commission has done in 1953, 1955, 1966, and 1971. What's the Federal Trade Commission done recently?

The one case that is current is the one that you voted against. That was the 4 to 1 decision on the *R.J. Reynolds*, which is a pending case, I suppose—that is still pending; isn't it?

Mr. OLIVER. That is still pending, yes.

Mr. LUKEN. So we are not going to ask you anything about that, except that-

Mr. OLIVER. I wish I could talk about it.

Mr. LUKEN. I wish we could, too. But we don't want to do that. Pillsbury and all that stuff.

Mr. OLIVER. Right:

Mr. LUKEN. But what else do you have pending? What else are you working on? You took issue with my statement that the Federal Trade Commission has been inactive.

There is the Barclay case in 1983 and you haven't done anything since. The Federal Trade Commission hasn't done anything since 1983.

Mr. OLIVER. We monitor advertisements on a regular, ongoing basis, as I stated, I think, in my statement. We do have the case that you referred to. It is interesting that-

Mr. LUKEN. But you've—continuing?

Mr. OLIVER. Well, but the Commission nevertheless did the investigating and worried about the case and it is true I voted against it, but it was certainly a Commission activity. We don't have to find—don't have to bring a case on every investigation we bring in order to be doing our job, investigating.

Mr. LUKEN. But you haven't done anything since Barclay in 1983. Barclay in 1983 is the last case that you've brought.

Mr. OLIVER. Well, there are only six companies out there, Mr. Chairman. What would you have us do? Sue them all at once, every day? We've had a case going against 16 percent of the industry since 1983.

Mr. LUKEN. I suggested that your record is one of inaction and you took issue with me. I'll leave the record for anyone independent enough to judge it. If you want to add anything else as to what you have been doing since Barclay in 1983 and the one you voted against, which is continuing and is pending today, what else have you done in this all important area? I think it is more important than that.

Mr. OLIVER. I think your statement said the activities are nonexistent. Isn't that what you said?

Mr. LUKEN. Well, I'll amend that to practically nonexistent.

How much time do we have? Do you want to ask any questions?

We'll adjourn for—and I said practically nonexistent in my statement, so I won't have to amend my statement. I have no further questions, but other members have. We will be back in 5 to 10 minutes.

[Brief recess.]

Mr. LUKEN. Gentlemen, will the subcommittee convene? The gentleman from Kansas is recognized.

Mr. WHITTAKER. Thank you, Mr. Chairman, and I want to express my appreciation to Chairman Oliver for staying so that I could inquire. I know he's on a tight schedule, and has got work to do at his office.

But, nonetheless, Chairman Oliver, as you know and I even mentioned before the hearing, there is a revisionist view of the statutory and administrative restrictions on tobacco advertising: that the end conclusion, the principal effect has actually been to protect the tobacco companies from health-related advertising copy that they were using on each other prior to the FTC and congressional interventions.

So, my question to you is, do you subscribe to this view that the harmful consumer influence of tobacco advertising is actually greater because of its being sanitized and standardized through Federal regulation? Or, to put it another way, that the Federal warning and labeling requirements may have actually had the opposite of their intended effect?

Mr. OLIVER. Mr. Whittaker, that's a very interesting question. Let me say, if I may, to begin with, that I am not here as an advocate of smoking. I don't smoke. Nobody in my family smokes. And I prefer, if you sit next to me, that you don't smoke either. I'm not here as an advocate for the cigarette companies.

I'm here as an advocate for consumers. And it's for that reason that I value advertising, because I think advertising is a mechanism for conveying useful information to consumers. I think that the freer and more robust advertising is, the more

information consumers will get from the firms in question.

So, while I can't actually subscribe, because I haven't investigated your theory, I think that in general truthful, vigorous advertising benefits consumers. And to the extent that all advertising winds up being simply a picture of a mountain and a pretty horse, consumers lose out because they don't get the kind of information that they might get with more vigorous advertising.

Mr. WHITTAKER. I think most people would subscribe to the idea that truly unbridled advertising could do a great deal of good in promoting information to the consuming public. The question and the theory--and, incidentally, this was by an FTC economist in the story, "The Ghost of Cigarette Advertising Past"—suggests that the limits that have been imposed actually serve as a floor, or rather a ceiling, I maybe should say, on the extent to which one company could expose the other company, if you would.

And, as such, it has ended up actually working adversely to the benefit of the consuming public. Whereas, had that ceiling not been established, one company would have been considerably more free to challenge another company's health claims.

Mr. OLIVER. I think that's highly likely. Certainly, we know the ad ban in the 1960's very definitely hurt consumers. Companies stopped advertising tar and nicotine content. And, as a result of that, they stopped decreasing the amount of tar and nicotine they had in their cigarettes.

So, the ad ban very definitely operated to the consumers' detriment.

Mr. WHITTAKER. Mr. Chairman, do you also believe that blanket prohibitions on advertising references to the physical effects of smoking, such as the FTC cigarette advertising guides mentioned at page 1 of your statement, actually protect tobacco companies from the adverse claims of their competitors, rather than protecting the consumers from the tobacco companies?

The key words here are the physical effects, in this case, now.

Mr. OLIVER. I don't think I quite understand your question. But I myself am in favor of fewer restrictions on advertising, rather than more. Because I think that the more the companies are able to slug it out in public, the more information that consumers will receive.

Mr. WHITTAKER. Thank you, Mr. Chairman, and thank you, Commissioner.

Mr. LUKEN. I just have one more question, Chairman Oliver. At the last hearing or at one of the previous hearings you testified--and I don't have your testimony here, so I can't give you book, chapter, and verse—with reference to the self-policing, self-regulatory aspects of controlling the advertising or ensuring the nondeceptiveness of advertising, that the tobacco companies were reporting on each other, or tattling on each other. Do you recall that testimony?

Mr. OLIVER. More or less, yes.

Mr. LUKEN. Is that generally what you testified to?

Mr. OLIVER. That's correct.

Mr. LUKEN. At that time, members of the subcommittee—at least one, and I think at least two, as I recall—took issue with that in view of the nature of the tobacco industry.

And recently there's been a good deal of publicity on the subject—and I'm not referring to any lawsuits—on the Tobacco Institute, on the actions that the companies have taken, apparently, in concert with reference to what you might call boycotts against those who are opposing, who are restricting, the airline that is restricting smoking and so on.

What is your reaction to that? Isn't there evidence that the tobacco industry is acting like a cartel in these matters? And, under such circumstances, can we really rely on their tattling on each other?

Mr. OLIVER. I'll make two comments. One is that I'm not aware of a boycott, which was-

Mr. LUKEN. You haven't read about the actions of the-

Mr. OLIVER. Is this a concerted boycott by several companies? I know that one company has changed its advertising agency. But I think individual companies are still allowed to select the advertising agency of their choice, and I don't think we could have any objection to that. If we-

Mr. LUKEN. Well, in a recent publication in the Washington Post, Walker Merriman, vice president of the Tobacco Institute, said: "If we're attacked, we're not going to roll over and play dead. The sooner our adversaries, friendly or otherwise, learn that, the less difficulty they're going to find themselves in."

That's in the context of RJR and Nabisco's decision to pull a million dollar advertising account. But the other actions attendant upon that, not just pulling the account, flying people in to picket Northwest Airlines. You're not aware of any of that?

Mr. OLIVER. I'm certainly aware of the change in advertising firms, and I see nothing wrong with that. I think they have the right to select their advertising firms and reject them, essentially, for whatever reason they may have.

Mr. LUKEN. Well, one protester, the president of the Smokers' Rights Alliance—have you heard of the Smokers' Rights Alliance?

Mr. OLIVER. There are a number of organizations out there. I don't know about it.

Mr. LUKEN. This is the Smokers' Rights. There aren't too many of those, are there?

Mr. OLIVER. I don't know.

Mr. LUKEN. But this is the Smokers' Rights Alliance, and they're an Arizona-based group, formed last year to fight the growing number of regulations forbidding smoking. And one of the protesters was quoted as saying that the Alliance is an independent group of 800 members, but the Tobacco Institute paid to fly some Alliance members to Washington for today's protest.

It's also an article in the Washington Post. There's been a good deal of publicity on this subject.

Mr. OLIVER. To the extent they're operating as a trade industry, trade industries traditionally operate for the benefit of an industry. And that doesn't get down to collusive behavior of the kind that raises antitrust concerns.

Mr. LUKEN. Well, we didn't really ask you about antitrust concerns at this time. We're only limiting it right now to the question of whether you are reassured as to the zeal with which these tobacco companies are going to report on one-another in view of this evidence of action in concert. And I'm only giving you a small portion of it.

Mr. OLIVER. I see no reason to be dubious that they would continue to compete against each other and report violations of law to us.

We have, as you know, had a case which was started by one company reporting a possible violation to us of another company. So, I think we have a history of tattling, if that's the word, in this industry.

Mr. LUKEN. You have a history of it? How many cases?

Mr. OLIVER. One.

Mr. LUKEN. One?

Mr. OLIVER. We have one case where-

Mr. LUKEN. That is a history to you?

Mr. OLIVER. Yes.

Mr. LUKEN. Well, one case-

Mr. OLIVER. It indicates that they-

Mr. LUKEN [continuing]. Would be the exception, would it not? The exception proves the rule, I always learned from grade school on. If there's only one, that would be the exception. That proves that the rule is otherwise.

Mr. OLIVER. One election is still a history, even though it's only one. The companies are

advertising. They obviously compete in advertising. We see that.

We see a certain amount of competition in this industry, even at the same time we see that they have certain interests in common. They can only tattle on violations. So, you're assuming that there are violations.

Mr. LUKEN. Here's a—and I would ask unanimous consent that this release be put into the record - news release from the Tobacco Institute. This is a release dated March 25, 1988: Northwest Airlines Disappoints Passengers Once More.

[The release follows:]

[Release from the Tobacco Institute, March 25, 1988]

NORTHWEST AIRLINES DISAPPOINTS PASSENGERS ONCE AGAIN OF ALL THE CONSUMER PROBLEMS CITED, NORTHWEST ADDRESSES THE SMALLEST

WASHINGTON, DC.—Airline passengers who fly Northwest Airlines appear to have a lot to complain about—they did so in droves last year. Consumer complaints filed against Northwest with the Department of Transportation [DOT] rose a staggering 1,418 percent from 1986 to 1987.

According to DOT during 1987, 6,940 consumer complaints were logged against the airline, as opposed to only 457 in 1986. Yet a new marketing campaign announced by the airline centers not on delayed or canceled flights, or even on the many other customer service issues cited time and again—but on banning smoking. Complaints about smoking on Northwest were less than 3 percent of the total in both years—one of the smallest categories.

The airline's own reports to the DOT between September 1987 and January 1988 place Northwest consistently near the bottom for on-time performance, ranking 13th of 14 carriers for most of the 5-month period. During the airline's best month, October 1987, nearly one of every four Northwest flights was late by more than 15 minutes. Records for 1988 indicate this dismal performance only continues to worsen. In January, Northwest flights arrived on time only 61.6 percent of the time.

In other areas, airline passenger complaints received by the Department of Transportation show Northwest faring just as poorly. According to the Federal Air Travel Consumer Report summarizing 1987 performance, Northwest received the second most passenger complaints. Northwest is at or near the bottom of the worst ranked airlines for delays or cancellations; overbookings; lost and damaged luggage; customer service; obtaining refunds; and problems making reservations, obtaining tickets, or boarding the aircraft.

If Northwest is truly attempting to satisfy passenger concerns about service, any number of issues deserves higher priority than smoking. Since the airline's customers complain with such great frequency, it's no wonder Northwest is attempting to create a smokescreen. Unfortunately, for smokers and nonsmokers alike, that's all it is—a smokescreen that does nothing to address the problems passengers feel are seriously wrong with Northwest.

Mr. LUKEN. This is from the Tobacco Institute complaining about-Northwest Airlines. Now, that's a little different from the one company taking action, isn't it?

This is evidence of the Tobacco Institute acting in concert against Northwest Airlines. Doesn't that shake you up a little bit, with reference to the companies tattling on each other?

Mr. OLIVER. No, it really does not.

Mr. LUKEN. Is this the normal behavior of a trade association in your book?

Mr. OLIVER. I would think it probably was, yes.

Mr. LUKEN. You know of other trade associations that talk like this: If we're attacked, we're not going to roll over an play dead. The sooner our adversaries, friendly or otherwise, learn that, the less difficulty they're going to find themselves in.

How many trade associations have you heard quoted to that effect? I mean legal trade associations.

Mr. OLIVER. Trade associations by nature support their own-

Mr. LUKEN. Would you answer the question? How many trade associations have you heard quoted with this kind of a statement?

Mr. OLIVER. None. But that doesn't seem to be dispositive of the question as to whether they should be allowed to work in the interest, generally, of the industry.

Mr. LUKEN. Let me add-

Mr. OLIVER. Could I make a comment? That doesn't indicate that there isn't competition in that industry any more than the existence of any other trade organization indicates that there is not competition in another industry.

There's lots of competition, and at the same time there's competition, industries form trade associations to promote their common goals. I don't see anything remarkable about that at all.

Mr. LUKEN. And I would add another statement. This is from Guy Smith, a Philip Morris vice president. It again reflects the attitude of this industry: I would suggest that organizations that discriminate against one-third of the adult population, those who smoke, do so at their economic or political peril.

Mr. LUKEN. It sounds like he's speaking for more than Philip Morris.

Mr. OLIVER. Are you suggesting that-

Mr. LUKEN. These are threats, and I suggest that this is evidence of a boycott.

Mr. OLIVER. You're not suggesting that-

Mr. LUKEN. And I'm only reading a small amount of it. Pick up your Advertising Age magazine.

So, you are still reassured, you're still confident that the tobacco companies will report on each other.

Mr. OLIVER. The existence of a trade organization does not indicate lack of competition, it seems to me, any more in this industry than in any other industry.

Mr. LUKEN. I have no further questions. Do you have anything further?

Thank you very much, Chairman Oliver, for your testimony.

Mr. OLIVER. My pleasure.

Mr. LUKEN. Oh, I'm sorry. I didn't see you were there. The gentleman from Virginia.

Mr. BOUCHER. Thank you, Mr. Chairman. I just have one question of you. Do you have any basis to believe that the testing that's done by the Tobacco Institute of tar and nicotine levels in cigarettes is in any way flawed?

Mr. OLIVER. I don't think we have any such evidence. My understanding is that when there was testing going on by both the FTC lab and the Oak Ridge lab that the variation in results was very small.

Mr. BOUCHER. Has the FTC given any consideration to a reopening of the testing laboratory that you used to operate?

Mr. OLIVER. No, we have not.

Mr. BOUCHER. Okay. That's all I have. Thank you.

Mr. WHITTAKER. Mr. Chairman?

Mr. LUKEN. The gentleman from Kansas.

Mr. WHITTAKER. Mr. Chairman, I'd like to note that the tar and nicotine tests that were conducted are somewhat analogous to the Environmental Protection Agency mileage figures on automobiles. They're comparative only, and they don't reflect individual fuel or, in this case, tobacco consumption.

The FTC's previous testing of tobacco products has not addressed the health impacts. So, I think that needed to be stated.

Mr. LUKEN. Mr. Chairman, first of all, I'd like unanimous consent that the article dated April 7 in

the Washington Post, to which I previously referred, the editorial viewpoint from Advertising Age magazine dated April 11, 1988, and an article entitled "Northwest Blamed Philip Morris Too" from Advertising Age, April 25, 1988. I'd ask unanimous consent that these also be placed in the record.

Mr. LUKEN. And I ask unanimous consent that the record be left open for 30 days, and that the Federal Trade Commission be asked to respond to these articles and any other evidence or notification that the Federal Trade Commission has as to the actions in concert taken by the various segments of the tobacco industry as to whether the Federal Trade Commission is making any investigation, as to these trade practices, the monopolistic inferences that might be derived from these trade practices, the intimidation aspects which might constitute a boycott, or any other investigation or comments that the Federal Trade Commission has with reference to these matters.

Mr. OLIVER. We'd be happy to respond.

Mr. LUKEN. Without objection. And also the one that I referred to before, without objection, the article from the, Washington Post dated April 24, 1988.

[The material follows:]

* * *

No. 83-2129
In the U.S. Ct. of Appeals
For the District of Columbia Circuit

FTC

v.

Brown & Williamson Tobacco Corp

Defendant-Appellant,

Appeal from an order of the
U.S. District Court for
the District Of Columbia

Brief for Plaintiff-Appellee
Federal Trade Commission

John H. Carey
Gen. Counsel

Howard Shapiro
Dept. Gen. Counsel

Jerold D. Cummins
Deputy Asst. Gen. Counsel

Attorneys for FTC

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2129

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

STATEMENT OF THE ISSUES

1. Whether empirical evidence of consumer deception is required as a prerequisite to a judicial finding that defendant-appellant's "1 mg. tar" designation for Barclay cigarettes is deceptive under the Federal Trade Commission Act.

2. Having found that Barclay's 1 mg. tar designation is deceptive, did the district court err in enjoining all future use of any milligram tar rating in Barclay advertising and labeling unless such rating is approved by the Federal Trade Commission

or is derived from methodology approved by the Commission for rating Barclay cigarettes?*

STATEMENT OF THE CASE

I. *BACKGROUND*

A. *Brief History of the Federal Trade Commission's Participation in Tar and Nicotine Testing*

Charged with monitoring unfair and deceptive advertising in or affecting interstate commerce, Commission has been concerned about the validity of "tar"[1] and nicotine content claims in cigarette advertising since at least 1955. In that year the Federal Trade Commission published cigarette advertising guides that advised that representations as to the tar and nicotine content of a cigarette should not be made unless the claims have been substantiated by competent scientific proof. 4 Trade Reg. Rep. (CCH) ¶ 39,012; App. 355.

However, in the absence of a standarized methodology for testing cigarette delivery, a "tar derby" occurred in cigarette advertising—a multitude of inconsistent, non-comparable tar claims based on differing test methods that deceived consumers and denied them a meaningful

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* This case has not previously been before this Court. A related case, but not one involving the issues on this appeal, is *Brown & Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165 (6th Cir.), *rehearing denied*, 717 F.2d 963 (6th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3512 (U.S. Dec. 16, 1983) (No. 83-1010).

1 "Tar" is the term given to particulate matter in cigarette smoke after extraction of nicotine and water. It is the major component linked with lung cancer. Tr. 19, 160.

opportunity to assess the relative deliveries of competing cigarette brands. App. 355.[2]

The Commission perceived that public confusion and deception about an important issue concerning people's health was engendered by this profusion of claims and testing methods. It observed that mere disclosure of the test method used by each manufacturer was insufficient to remedy this problem because consumers could not possibly evaluate all methods and make meaningful comparisons between brands.

To encourage undeceived choices by consumers, the Commission in 1967 adopted a testing methodology (sometimes referred to as the Cambridge filter method) and began its own testing program to analyze in a standardized fashion the tar and nicotine content of cigarette smoke. Since that time, the Commission has periodically published the results of tests using the FTC method. App. 355-56.

The tests utilize a smoking machine. The Commission has explained that their purpose is not to measure the exact amount of tar or nicotine that any particular or average smoker receives. That amount will depend in part on individual behavior, and therefore cannot be measured in a standardized fashion. Rather, the tests determine the amount of tar and nicotine that a hypothetical smoker would receive if that person smoked the cigarette to a

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[2] See *Hearings on False and Misleading Advertising (Filter-tip Cigarettes) Before Subcommittee on Legal and Monetary Affairs of House Committee an Government Operations*, 85th Cong., 1st Sess., at 289-98 (1957); H.R. Rep. No. 1372, 85th Cong., 2d Sess. 23-29 (1958).

defined butt length, with the puff frequency, duration, and volume specified by the Commission for its machine test. The test thus provides an objective, comparative basis for assessing the relative amounts of tar and nicotine cigarettes will deliver when each is smoked in the same way. App. 356, 400, 1110.

In 1970, the Commission proposed a Trade Regulation Rule to require disclosure of FTC tar and nicotine ratings in cigarette advertising. 35 Fed. Reg. 12,671 (Aug. 8, 1970); App. 356. To avoid such a rule, five leading cigarette companies, including appellant Brown Williamson Tobacco Corporation ("B&W"), agreed among themselves to a voluntary disclosure plan (App. 955-59). The Commission suspended the proceeding to allow implementation of the voluntary disclosure plan. 36 Fed. Reg. 784 (Jan. 16, 1971); App. 357.[3]

No Commission rule or order requires the cigarette manufacturers to disclose in their cigarette advertising the FTC tar and nicotine rating for the advertised brand. Nevertheless, all have done so (including, until recently, B&W). Where such ratings are not yet available, they have relied on their own tests conducted pursuant to FTC test methodology.[4] Appellant concedes that "[t]he public

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[3] In suspending the rulemaking proceeding, the Commission reserved the right to "take any other action relating to this subject at any time it deems such action to be necessary or desirable in the public interest." Govt. Exh. 3, attachment 4.

[4] Under their plan the companies agreed (App. 956-57) to disclose the tar and nicotine figures in all advertising for their cigarettes according to the most recent published Commission test results, the disclosure being in the following language:

has come to accept and rely upon those numbers, and the cigarette companies have molded massive advertising and marketing strategies around those numbers" (App. 4).

B. *The Commission's Investigation of Barclay*

1. *The Marketing of Barclay*

In early 1981, B&W commenced a nationwide marketing of a new brand of cigarettes—"Barclay". By its own admission,[5] the company has heavily

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[Footnote continued from previous page]

_____ mg. "tar", _____ mg. nicotine av. per cigarette, FTC Report (date)

For new varieties of cigarettes not yet tested and reported in the latest FTC report, the plan permits the figures to be stated and determined by the manufacturer in its own tar and nicotine test in accordance with FTC test methodology, using the language:

_____ mg. "tar", _____ mg. nicotine av. per cigarette by FTC method

[5] In June 1982, B&W's senior vice president of marketing stated in an affidavit filed in an injunction suit B&W commenced against the Commission (App. 435):

> * * * Brown & Williamson has expended approximately $150 million in advertising and promoting Barclay—perhaps the largest sum ever expended on advertising in the history of the cigarette industry.
>
> * * * The keystone of Barclay's advertising compaign has been its 1 mg. "tar" delivery. The campaign was so successful that Brown & Williamson launched, with Barclay, its first successful new product launch in 22 years. * * * Seven hundred thousand consumers began smoking Barclay in 1981.

advertised and promoted king-size Barclays as 1 milligram ("mg.") in tar, which is one of the lowest tar claims made for a cigarette (App. 908). The campaign also emphasized the themes "99% tar free" and "The pleasure is back" (App. 439-40). "The pleasure is back" slogan presumably refers to the fact that Barclays taste stronger than other filtered cigarettes having a comparable low tar rating. Govt. Exh. 3, attachment 12.[6]

Because the Commission had not yet published its test results for Barclays, the tar/nicotine legend carried in the ads said "1 mg. 'tar', 0.2 mg. nicotine av. per cigarette by FTC method" rather than citing to an FTC Report.[7] Barclay advertisements stated in larger size print "99% tar free," showed nearby the statement "1 MG TAR" in a picture of the Barclay package (App. 439-40). Packages of king-size Barclays stated "1 MG TAR" on the label. Govt. Exh. 3, attachments 87-89. Barclay soon captured a significant share of the market. App. 359, 435.

2. *The Origin of the Controversy*

A number of cigarette companies complained to the Commission that the 1 mg. tar claim was

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[6] B&W attributes the stronger taste to a "swirling" manner in which Barclay's filter delivers streams of smoke and air inside a smoker's mouth. However the evidence suggests that the enhanced taste is more probably due to higher tar yields. Govt. Exh. 8, at 52.

[7] After the Commission in its December 1981 Report officially listed Barclay (king-size) as a 1 mg. tar, 0.2 mg. nicotine cigarette, B&W changed the legend in Barclay advertising to refer to the FTC Report: "1 mg. 'tar', 0.2 mg. nicotine av. per cigarette. FTC Report Dec. '81." See, *e.g.*, Govt. Exh. 3, attachments 83 & 85.

inaccurate and misleading. They asserted that the filter used in the Barclay is unlike other filters—that when the cigarette is smoked between human lips its air ventilation system is inevitably obstructed and the cigarette delivers disproportionately more tar and nicotine than other comparably rated cigarettes. The FTC's test machine does not reproduce this obstruction. Thus, they claimed that the FTC test method does not accurately rate the Barclay. App. 359-366.

There are two primary methods by which cigarette companies construct cigarettes to reduce tar and nicotine deliveries: filtration and ventilation. Filters trap some of the smoke particulates (tar) in smoke. Ventilation, on the other hand, is used to provide alternate or additional routes for air to enter the cigarette. Ventilation is sometimes called "dilution" or "air dilution." The conventional filter-ventilated cigarette has a filter that is wrapped with porous paper overlaid with perforated "tipping paper." During a puff, air enters the perforations and mixes with the smoke inside the filter before it enters the smoker's mouth. The process is set forth below in the diagram of the dilution mechanism of a typical diluted cigarette (Govt. Exh. 3, attachment 11, diagram 1):

DIAGRAM OF DILUTION MECHANISM OF TYPICAL DILUTED CIGARETTE

CONSTRUCTION

* * *

SECTION SHOWING FLOW PATTERN

* * *

There is an inverse relationship between the dilution of a filtered cigarette and its measured tar delivery. If a cigarette is highly ventilated, each puff will contain a high percentage of diluting air and a correspondingly lower percentage of particulate-containing smoke. All the cigarette brands with very low tar delivery have a very high percentage of dilution. (The ratio of the volume of ventilating air to the combined volume, expressed as a percentage, is the "percentage of dilution.") Govt. Exh. 3, attachment 11, p. 8, and appended exhibit 4.

The Barclay cigarette uses a filter with a unique construction. As shown in the next diagram (Govt. Exh. 3, attachment 11, diagram 2), the Barclay filter has four lengthwise channels, each surrounded by *nonporous* paper, which extend from the mouth end of the filter to slightly beyond several rows of ventilating holes in the paper on the outside of the filter. The air that enters the four channels through the filter perforations does not enter the interior of the filter and does not mix with the smoke until inside the smoker's mouth. Govt. 3, attachment Exh. 12, p. 3.

DIAGRAM OF DILUTION MECHANISM OF BARCLAY CIGARETTE

CONSTRUCTION

* * *

SECTION SHOWING FLOW PATTERN

* * *

A number of B&W's competitors complained to the Commission that when Barclay cigarettes are smoked by humans (as distinguished from machine-test smoking), the four channels which run

lengthwise along the outside of the filter collapse (fully or in part) and/or are blocked by lip tissue, thereby decreasing the air dilution and increasing the tar delivery. They argued that other low tar cigarettes are not subject to these phenomena because they do not have this channel design. App. 359-366.

The Commission commenced a comprehensive inquiry to determine whether the Barclay cigarette was accurately rated by the current FTC testing methodology. On several occasions it solicited comments and evidence on this question from all the cigarette companies. B&W participated in the Commission's inquiry, presenting evidence to support its own contentions and commenting upon studies performed by others. App. 360, 367. The Commission's role in this proceeding was not as an advocate of any position, but rather as an impartial fact-finding body.

To assist in an evaluation of the evidence, the Commission selected three consultants—each an expert in the chemistry or use of tobacco.[8] They analyzed extensive data and tests on the Barclay that were submitted to the Commission by B&W and other cigarette companies. Working independently,

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[8] The three scientists were: Dr. Michael R. Guerin, of the Analytical Chemistry Division of Oak Ridge National Laboratory; Dr. Fred G. Bock, with the Papanicolaou Cancer Research Institute in Miami; and Dr. Lynn T. Kozlowski, of the Addiction Research Foundation in Toronto and the University of Toronto. All three are respected scientists. None was connected with any cigarette company. App. 366; see also App. 346-49, 351, 441-46. B&W specifically approved the selection of both Drs. Bock and Guerin. Govt. Exh. 11.

each scientist arrived at the same ultimate conclusion—that the Barclay cigarette is not properly ranked by the FTC testing method and yields substantially more tar than other cigarettes rated 1 mg. tar when smoked by humans.[9] Their collective estimates of the proper tar rating for the Barclay ranged from 3 mg. to 7 mg. (App. 372-76).

After reviewing the evidence and the reports of the three scientists, the Commission, on June 25, 1982, issued a press release announcing that, *inter alia*, it had arrived at the following determinations (Govt. Exh. 3, attachment 71):

(1) the present testing methodology does not accurately assess the tar and nicotine yields of Barclay cigarettes, and the Commission will not accept test results based on the current methodology

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[9] The principal evidence upon which they relied were two major ventilation studies. Barclays are generally found to have a dilution percentage of around 80% in machine tests, *i.e.*, each puff will contain about 80% of diluting air drawn through the ventilation channels and 20% of smoke drawn through the cigarette column where the tobacco resides. The ventilation studies showed that when the Barclay is puffed by human smokers, the dilution level falls precipitously to levels of 40% to 60%. No reduction was observed for any of the non-Barclay cigarettes tested. App. 407-410; Govt. Exh. 3, attachments 44-45.

The Commission's consultants found that the final ventilation studies were well-designed tests for the purpose of measuring the effects on air dilution of holding cigarettes in the mouth. They did not find them "flawed" studies as B&W asserts (B&W Br. 14). See Govt. Exh. 3, attachment 54 (final report, Dr. Guerin, at 4); attachment 51 (supplemental report, Dr. Kozlowski, at 3); attachment 55 (final report, Dr. Bock, at 11-14).

as substantiation for claims made about the tar and nicotine content of Barclay cigarettes;

(2) a prior FTC report, which had listed the tar yield of the Barclay cigarette as 1 mg., was inaccurate and the report would be amended to omit Barclay's ratings; and

(3) pending a revision in the test methodology so that the Barclay yield may be accurately measured, further FTC reports would not include results for the Barclay.

At the same time, the Commission stated that it intended to make these announcements by a *Federal Register* notice and to request comment on several issues, including the question of how to modify the FTC testing methodology to accurately rate the Barclay cigarette. Govt. Exh. 3, attachments 70-72. Before it could do so, however, B&W commenced a court action in the United States District Court for the Western District of Kentucky (Louisville), arguing that the Commission's decision violated the Administrative Procedure Act ("APA") and was not supported by the evidence, and that the Commission's proposed actions would cause it irreparable injury. If filed an affidavit executed by its senior marketing officer which stated that competition had increasingly centered on the ultra-low tar segment of the cigarette market and that FTC tar ratings are closely noted and relied upon by consumers who are concerned about the health risks in smoking. The affidavit stated that the keystone of Barclay's successful entry into the market had been its 1 mg. tar rating and that, unless stopped, the Commission's actions would, among other things, cause B&W to lose customers "to whom [the Barclay] brand represents the preferred way of reducing tar

intake while continuing to enjoy smoking" (App. 435-36).

B&W obtained a temporary restraining order which had the effect of prohibiting the Commission from publishing its notice in the *Federal Register* and from taking any enforcement action to stop B&W from relying on the FTC methodology for tar claims. App. 378-79.

Although the district court in Louisville subsequently dismissed B&W's complaint, concluding that the Commission's determinations were not final agency action and hence were not reviewable under the APA, it issued an injunction against the Commission pending B&W's appeal to the Sixth Circuit. App. 379.

C. *The Sixth Circuit's Ruling*

Following oral argument on B&W's appeal from the district court's dismissal of the complaint, the Sixth Circuit, on April 1, 1983, dissolved the injunction. App. 380.

Subsequently, on June 24, 1983, the Sixth Circuit issued its opinion holding that the Commission's June 25, 1982 determinations were reviewable agency actions. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, *rehearing denied*, 717 F.2d 963 (1983), *petition for cert. filed*, 52 U.S.L.W. 3512 (U.S. Dec. 16, 1983) (No. 83-1010).[10]

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[10] Among other things, the court reasoned, "[d]eclining jurisdiction would only delay the dissemination of the most up-to-date information on the Barclay cigarettes. The reliance that smokers who are concerned about health risks place on representations of the 'tar' and nicotine content of cigarettes

Rather than remanding, "which would entail further delay," the court decided "in the interest of judicial economy to reach the merits of the case." *Id.* at 1173.

After reviewing extensive documentation in the form of affidavits and exhibits submitted to the district court, the court of appeals entered judgment for the Commission on the merits. The court rejected B&W's contention that the Commission had violated the APA or acted without sufficient evidence.[11]

On September 19, 1983, the court, in a strongly worded opinion, denied a petition for reconsideration filed by B&W. 710 F.2d 1165.

D. *The April 13, 1983 Federal Register Notice*

Because the Sixth Circuit, on April 1, 1983, vacated the injunction pending appeal, the Commission was free to proceed with its plan to seek

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underscores the public interest in resolving this controversy in this forum." 710 F.2d at 1172.

[11] Indeed, the court found the evidence "overwhelming," stating, *inter alia*:

> The FTC did not act arbitrarily. The conclusions of the three experts are consistent and clear. All three experts reviewed the extensive materials filed by the companies and weighed the persuasiveness of the methodologies utilized in the studies. Faced with such overwhelming evidence that Barclay was inaccurately being reported as a 1 mg. "tar" cigarette, the FTC appropriately took action to halt the dissemination of misleading and incorrect statistics to the public.

710 F.2d at 1176.

public comment on proposals to modify the present methodology and to delete the values listed for Barclay cigarettes in past reports. This it did by publishing on April 13, 1983, an updated version of its June 25, 1982 proposed notice. The Commission reiterated to B&W that it would consider continued advertising claims of 1 mg. tar to be a deceptive practice under Section 5 of the FTC Act, 15 U.S.C. § 45 (App. 382).

The Commission had previously provided B&W with a number of options for modifying its advertising during the period the Commission was studying proposals to revise its testing methodology. The Commission had suggested three alternatives: B&W could admit any reference to tar and nicotine in Barclay advertising, simply claim "low tar," or use an estimated yield of 3 mg. to 7 mg. tar. Govt. Exh. 3, attachment 74. Following, the Sixth Circuit's dissolution of the injunction, these options were reiterated to B&W (App. 381-82). B&W, however, chose to ignore them and continued to label and advertise Barclays as 1 mg. tar cigarettes and continued to prominently state "99% tar free" with '1 MG TAR" displayed nearby on a picture of the Barclay package label. The only revision B&W made was in the fine-print tar and nicotine legend which appears in a corner of Barclay ads. B&W changed the legend which had previously referenced "by FTC method" or "FTC Report Dec. '81" (App. 439), to read (App. 440):

> Kings, 1 mg. "tar", 0.2 mg. nicotine av. per cigarette by a recognized method used by B&W and supported by independent laboratories.

Barclay package labels continued to state "1 MG TAR" without any specified source (App. 385; Govt. Exh. 87-89).

II. *THE DECISION BELOW*

On July 7, 1983, the Commission filed the instant suit, seeking preliminary and permanent injunctive relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to prevent B&W from, *inter alia*, continuing to represent that Barclay is a 1 mg. tar cigarette. The Commission alleged that Barclay's advertisements and labels were "deceptive acts or practices" under Section 5 of the FTC Act, 15 U.S.C. § 45, because they have the tendency and capacity to lead consumers to believe, incorrectly, that Barclay delivers approximately the same amount of tar to human smokers as other cigarettes rated 1 mg. tar, when smoked in the same manner, and that Barclay's 1 mg. tar designation is an official government rating. (App. 15-16; Tr. 1000-1004).[12]

Although the matter was originally scheduled to be heard before the court on the Commission's motion for a preliminary injunction, extensive pre-hearing discovery took place during the month of August, and at the hearing each party stated its consent to proceed to final judgment on the basis of the testimony, affidavits, and other exhibits to be submitted.

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[12] To simplify the issues, the Commission's complaint did not directly challenge the 0.2 mg. nicotine rating referred to in the tar/nicotine legend appearing in Barclay ads, even though the Commission's investigation revealed that nicotine as well as tar yields are understated in Barclay advertisements. The Commission believes that consumers interested in low yield cigarettes look primarily at tar claims made for cigarettes.

On October 14, 1983, after a six-day trial, the court (per Gesell, J.), issued an opinion finding that the claim that Barclay is a 1 mg. tar cigarette is deceptive under the FTC Act.

Judge Gesell ruled that an advertisement may be deceptive within the meaning of the FTC Act if it has "a tendency and capacity to convey misleading impressions to consumers even though other nonmisleading interpretations may also be possible" (quoting *Chrysler Corp.* v. *FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977)) and that "[t]he impression created by the advertising, not its literal truth or falsity, is the desideratum" (quoting *American Home Prods. Corp* v. *FTC*, 695 F.2d 681, 687 (3d Cir. 1982)). He found that Barclay advertising and labels lead consumers to believe that Barclay is officially rated 1 mg. tar and that Barclay delivers to the smoker the same amount of tar as cigarettes rated 1 mg. by the Commission (App. 44-45, 51 n.2).[13]

Judge Gesell also found that B&W's change in the wording of its advertising legend (deleting specific reference to the FTC test method) was not sufficient to put consumers on notice that the rating given is not an official rating. Further, he found that even if consumers were to be informed that Barclay's rating is not government-approved, they would still take Barclay's 1 mg. designation to be a claim that Barclay delivers to smokers the same amount of tar as other 1 mg.-rated cigarettes. App. 44-45.

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[13] Incredibly, B&W asserts that "the only advertising claim which the court found deceptive was Barclay's tar legend" (B&W Br. 21). The court found the 1 mg. tar designation deceptive without limitation to where it appeared in Barclay advertisements and labeling. See, *e.g.*, App. 44, 48, 49.

This claim, he found, was false. After reviewing the scientific evidence submitted by each party, the court concluded that the cigarette ventilation studies presented by the Commission "are the only credible evidence which addressed the question of how much tar a smoker receives in his mouth, the issue the FTC testing method attempts to determine" (App. 48). These studies, the judge found, provide "strong evidence that Barclay is improperly rated as 1 mg. because its vent system is 'compromised' under actual smoking conditions, unlike the vent systems of other low-tar cigarettes." *Id.* On the other hand, he noted, "[t]he evidence presented by B&W failed to refute the ventilation studies and did not provide significant contrary evidence." *Id.* He concluded that the ventilation studies demonstrate that "any claim that Barclay is a 1 mg. tar cigarette is deceptive" (App. 48). The judge also rejected an argument by B&W that the FTC testing system is itself deceptive and that the Commission should be foreclosed from seeking equitable relief. App. 40-43.

On October 25, 1983, the court entered a judgment permanent enjoining B&W from promoting Barclay cigarettes with any claims a specific milligram tar rating unless such rating is approved the Commission or is derived using a test methodology approved the Commission for measuring Barclay. App. 60-62.[14]

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[14] The Commission also challenged any unqualified use of the phrase "99% tar free' in Barclay ads. The Commission did not dispute evidence submitted to it by B&W that smoke from any cigarette with a rating of up to 5 mg. tar would approximate "tar free" by weight. However, it argued that consumers would be cognizant of this scientific fact and would construe the

On the same day, the district court denied B&W's motion under Fed. R. Civ. P. 62(c) for a stay of the injunction pending appeal (Order, Oct. 25, 1983). This Court subsequently denied an application by B&W for a stay pending appeal (Order, Nov. 7, 1983).

SUMMARY OF ARGUMENT

Barclay's advertising must be viewed in the context of a 12-year industry practice of publicizing the tar delivery of cigarettes in terms of a single, standardized test method—the FTC test method. The evidence fully supports the district court's findings that notwithstanding B&W's 1983 revision of its tar/nicotine legend, smokers would continue to obtain the same message from Barclay 1 mg. claim as they did before, namely, that Barclay cigarettes are rated 1 mg. by the official rating source and

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phrase "99% tar free" as meaning virtually free of tar, a claim which the Commission asserted was not accurate. The court found, however, that the Commission failed to demonstrate that "99% tar free," unaccompanied by the 1 mg. tar claim, is deceptive (App. 48-49). The Commission has not appealed this ruling and B&W's lengthy discourse on this subject is entirely irrelevant this appeal.

Contrary to B&W's representations, the Commission's complaint did not challenge the use of the phrase "ultra low" with respect to Barclay. Nor did the Commission attempt to inject it as a challenged claim during the trial (B&W Br. 19). Reference to "ultra low tar" arose during the trial only because *B&W* mentioned it as a type of claim that would be enjoined by the Commission's prayer for relief, which sought an injunction against *any* numerical or descriptive representation about tar yield absent disclosure of an authorized tar rating. App. 18; Tr. 15-16.

deliver the same amount of tar to smokers as competing cigarettes rated 1 mg. tar.

Even if a consumer happened to focus on the fine-print statement in the revised Barclay legend referring to "1 mg. tar by a recognized method used by B&W and supported by independent laboratories," that claim, although literally true, is inherently deceptive. The methods referred to in the legend are machine tests virtually identical to the FTC method and B&W has not appealed from the district court's finding that the ventilation studies introduced by the Commission demonstrate that such machine tests do not properly rank Barclay on a scale with other cigarettes in terms of delivery of tar to the human smoker.

Contrary to B&W's argument, the cases do not establish that consumer survey evidence was required to show the deceptive implications of Barclay's 1 mg. tar designation. Although the Second Circuit, in private suits under the Lanham Act, has taken the view that evidence of "public perception" is generally required when the alleged claim is implictly made, this requirement has not been followed in FTC Act cases. Nor has the Second Circuit's Lanham Act standard been followed by the Fifth Circuit. In an injunction suit under the FTC Act, extrinsic evidence should not be a requirement, at least where the implied representation, as here, is clear from the face of the advertisement.

In any event, the Court need not reach the question, because the Second Circuit's requirement is met here. The district court had extrinsic evidence of consumer perceptions in the form of expert testimony and statements of B&W's own marketing official that amply supported its findings on how

consumers would perceive Barclay's 1 mg. tar designation.

The court's order, which requires that any milligram designation in advertising for Barclay be one that is approved by the Commission or derived using a test method approved by the Commission for Barclay, does not violate B&W's rights under the First Amendment and is not an improper trade regulation rule. The order is reasonably necessary to assure that any future milligram tar rating will be one that is based on a test method that takes into account the fact that, unlike other cigarettes, the Barclay ventilation system is obstructed, and tar delivery increased, when it is smoked by humans. Anything less would permit continuation of a deceptive tar claim for Barclay.

ARGUMENT

I. *INTRODUCTION*

Deceptive advertising and labeling have long been held a violation of the FTC Act, *FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483 (1922), and courts have consistently upheld Commission efforts to compel manufacturers to adhere to a high level of candor and honesty in labeling and advertising. *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 759-761 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

The standard of lawfulness is a realistic and common-sense one. Application of the FTC Act to a particular advertisement ordinarily requires answers to two questions: What is the likely impression of the advertisement on appreciable numbers of consumers to whom it is directed? Is that impression true or false? These are questions of fact, not law.

National Bakers Services, Inc. v. *FTC*, 329 F.2d 365, 367 (7th Cir. 1964).[15]

Furthermore, the Commission need not show that there has been actual deception; it must establish only that the advertisement has a likely potential to deceive. *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 81 (1934) ("capacity to deceive"); *Chrysler Corp.* v. *FTC*, *supra*, 561 F.2d at 363; *American Home Prods. Corp.* v. *FTC*, *supra*, 695 F.2d at 687 (citing cases). In determining the deceptiveness *vel non* of an advertisement the court must look to the general impression given by the advertisement read as a whole. *See*, *e.g.*, *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 679 (2d Cir. 1944); *Bockenstette* v. *FTC*, 134 F.2d 369, 371 (10th Cir. 1943). Because most people do not read advertisements analytically, the literal truth of individual assertions is no defense if they are so combined as to convey a misleading impression on a casual reading. *American Home Prods. Co.*, *supra*, 695 F.2d at 687, 689; and see cases collected there and in *Alberty* v. *FTC*, 182 F.2d 36, 44 (D.C. Cir.) (Bazelon J., dissenting), *cert. denied*, 340 U.S. 818 (1950).[16]

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[15] A third question—Is the false impression likely to affect consumers in deciding whether to purchase the advertised product? Is there material deception? in other words—can usually be inferred from the nature of the misrepresentation. See pp. 43-45, *infra*.

[16] *See also Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1949) (postal fraud order): "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because

The Commission and the courts have consistently held that an advertisement may be enjoined if it is capable of being read in a misleading way even though other, nonmisleading interpretations may be possible. *Chrysler, supra*, 561 F.2d at 363; *Giant Food, Inc.* v. *FTC*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964); *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 272 (2d Cir. 1962).[17] Advertising is also to be judged in the context of the expectations which consumers

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advertisements are composed or purposefully printed in such a way as to mislead. * * * Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds."

[17] This principle was first established sixty years ago in *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438 (1924). Interpreting a predecessor statute of Section 403(a) of the Food, Drug and Cosmetic Act, 21 U.S.C. § 343(a), containing a provision deeming as misbranded any food "if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which * * * shall be false or misleading in any particular," the Supreme Court observed (p. 443):

> Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment and of the purpose of the act.

will likely have as the result of past exposure to related advertising or industry practices.[18]

II. *THE RECORD FULLY SUPPORTS THE DISTRICT COURT'S FINDING THAT B&W'S LABELS AND ADVERTISEMENTS ARE DECEPTIVE.*

Since early 1981, Barclay has been heavily promoted as a "1 mg. tar" cigarette. As noted, the only revision in its reference to tar yield has been in the tar and nicotine legend which appears in fine-print in a corner of Barclay advertisements. That legend had referred to the FTC method or the December 1981 FTC Report, until the Commission's notice in April 1983 that it was delisting Barclay ratings from its previous reports. Thereupon, B&W changed its legend to read (App. 382):

> Kings, 1 mg. "tar", 0.2 mg. nicotine av. per cigarette by a recognized method used by B&W and supported by independent laboratories.

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[18] Thus, an advertisement of bread as a "diet" product has the likelihood of deception when consumers, accustomed to 23-gram slices or bread, are not told that the "diet" loaf has the same number of calories as a loaf of ordinary bread, the only difference being that the "diet" bread is sliced thinner. *Bakers Franchise Corp.* v. *FTC*, 302 F.2d 258 (3d Cir. 1962); *National Bakers Services, Inc.* v. *FTC*, 329 F.2d 365 (7th Cir. 1964). See also *Royal Baking; Powder Co.* v. *FTC*, 281 Fed. 744 (2d Cir. 1922) and *Waltham Watch Co.* v. *FTC*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963), discussed in *Warner Lambert Co.* v. *FTC*, *supra*, 562 F.2d at 759-761. See also *id.* at 769. *Cf. Plough, Inc.* v. *Johnson & Johnson Baby Prods. Co.*, 532 F. Supp. 714, 717 (D. Del. 1982) ("[c]ontext can often be important in discerning the message conveyed * * *").

The text of the advertisements continued to state "99% tar free" with "1 MG TAR" nearby on a picture of the Barclay package (App. 440). The district court's finding that B&W's change in the wording of the legend was not sufficient to alert consumers that the rating given was no longer an official rating and the cigarette's tar delivery is not comparable to that of other 1 mg. cigarettes is manifestly correct and supported by the record.

1. In interpreting the advertisements, the fact that the FTC test methodology had been used by the industry, including B&W, for the past 12 years as the standardized reference point for comparing tar output of cigarettes cannot be disregarded. As B&W acknowledged in the complaint it filed in the Louisville litigation, "the public has come to accept and rely upon those numbers * * *" (App. 424). Common sense (as well as the expert testimony in the record, discussed below) supports the district court's conclusion that consumers will obtain the same message from the "1 MG TAR" figures appearing in Barclay advertisements and packages that they obtained prior to April 1983, namely, that Barclay cigarettes are rated 1 mg. tar by the official rating source and deliver the same amount of tar to smokers as competing cigarettes rated 1 mg. in tar by the FTC method.

As the district court reasoned, the tar numbers have meaning *only* as comparative ratings; consumers will naturally assume that Barclay's tar delivery is comparable to that of other 1 mg.-rated cigarettes and that its 1 mg. designation is based on the same source. (App. 44). The new reference in the legend neither qualifies nor contradicts that message. In fact, B&W concedes that the sources it

references in its legend are machine tests virtually identical to the FTC method. Thus they suffer from the same inability to rate the Barclay accurately as the FTC test itself. Govt. Exh. 5, pp. 6-7.

Central to B&W's thesis that the advertisement is "literally true" is the presupposition that a consumer would notice the fine-print legend in the corner of the ad,[19] read both the tar number and the statement of the source for that number, notice that the source was different from that used in other ads, and somehow realize that Barclay's 1 mg. rating was not comparable to that of other 1 mg.-rated cigarettes.[20] Moreover, no legend or other source description whatsoever appears on package labels.

Where, as here, the advertising claims asserted to exist are clear from the advertisements themselves, further evidence of consumer understanding is unnecessary. *Chrysler Corp.* v. *FTC*, *supra*, 651 F.2d at 363. The fact that this case was brought as an original injunction case under the FTC Act, rather than as an administrative proceeding under that Act, does not require a different result. Indeed, even under the Lanham Act, this proposition has been recognized. *See Better Business Bureau of Metropolitan Houston, Inc.* v. *Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir.

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[19] In some instances the legend is virtually illegible. See Govt. Exh. 3, attachment 86, where the legend appears in a full-page newspaper advertisement, yet can hardly be read.

[20] In any event, even a fine-print disclaimer cannot be deemed to qualify a theme which dominates an ad. See, *e.g.*, *Giant Food Inc.* v. *FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963), *cert. denied*, 147-48 (2d Cir. 1964); *Bantam Books, Inc.* v. *FTC*, 275 F.2d 680 (2d Cir.), *cert. denied*, 364 U.S. 819 (1960).

1982); *McNeilab, Inc.* v. *American Home Prods. Corp.*, 501 F. Supp. 517, 525, 533, 543 (S.D.N.Y. 1980), both discussed below.

2. Even if the challenged claims were not considered clear from the labels and advertisements, there was substantial evidence presented regarding likely consumer perceptions of these labels and advertisements. That evidence included unequivocal expert testimony by consumer behavior specialist, Dr. Edward Popper.[21]

Among other things, Dr. Popper testified that the tar and nicotine figures featured in advertising for cigarettes serve no purpose for consumers other than as a basis for comparing tar yields to smokers, and that consumers will view Barclay advertisements as claiming that Barclay's tar yield to smokers is comparable to that of other 1 mg.-rated cigarettes and less than that of cigarettes rated at more than 1 mg. (App. 654). He based his testimony, in part, on empirical studies of how consumers use numerical rating systems.

Dr. Popper further testified that the change in the legend in Barclay advertisements would not tend to alter this perception. Citing well-established principles of the psychology of human perception, he testified that consumers, after years of exposure to

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[21] Dr. Popper is an Associate Professor of Marketing at Northeastern University who has specialized in marketing research as it relates to consumer behavior and has authored a number of articles in that field. He is currently on leave from his faculty position under the auspices of the American Association of Collegiate Schools of Business, Federal Faculty Fellow Program, to serve as Consumer Research Advisor to the Commission (App. 461-64, 545-48).

tar and nicotine legends, have become so habituated to the format and appearance of the legends that they are likely to pay attention only to the numbers and to be unaware of any change in the source. They simply would not realize that the terminology employed indicated a departure from the usual source for the number (App. 649, 653-660; 196-98, 206-211, 227).

The district court properly relied upon this testimony;[22] as well as B&W's concessions that consumers use the tar numbers to compare the yields of cigarettes.[23] It found that B&W's "1 mg. tar" designation represents that Barclay delivers to the

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[22] At several points B&W attempts to attack Dr. Popper's credibility. Credibility, however, is for the trial court to determine. Judge Gesell, who saw and heard Dr. Popper, gave his testimony full weight on this issue (App. 55). In any event, B&W frequently misstates the record in its attack on Dr. Popper. For example, B&W claims that Dr. Popper altered the language of an affidavit so as to conform it with the Commission's complaint (B&W Br. 20, ftn.). In actuality, he testified to the exact opposite—that he had never read the complaint at the time he executed his affidavit (App. 96). He was under the impression that Commission counsel conformed the complaint to *his* affidavit (App. 97, 104-05).

[23] As previously noted, B&W stated in the papers it submitted to the district court in Louisville that tar numbers derived from the FTC test method have been used in all domestic cigarette advertising for the past decade, that those numbers are compared by consumers who are concerned about the tar yield of cigarettes, and that its customers rely on the 1 mg. tar designation in determining that Barclay is a preferred cigarette for reducing tar intake. (App. 424, 434-35). These admissions in judicial proceedings are binding on B&W. *Best Canvas Prods. & Supplies* v. *Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983); *Hill* v. *FTC*, 124 F.2d 104, 106 (5th Cir. 1941).

smoker the same amount of tar as cigarettes rated 1 mg. by the FTC or by the FTC method (App. 44-45, 55). The court also noted that the Barclay package makes no mention of any rating system, but only states "1 MG TAR," and found that consumers will--as B&W's expert witness conceded (App. 292-93)--assume that this represents an official rating (App. 44, 55).

3. Barclay's 1 mg. tar designation is deceptive under *any* reasonable interpretation of its meaning. Even if consumers focused on the tar legend and understood the literal meaning that B&W ascribes to it—that Barclay is a 1 mg. tar cigarette according to the Cambridge filter method (or the FTC method, or the CORESTA method)—this claim, although literally true, is inherently misleading.

All of these methods are machine tests that give a rating for Barclay that is not commensurate with the ratings for other cigarettes in terms of tar delivery to human smokers. The ventilation studies demonstrate that the current machine tests do not properly place the Barclay on a scale with other cigarettes in terms of human smoking experience. Therefore, as the court found, "*any* claim that Barclay is a 1 mg. cigarette is deceptive" (App. 48) (emphasis added). *Cf. R. J. Reynolds Tobacco Co.* v. *Loew's Theatres, Inc.*, 511 F. Supp. 867 (S.D.N.Y. 1980): "[T]he procedure used dictated the test result. * * * The test was * * * deceptive and advertising based upon it reflected that quality."[24]

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[24] See also the Commission's *Statement of Basis and Purpose for the Labeling and Advertising of Home Insulation Rule*, 44 Fed. Reg. 50218, 50224 (Aug. 27, 1979) (claims for insulation R-

The district court's findings may not be set aside unless clearly erroneous. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982); Fed. R. Civ. P. 52(a). B&W contends, nevertheless, that absent consumer-survey evidence, the district court's findings cannot stand as a matter of law. We now turn to that issue.

III. *CONSUMER SURVEY EVIDENCE WAS NOT A PREREQUISITE IN THIS CASE.*

A. *The Standards Required by the Second Circuit in Lanham Act Cases Are Not Applicable in this Proceeding.*

B&W argues that the court below committed error in deciding that Barclay's advertisements and labels were deceptive without having before it consumer survey evidence. It relies on decisions in private suits under Section 43(a) of the Lanham Act[25]—primarily by courts in the Second Circuit—which call for evidence of "public reaction" if the challenged claim is not "explicitly" set forth in the advertisement. *E.g.*, *Coca-Cola Co.* v. *Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982);

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value based on testing at a one-inch thickness are deceptive because such testing may produce a higher R-value than testing at greater thicknesses, and insulation is sold at greater thicknesses).

[25] That statute provides, *inter alia*, that anyone who uses a "false description or representation" in connection with goods placed in commerce "shall liable to a civil action by [anyone] * * * who believes that he is or is likely to be damaged by the use of * * * such false description or representation." 15 U.S.C. § 1125(a).

American Home Prods. Corp. v. *Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978), quoting with approval Judge Lasker's earlier formulation of a similar test in *American Brands, Inc.* v. *R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1356-57 (S.D.N.Y. 1976).[26]

1. Whatever the proper standard may be for Lanham Act purposes, the question here should not be whether the representations found by the district court were literally "false on the face" of the advertisements (B&W Br. 33), but whether the finding by the district court that the 1 mg. tar claim is inherently misleading was reasonable on the basis of the evidence before it.

Standards in Lanham Act cases should not be considered binding in FTC Act court proceedings. As stated in the leading case of *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d. Cir. 1974), Congress' purpose in enacting § 43(a) of the Lanham Act was

> to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally and almost certainly without any consideration of consumer rights of action in particular. The Act's purpose, as defined in § 45 [sic], is exclusively to protect the interests of a purely

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[26] Despite the fact that B&W filed a 128-page pre-trial brief with the district court, it did not cite the Lanham Act or any decision construing that act. It made only a passing reference to a Lanham Act case during the trial (Tr. 1105).

> commercial class against unscrupulous commercial conduct. [footnote omitted].

Id. at 236, quoting *Colligan* v. *Activities Club of New York*, 442 F.2d 686, 692 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971). "[A]n action under the Lanham Act * * * is not the proper vehicle in which to vindicate the public's interest in health and safety." *American Home Prods. Corp.* v. *Johnson & Johnson*, 436 F. Supp. 785, 797 (S.D.N.Y. 1977), *aff'd*, 577 F.2d 160 (2d Cir. 1978). *See also Ragold, Inc.* v. *Ferrero, U.S.A., Inc.*, 506 F. Supp. 117, 125 n.9 (N.D. Ill. 1980) (contrasting the public interest focus of FTC proceedings with the private party orientation of Lanham Act cases).

In contrast, the FTC Act is designed to protect the public interest and does not provide private remedies. *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973); *FTC* v. *Klesner*, 280 U.S. 19 (1929). The courts, as well as the Commission, share enforcement of the FTC Act, and, as in other governmental injunction suits, the district court's discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944). *Cf. also Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-98 (1946); *Goodman* v. *FTC*, 244 F.2d 584, 603 (9th Cir. 1957) (under the FTC Act, "we are not in the realm of civil torts").

The Second Circuit's distinction between literal and non-literal advertising claims has not been made in cases arising under the FTC Act. *See, e.g., Spiegel, Inc.* v. *FTC*, 411 F.2d 481, 483 (7th Cir. 1969) ("The meaning and 'impression upon the mind

of the reader arises from sum total of not only what is said but also of all that is reasonably implicit'," quoting *Aronberg FTC*, 132 F.2d 165, 167 (7th Cir. 1942)); *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 450 U.S. 983 (1977) ("The tendency of the advertising to deceive must be judge by viewing it as a whole * * *."); *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962).[27] This is true not only in agency cases but in injunction suits under the FTC Act as well. As the Second Circuit has observed in a preliminary injunction case under Section 13(a) of the FTC Act, 15 U.S.C. § 53(a):

> [S]ince the purpose of the statute is not to punish the wrongdoer but to protect the public, the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader. *It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than separately.*

FTC v. *Sterling Drug, Inc.*, 317 F.2d 669, 674-75 (2d Cir. 1963) (emphasis added).

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[27] "The skillful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions. Facts are dull and dangerous; exaggerations are vivid, attractive and privileged. *Feil* v. *FTC*, 285 F.2d 879, 896-97 (9th Cir. 1960), quoting M. Handler, *The Control of False Advertising Under the Wheeler Act*, 6 Law and Contemp. Prob. 91, 99 (1939).

The fact that on review of Commission orders appellate courts give special deference to the Commission's findings as to the meanings of advertisements does not mean that a trial court in an injunction suit under the FTC Act is powerless to draw reasonable inferences from advertisements. Courts commonly, and properly, do so.[28] *See, e.g., FTC v. Pharmtech Research, Inc.*, 1983-2 Trade Cas. (CCH) ¶ 65,738 at 69,773 (D.D.C. Nov. 30, 1983); *FTC* v. *National Health Aids, Inc.*, 108 F.Supp. 340, 346-48 (D. Md. 1952).[29] Courts also find implied representations in advertisements in suits seeking civil penalties and permanent injunctions under 15 U.S.C. § 45(1) where the issue is whether the defendant's advertisement makes a claim that is prohibited by an FTC order. *E.g., United States* v.

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[28] Thus, the Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938)— which amended the FTC Act to provide, *inter alia*, for preliminary injunction proceedings against false advertising relating to foods, drugs, devices or cosmetics—specifically directs that in determining whether the advertisement is "false" there shall be taken into account not only the "representations made" but also those "suggested" by the advertisement. 15 U.S.C. § 55(a)(1). A district court's authority to find advertising "deceptive" under the more comprehensive provision of 15 U.S.C. § 45(a) should not be any less. *Cf. Feil* v. *FTC*, 285 F.2d 879, 899 (9th cir. 1960).

[29] These were cases where preliminary injunctions were issued ancillary to a pending administrative complaint. See 15 U.S.C. § 53(a), (b). B&W acknowledges (B&W Br. 41) that such preliminary injunctions, as in the case of permanent injunctions under 15 U.S.C. § 53(b), cannot issue merely on the basis of the Commission's claim that the advertising is deceptive, but instead requires "an independent determination of the sufficiency of that claim" by the court. *FTC* v. *Simeon Management Corp.*, 532 F.2d 708, 713 (9th Cir. 1976).

Piuma, 40 F. Supp. 119, 123 (D. Calif. 1941), *aff'd*, 126 F.2d 601 (9th Cir.), *cert. denied*, 317 U.S. 637 (1942) ("No testimony is necessary to determine that the meaning and spirit of the advertisements violate the cease and desist order. * * * [T]he Court is of the opinion that the advertisement as a whole violated the cease and desist order"). *Accord, United States* v. *Reader's Digest Assn, Inc.*, 662 F.2d 955, 964 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), *affirming* 464 F. Supp. 1037, 1053-55 (D. Del. 1978); *United States* v. *J.B. Williams Co., Inc.*, 498 F.2d 414, 434 (2d Cir. 1974); *United States* v. *Union Circulation Co., Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,052 at 70,861 (N.D. Ga. 1982).

Similarly, in enforcement proceedings under statutes prohibiting deceptive labeling of food and drugs, the courts are empowered to make reasonable inferences as to how consumers will understand the labels. *See, e.g., United States* v. *95 Barrels of Vinegar*; *supra*; *V.E. Irons, Inc.* v. *United States*, 244 F.2d 34, 42-43 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957); *United States* v. *47 Bottles, More or Less, etc., Jenasol RJ Formula '60'*, 320 F.2d 564, 571-72 (3d Cir. 1963); *Pasadena Research Labs.* v. *United States*, 169 F.2d 375, 383-84 (9th Cir.), *cert. denied*, 335 U.S. 853 (1948); *United States* v. *One Device, etc., Colonic Irrigator*, 160 F.2d 194, 200 (10th Cir. 1947); *United States* v. *An Article of Food, etc.*, 377 F. Supp. 746, 749 (E.D.N.Y. 1974).

The same rule applies in court enforcement actions by the Securities and Exchange Commission against fraudulent sales of securities. See, *e.g.*, *SEC v. First American Bank and Trust Co.*, 481 F.2d 673, 678 (8th Cir. 1973); *Cf. Charles Hughes & Co.* v. *SEC*, 139 F.2d 434, 436-37 (2d Cir. 1943), *cert.*

denied, 321 U.S. 786 (1944) (court itself finds implied representation in sustaining SEC determination that sales practice constitutes fraud and deceit).[30]

To require empirical evidence of consumer perception in injunction proceedings under the FTC Act whenever the claim challenged is an "implied" one would alter a contrary practice that has existed over the years and would frustrate Congress' objective of providing in Section 13(b) of the FTC Act a speedy and efficient remedy against false advertising and other practices that violate Section 5 of that Act. Such a ruling would be directly inconsistent with the legislative history of Section 13(b), which contemplated that in routine deceptive practices cases where the Commission's expertise is not needed in delineating the meaning and scope of Section 5, the Commission could sue for permanent injunctive relief in the district courts. See S. Rep. No. 93-151, 93rd Cong., 1st Sess. 30-31 (1974); *United States* v. *JS&A Group, Inc.*, 716 F.2d 451, 456-57 (7th Cir. 1983); *FTC* v. *Singer, Inc.*, 668 F.2d 1107, 1110-11 (9th Cir. 1982); *United States* v. *National Dynamics Corp.*, 525 F. Supp. 380, 381 (S.D.N.Y. 1981). See also *FTC v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51 (D. Md. 1981), *aff'd*, 661 F.2d 920 (4th Cir. 1981). It would also impair the

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[30] Similarly, in libel cases where the alleged defamation occurs by innuendo rather than by explicit statement, the courts reach determinations without the aid of evidence as to how readers would construe the writing. See, *e.g.*, *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1919); *Lane* v. *Washington Daily News*, 85 F.2d 822 (D.C. Cir. 1936); *Lewis* v. *Time Inc.*, 710 F.2d 549, 552 (9th Cir. 1983); *Clark* v. *American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1212-13 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1433 (1983).

implementation of other statutes which provide for enforcement by government injunction suits against deceptive practices. Surveys are time consuming and expensive and many problems can arise in constructing a reliable one. See, *e.g.*, *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1077 (1967). Any requirement of their use should be restricted to cases where the deceptive claim asserted to exist is not reasonably apparent. *Id.*

2. With due respect to the Second Circuit, even for Lanham Act purposes, a standard of proof that turns simply on whether an advertising representation is "literally" made in an advertisement is unrealistic.[31] "[I]mpressions are the primary targets of the adwriters." *Stanley Labs.* v. *FTC*, 138 F.2d 388, 393 (9th Cir. 1943) (internal quotes omitted), and it has long been recognized that some claims, although "implied," can nevertheless be so unambiguous that the advertisement speaks for

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[31] Even Judge Lasker, who originated the test, has not strictly adhered to it. In *McNeilab* v. *American Home Prods Corp.*, 501 F. Supp. 517. (S.D.N.Y. 1980), he found, solely on the advertisement before him, that the representation that an analgesic product "the maximum strength allowed" made an "implied" claim that the Food and Drug Administration has authorized the sale of the product (p. 533). On reconsideration, he adhered to the view that he could properly find that the claim was suggested, stating:

> [E]ven if arguendo, one grants the phrase * * * is susceptible of another interpretation, it remains at best an ambiguous statement tending to confuse and the very purpose of the statute is to avoid such ambiguity.

Id. at 543.

itself and no extrinsic evidence of meaning is required, *id.* ("the mute and accusing testimony of the thing itself").[32]

The Fifth Circuit in a recent Lanham Act case declined to impose a requirement of evidence of consumer perception when the inference that the challenged claim is made is a strong one from the advertisement and the context in which the representations are made.[33] In *Better Business*

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[32] Can there be any doubt, for example, that a before-and-after commercial depicting the transformation of a tired-looking housewife into an energetic athlete upon taking an iron-tonic preparation implies that the product is an effective remedy for general tiredness? The Second Circuit found such implication so clear that it held that a civil penalty count based on the advertising alone should not go to a jury but should be upheld on a motion for summary judgment. *United States* v. *J.B. Williams Co., Inc.*, *supra*, 498 F.2d at 434.

See also *Royal Oil Corp.* v. *FTC*, 262 F.2d 741, 745 (4th Cir. 1959) ("Neither customers who have actually been deceived, nor experts, need be produced where the exhibits themselves sufficiently demonstrate their capacity to deceive."); *Resort Car Rental System, Inc.* v. *FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975) (Commission could have reached conclusions regarding deceptive nature of ads without consumer witnesses "whose testimony merely supported the inferences which can logically be drawn by scrutinizing the advertising alone.").

[33] Possibly the Second Circuit intends the requirement of evidence in Lanham Act cases to turn on the ambiguity of the advertising representation, rather than on whether it is express or implied. In *American Home Prods. Corp.* v. *Johnson & Johnson*, *supra*, the court itself did not speak in terms of a simple "implicit"/"explicit" distinction, but referred to the fact that "in this case the language of the advertisements is *not unambiguous*. The 'truthfulness' of the claims, therefore, cannot be established until *the ambiguity* is resolved" (577 F.2d

Bureau of Metropolitan Houston, Inc. v. *Medical Directors, Inc.*, 681 F.2d 397 (5th Cir. 1982), a weight reduction center advertised that a Better Business Bureau "spy" had tried its system and found it effective. In fact, the "spy" was a customer who did not work for the Bureau but, without having been solicited to do so, had forwarded reports to it. The court affirmed the trial court's finding that defendant's advertising created a "likelihood of confusion and deception" (*id.* at 399) by implying that the Better Business Bureau had endorsed the advertiser's services. The appellate court rejected arguments that evidence of actual consumer deception was required, stating (*id.* at 403):

> The Center's primary attack on these findings focuses on the type of evidence adduced at the hearing. The Bureau relied heavily on the Center's advertisements themselves to create the *inference* of endorsement of which it complains. The Center contends that a likelihood of public confusion cannot be found absent proof of

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[Footnote continued from previous page]

164, emphasis added). See also *id.* at 166: "We believe that the claims of both the television commercial and the print advertisement *are ambiguous*. * * * Given this rather *obvious ambiguity*, [the district court] was warranted in examining, and may have been compelled to examine, consumer data to determine first the messages conveyed in order to determine ultimately the truth or falsity of the message" (emphasis added).

Here, as Judge Gesell found (App. 10), the advertising and labels unambiguously conveyed the message that Barclay delivers to the smoker the same amount of tar as cigarettes rated 1 mg. by the FTC.

> actual consumer confusion. The Center is in error. Actual consumer confusion may be the best indicator of the likelihood of deception, but it is not the only indicator. * * * The advertisements themselves clearly *imply* that the Hickmans acted at the behest and under the direction of the Bureau, and that they found the Bureau's standard satisfied. They need not be interpreted for the Court. * * * The impression is reinforced by the context in which the representations were made. The Center's reference to the Bureau's investigative function calls to mind the Bureau's central purpose of encouraging honesty and exposing deception in commercial transactions. The Bureau's name is used in precisely the type of situation with which it normally would be affiliated, the *inference* of endorsement arising from this use is a strong one. [Citations omitted; emphasis added.]

Here too, the district court could infer from the advertisements themselves that consumers would believe that Barclay's tar delivery to smoker was comparable to that of other 1 mg. tar cigarettes and that it was officially rated by the government as a 1 mg. cigarette.

B. *In any Event, the Second Circuit's Lanham Act Requirements are Met in this Case.*

Assuming *arguendo* the applicability of the Second Circuit's evidentiary requirements as set forth in *Coca-Cola* v. *Tropicana*, *supra*, those requirements are met here. Contrary to B&W's assertion, that case does not hold that *survey*

evidence as such is a prerequisite in all cases where implied claims are involved. "While Courts [in Lanham Act cases] use such phrases as 'tested by public reaction' (citing *Coca-Cola* v. *Tropicana*], there is no ironclad requirement that such evidence be presented by survey. Presumably expert communications specialists—psychologists, media scholars, advertisers or the like—could offer such evidence." R. Boal, *Techniques for Ascertaining Likelihood of Confusion and the Meaning of Advertising Communications*, 73 Trademark Reporter 405, 427 (1983).[34] Here, ample evidence of consumer perceptions, consisting of admissions on the record made by B&W in the Louisville litigation, as well as expert testimony, was before the court.

B&W itself argued in the Louisville case that tar ratings are used comparatively and that its customers view Barclay's lower tar designation as a "way of reducing tar intake" (App. 435-36).

Dr. Popper, the Commission's expert witness, agreed that consumers use the tar figures as comparative ratings and are generally aware that the ratings are derived from a uniform testing method (App. 654-58). He pointed out examples of

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[34] Contrary to what B&W states (B&W Br. 35), Judge Lasker in the *American Brands* case, *supra*, did not rule out the use of expert opinion as an extrinsic aid in assessing the likely understanding of an advertisement. The issue was not raised. The testimony he rejected was not opinion testimony but "hearsay" evidence by a sales manager of statements by a few consumers who had read the advertisement. Not surprisingly, the court ruled that the report of "three or four casual conversations" was not sufficient evidence of consumer perception. 413 F. Supp. at 1357.

other such rating systems, such as R-values for insulation, where absolute numbers have no intrinsic value of their own except in the context of a comparison. A study done for the Commission on the R-value Trade Regulation Rule (a rule which requires disclosure of an insulating product's resistance to heat loss, higher R-values indicating better insulation) demonstrated that consumer usage of the ratings is exclusively comparative (App. 509, 535, 655). He also noted that consumer surveys performed for the R.J. Reynolds Tobacco Company in 1981 showed that a substantial number of smokers perceive Barclay as comparable to the lowest of the ultra-low tar cigarettes (App. 658).

Given this comparative use of ratings and the long history of FTC numbers in advertising, Dr. Popper concluded that consumers will view Barclay advertisements as claiming that its tar yield to smokers is comparable to other 1 mg.-rated cigarettes and less than that of cigarettes rated at more than 1 mg. (App. 654). As previously noted (*supra* p. 27), he further testified that the April 1983 revision in the fine-print tar/nicotine legend in Barclay advertisements would not alert consumers to the fact that something other than the usual FTC rating scale was being used (App. 208-11, 659-60).

Thus, there was ample extrinsic evidence supporting the district court's findings that B&W's 1 mg. tar designation had the likely potential to mislead.

IV. *CONTRARY TO B&W'S ASSERTION, THE DISTRICT COURT DID NOT DEFER TO THE FTC'S EXPERTISE.*

According to B&W, the court below simply deferred to the FTC's expertise when it found that

B&W's advertising and labels made the representations which the Commission alleged were deceptive (B&W Br. 29, 39-43). B&W apparently would have this Court infer that such deference was made by the fact that Judge Gesell cited an appellate decision that involved review of agency findings (*American Home Prods. Corp.* v. *FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982)) for the proposition that "consumer survey evidence is not necessary in order to establish a violation of § 5 of the [FTC] Act" (App. 55).[35]

No such inference can be made. Commission counsel never suggested to Judge Gesell that he should defer to the Commission and his opinion makes clear that his findings were based on his independent review of the evidence. Thus, the remainder of the paragraph in Judge Gesell's opinion in which the citation to *American Home Court Prods.* appears states (App. 55):

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35 The text in *American Home Products* in which footnote 10 appears states (695 F.2d at 687):

> It is true that on some crucial points at hand the Commission lacked direct evidence that consumers were in fact misled. But the Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception.

A lengthy footnote following this passage contains references to and quotes from a number of cases sustaining FTC findings that advertisements were deceptive even though consumer testimony or surveys were absent. The footnote also holds that there is no First Amendment problem in finding that an advertisement is misleading even though the finding is not based on empirical evidence that the public was in fact misled.

> The Court finds that the evidence in the present record amply supports the conclusion that consumers are aware of and rely on FTC ratings. First, B&W has conceded this fact in the related proceedings in federal court in Kentucky. *See* Note 8, *supra*. Second, the fact that cigarette companies spend millions of dollars advertising low FTC ratings allows the inference that marketing experience demonstrates reliance by consumers on such information in making purchasing decisions. Finally, the Court heard expert testimony supporting this conclusion. Tr. 849 (testimony of Dr. Popper).

B&W's assertion that Judge Gesell deferred to the Commission's view of the advertising expertise is clearly without merit.

V. *THE RECORD FULLY SUBSTANTIATES THE DISTRICT COURT'S FINDING THAT BARCLAY'S 1 MG. TAR DESIGNATION WAS A "MATERIAL" DECEPTION.*

Contrary to what B&W suggests (B&W Br. 46-47), the Commission is not required to produce direct evidence that deceptive statements made in advertising are material to consumers in their purchasing decisions. Materiality can ordinarily be presumed when there is an affirmative representation, for if a statement is important enough to be included in the advertisement, it is usually important enough to be stated in a non-deceptive manner. *Colgate-Palmolive Co.* v. *FTC*, 310 F.2d 89, 92 (1st Cir. 1962), *subsequent order*

vacated following remand, 326 F.2d 517 (1st Cir. 1963), *order reinstated*, 380 U.S. 374 (1965).[36] "In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." *Central Hudson Gas & Elec. Co.* v. *Public Serv. Comm'n.*, 447 U.S. 557, 567-68 (1980). See also *Warner-Lambert Co.* v. *FTC*, *supra*, 562 F.2d at 762.

The decisions cited by B&W are not to the contrary. Indeed, they are in full accord with this view. In the Supreme Court's decision in *Colgate*, cited by B&W (Br. 46), the Court said (380 U.S. at 391-92):

> Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the [television] commercials had a tendency to mislead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy. *See Federal*

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[36] *FTC* v. *Simeon Management Corp.*, 532 F.2d 708 (9th Cir. 1976), is not to the contrary. In that case there was no finding that the advertisements included any affirmative misstatements. The issue of materiality arose in relation to the Commission's contention that the defendant's weight reduction advertisements were deceptive because they failed to disclose certain material facts, *e.g.*, that the treatment included use of a drug not approved by the FDA. The court's holding that evidence of materiality was required was limited to where the advertising was alleged to be deceptive by nondisclosure as distinguished from deception through misstatement. *Id.* 714-16.

Trade Commission v. *Raladam Co.*, 316 U.S. 149, 152.[37]

Assuming *arguendo* the applicability of Lanham Act cases as precedents here, the decisions under that Act cited by B&W (Br. 56, 47-48) also do not support its position. Contrary to what B&W states (B&W Br. 47), the court in *Toro Co.* v. *Textron, Inc.*, 499 F. Supp. 241 (D. Del. 1980), granted injunctive relief despite the lack of direct evidence that consumers relied on the particular claims that were found to be false. The court held that to obtain an injunction under Section 43(a) a plaintiff need only show that the false representations have a "tendency" to deceive. Evidence of "actual consumer reliance" in purchasing decisions is needed only to recover monetary damages. *Id.* 251, 254. *Accord, Hesmer Foods, Inc.* v. *Campbell Soup Co.*, 346 F.2d 356, 359 (7th Cir.) *cert. denied*, 382 U.S. 839 (1965); *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641, 649 (3d Cir. 1958); *Skil Corp.* v. *Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974).

In any event, B&W is in no position to deny that consumers' purchasing decisions are likely to be influenced by information that Barclay's tar rating is

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[37] As indicated by the Supreme Court's citation to the decision in the passage above, *FTC* v. *Raladam Co.* did not hold, as B&W says (B&W Br. 47), that materiality to consumers of deceptive statements in advertising must be shown by extrinsic evidence. The decision—which construed the FTC Act when it prohibited "unfair methods of competition" and had not yet been amended to cover also "unfair or deceptive acts or practices"—upheld the authority of the Commission to *infer* that trade would be diverted from sellers of competing products who did not engage in the same type of unfair competition as the violator.

not derived from the FTC or that the cigarette delivers disproportionately more tar than other 1 mg. cigarettes when smoked comparably. B&W itself considered the Commission's ratings so important to consumer reactions that it sought to enjoin the Commission from changing them. It asserted that if the Commission's plan to delist its tar rating for Barclay was permitted to go forward it would "lose the brand loyalty of its customers who rely largely, if not solely, on its low 'tar' delivery" (App. 436). It described its 1 mg. tar rating as 'the "keystone" of its inaugural advertising promotion, which successfully enabled the company to reverse a previously declining market position (App. 435).[38] It averred that the FTC "numbers are closely noted and accepted by consumers, who are concerned about the 'tar' and nicotine yield of their cigarettes and make brand choices accordingly" (App. 435).

The district court was entitled to rely on these admissions in finding that a cigarette with a lower tar number is generally considered by smokers to be relatively less risky to their health (App. 37). Hence, it follows that a deceptively low tar rating for a cigarette is a material misrepresentation.

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[38] Although B&W now claims that the low tar message was conveyed primarily by the slogan "99% tar free" (B&W Br. 49), the designation "1 MG TAR" has always appeared in close proximity to the phrase. The two designations obviously visually reinforce each other. Contrary to what B&W states (B&W Br. 49), the court did not find the "99% tar free" slogan as it appeared in conjunction with "1 MG TAR" was "not deceptive." It found only that the Commission failed to show that "the '99% tar free claim, *unaccompanied by the '1 mg. tar' claim*, is deceptive" (App. 49) (emphasis added).

VI. *THE RECORD SUPPORTS THE COURT'S FINDINGS AS TO THE NATURE OF TJE FTC RATINGS AND THEIR MATERIALITY TO CONSUMERS*

B&W argues that the court erred in finding that the purpose of the FTC test method is to measure the relative delivery of tar to the "smoker's mouth." It also argues that there is no evidence that consumers understand this to be the nature of tar tests or that, if they did, it is of significance to them to know comparative measurements of smoke before it is drawn into the lungs (B&W Br. 43-46, 48-49).

1. These arguments are designed to obfuscate the fact that the purpose of the FTC test program is to measure and report the relative deliveries of tar and nicotine by cigarettes under *standardized* smoking conditions, so that consumers will have an objective basis of comparison (see, *e.g.*, App. 947-49, 1110). As the Commission pointed out, no testing method practicably measure what smokers actually obtain from cigarettes, since smoking patterns vary (*id.*). For that reason, the FTC smoking machine test must use a standardized set of smoking parameters (puff volume, puff frequency, puff duration, etc.) to measure what a hypothetical smoker would receive in his mouth if he smoked the cigarette in the same fashion.[39]

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[39] Despite what B&W claims, the court had more than just Commission counsel's "unsworn" explanation of this (B&W Br. 43). In addition to the experts' characterizations, during the trial, of the method as one that measures "mouth delivery" (App. 64-72, 74-80, 350, 352-53, 447-49), it had Dr. Kozlowski's November 1981 report to the Commission that stated this:

Contrary to B&W's claim, there is no contradiction between the FTC method and the fact that the more cigarette smoke is inhaled into the lungs, the more it becomes critical from a health standpoint. A smoker can assume that if he puffs on *and inhales* the smoke from two cigarettes *similarly*, he will receive proportionately more in his mouth, *and* his lungs, from a higher-rated cigarette than from a lower-rated cigarette (App. 76, 86-89, 93; Tr. 155, 171).[40] The Commission's 1978 Federal

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[Footnote continued from previous page]

> The FTC cigarette testing procedure is designed to give estimates of the delivery of tar and nicotine (and carbon monoxide) j to an idealized 'average' smoker, to provide some objective basis for ranking the yields of cigarettes. *The basic question of 'delivery' (or of tar and nicotine yield) refers to the amount of these toxic products reaching the mouth of the smoker.* Once the smoke reaches the mouth, its fate depends on many factors that are all subject to substantial individual variation (*e.g.*, depth of inhalation, duration of inhalation microsomal enzymes in the liver, urinary pH, exercise) [Emphasis added].

Govt. Exh. 8, attachment 2, at ¶ 1.2.

[40] The current smoking machine has a filter pad behind the device that holds the cigarette as the latter is being mechanically puffed. Particulates are caught on the filter pad and then weighed. Govt. Exh. 5 at 1-3. Because the machine has no "artificial lungs"—of necessity it only acts as a surrogate for the mouth, although it also measures what is *available* for the hypothetical smoker to inhale into his lungs.

Body retention *after* smoke has passed through the lungs will depend upon individual metabolic factors that cannot be accounted for by a standard test. As the court noted, the record shows that smokers' bodies will tend to retain more smoke constituents from higher-rated cigarettes (App. 42).

Register explanation of its 1967 Statement of Considerations makes this very point, which remains true today (App. 1110):

> The point of this statement was that the FTC's "tar" and nicotine values represented valid standards for making comparisons among different cigarettes. Thus, *if the consumer smoked each different cigarette the same way*, he would *inhale* "tar" and nicotine in amounts proportional to the relative values of the FTC figures. A person who smoked a 10 mg. "tar" cigarette would *ingest* half the "tar" he would by smoking a 20 mg. "tar" cigarette, *providing he smoked the same way*. [emphasis added][41]

"Delivery to the mouth" was simply a term used by Commission counsel and the experts in recognition that the FTC smoking machine acts as a surrogate for the human mouth and to distinguish what it measures from what cotinine studies attempt to measure, which is the amount of nicotine in the blood of smokers under free, *non-standardized*

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41 B&W apparently would have the Court construe the last sentence as referring to the amount of tar retained in the body after the smoke passes through the lungs (B&W Br. 7, 44). We believe that word "ingest" in that sentence was probably used in the sense of "inhale" which appears in the first sentence, *i.e.* taking *into* the mouth or lungs. But even under B&W's interpretation, the statement is substantially accurate. If the cigarettes are "smoked the same way" the lower-rated cigarette will impart to the body less smoke components than the higher rated cigarette. See preceding footnote.

smoking conditions.[42] As the district court found, cotinine studies are impractical to use for a large scale rating of cigarettes and, in any event, it has not been demonstrated that reliable tar data can be derived from them (App. 43). B&W's own expert

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42 See *e.g.*, App. 84-85:

> [FTC Counsel] * * * The Commission when [it] talk[s] abut the FTC system does talk about delivery or reception by the mouth [;] absorption and the taking up by the body we refer to as another process.
>
> * * *
>
> What goes into the mouth is the starting of the process.

and Tr. 996:

> The smoking machine is designed to be a surrogate for the human mouth.

See also App. 64-72, 82, 74-80, 350, 352-53, 447-49; and Tr. 128-29, 174, 466, 518, 1025, 1168.

B&W claims "*[n]ever* has the FTC stated, before this dispute, that those ratings are meant to provide consumers with information about smoke drawn into the mouth before inhalation" (B&W Br. 45). Perhaps the Commission itself has never phrased it precisely that way, but B&W has. In its comments on the proposed revision to FTC methodology it stated:

> Until recently, the Commission did not question the value of its cigarette testing method, although that method told a consumer only what the brand would deliver to his mouth if he smoked precisely like the machine.

Comments of Brown & Williamson Tobacco Corporation of Federal Trade Commission's Proposal to Modify the Official Cigarette Testing Methodology (48 Federal Resister 15953), June 30, 1983, at 4 (on file in the Office of the Secretary of the Commission).

acknowledged that standardized smoking conditions are necessary to obtain useful comparative ratings (App. 51, ftn. 6). B&W's assertion, therefore, that the cotinine studies disprove the assumptions underlying the FTC testing program is fundamentally incorrect.

2. There is no basis for B&W's claim that a standardized rating system based on delivery to the "mouth" such as the one used by the Commission provides no information of interest to consumers. B&W obviously thought consumers found it useful before this litigation commenced. Not only did it expend considerable sums of money promoting its cigarette as very low in tar according to the "FTC method," it told the Commission that:

> The evidence is clear that the Commissioners [in 1967] recognized they could do no more than establish a comparative rating scheme that ignored individual smoking patterns. The current FTC standard is universally accepted. All domestic cigarette companies have voluntarily adopted it for purposes of advertising. It is, essentially, the international standard as well. And there is every reason to believe that it is one of the all-too-few governmental regulations and standards that consumers accept and rely on.

Submission to FTC, Feb. 16, 1982, Govt. Exh. 3, attachment 46 at 20.

The testimony of consumer experts for both parties was that consumers would assume that the rating system provides comparative information for cigarettes which are smoked in the same manner

and that actual deliveries will depend on how the individual smokes the cigarette. App. 198, 206-07, 297. Given this fact, the ratings clearly provide material and useful information to consumers.

3. In sum, the argument that the only pertinent data are continine studies which attempt to show the average amount of smoke constituents actually retained by a population of smokers, misapprehends the purpose of the program by attempting, as one of the Commission's consultants phrased it, to superimpose the "manner in which individuals use the products * * * on the inherent characteristics of the product" (Gov't Exh. 2, at 17). It overlooks the fact that smokers make individual purchasing decisions. The FTC ratings provide meaningful information to smokers who want to reduce "tar" intake and are willing to avoid compensatory behavior. The FTC ratings also provide a means by which new smokers may make a meaningful choice in their initial selection of a cigarette brand. Thus, as the district court found, "the [FTC] system does provide legitimate comparative information to consumers who wish to reduce the health hazards the Surgeon General has concluded are inherent in cigarette smoking" (App. 43).[43]

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[43] Although, as B&W notes (Br. 56), Dr. Kozlowski stated early in the proceeding that modifications should be made in the FTC system, after subsequently reviewing the underlying data in Dr. Gori's 800-person study, he concluded that the cotinine studies "do not establish that all smokers compensate, or that smokers smoking brands with different nominal yields actually intake equivalent amounts, or that the FTC rating system is worthless" (Govt. Exh. 8, at 44).

4. The cotinine studies do not support B&W's position that the FTC test scale bears no discernible relationship to the realities of human smoking experience. B&W's argument is that cotinine studies have shown that, mainly because of "smoker compensation," there is no "direct proportional relationship between nominal FTC ratings and human absorption of smoke" (B&W Br. 25-26). Although it may be true that for groups of smokers, absorption of nicotine does not on average bear a direct proportionate (1 to 1) relationship to FTC nicotine ratings, nevertheless, as the district court found (App. 42), Dr. Gori's cotinine work showed that there is a positive correlation between FTC ratings and blood levels of nicotine in such groups. Moreover, the correlation appears significant from a public health point of view. Dr. Bock testified that even accepting Dr. Gori's conclusion that a difference of only 30-40% in actual smoke intake exists between smokers of high-yield cigarettes and smokers of low-yield cigarettes, such a difference could account for 100,000 early deaths a year (Tr. 213-14; App. 54).

Finally, even if an attempt were made to "rank" Barclay along with other cigarettes in terms of what cotinine studies indicate to be the level of nicotine retained by smokers under free, non-standardized smoking conditions,[44] the evidence indicated that Barclay should be "ranked" much higher than

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[44] As the court noted (App. 43), Dr. Gori estimated it would take a study using 40,000 people to so test the brands now rated by the FTC (Tr. 478-79).

cigarettes rated 1 mg. tar under machine-test methods.[45]

VIII. *THE COURT'S INJUNCTION IS NOT IMPERMISSIBLY BROAD.*

Having found that the methodologies which B&W relied upon as justification for its 1 mg. tar rating did not provide results comparable to those obtained by smokers with other 1 mg. tar cigarettes, the district court enjoined B&W from using any tar rating in milligrams for Barclay unless it is one approved by the Commission or is derived using a test methodology approved by the Commission for measuring Barclay yields (App. 61). Contrary to B&W's assertion the decree does not violate its First Amendment rights and does not constitute an unauthorized trade regulation rule.

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45 While B&W may dispute this evidence, it wrongly tells the Court that the Commission "introduced no evidence" disputing its assertion that Barclay is comparable to other 1 mg. cigarettes in terms of smoke retained by smokers (B&W Br. 46 ftn.). Not only did the court reject B&W's contention that B&W's evidence shows such comparablility (App. 46-47), it expressly found that one of the studies introduced by the Commission—a cotinine study performed by Arthur D. Little, Inc. (Govt. Exh. 3, attachment 48)—does indicate that smokers obtain and retain as much nicotine from a Barclay as they do from a 5 mg. tar cigarette (App. 47).

The Commission's experts testified that data from a study by B&W's own witness, Dr. Gori, similarly showed that Barclay smokers retain nicotine equivalent to smokers of much higher rated brands. Govt. Exh. 8, at 39-40, 53; Govt. Exh. 1, at 23-24; Tr. 202-05, 211-12.

A. *The Decree is not an Unconstitutional Prior Restraint on Commercial Speech.*

Although the First Amendment affords commercial speech "a limited measure of protection," such speech nevertheless occupies a "clearly subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). When seeking to remedy misleading advertising the courts may constitutionally "require that a commercial message appear in such a form * * * as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, 440 U.S. 1, 10 (1979), quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976). So long as the remedy is "reasonably necessary to prevent deception," its requirements do not contravene the First Amendment. *In re R.M.J.*, 445 U.S. 191, 203 (1982). The fact that health is involved enhances the interest in assuring "that the stream of commercial information flows cleanly as well as freely." *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157, 162 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) quoting *Virginia Pharmacy*, 425 U.S. at 772. *Accord*, *American Home Prods. Corp.* v. *FTC*, *supra*, 695 F.2d at 714.

In preventing false and deceptive commercial speech, the government may also if necessary prohibit some speech that is not, by itself, necessarily false or deceptive but only potentially so. Thus in *Friedman* v. *Rogers*, *supra*, the court upheld a state ban on the practice of optometry under a trade name because of "[t]he possibilities for deception * * *."

440 U.S. at 13. In that case the state broadly banned all optometrists from using trade names. The Court found it irrelevant that the use of a trade name was "not in fact misleading" since the state found it was the type of speech which "enhances the opportunity for misleading practices" *id.* at 15. See also *Young* v. *American Mini Theatres Inc.*, 427 U.S. 50, 68, (1976): "[R]egulatory commissions may prohibit businessmen from making statements, which though literally true, are potentially deceptive."

Here in contrast, the court's order applies to an established violator and requires it to do no more than to refrain from using tar numbers that would be inherently deceptive. The decree here follows directly from the court's findings that (1) "a rating number standing alone or based on a different rating scale gives no useful information about relative health risks" (App. 44); (2) a tar rating "can only be understood in reference to ratings in other cigarette advertisements, which are FTC ratings" (*id.*); and (3) "even if consumers were informed that Barclay's rating is not government approved and that, indeed the government has withdrawn Barclay's rating, they would still take Barclay's 1 mg. designation to be a claim that Barclay delivers to the smoker the same amount of tar as those cigarettes rated 1 mg. by the FTC" (App. 44-45).

The court correctly perceived that, unless the milligram tar rating[46] for Barclay is derived from a

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[46] The order interdicts only representations of "specific milligram" tar numbers or yields unless authorized under the terms of the order. As the order itself recognizes, nothing in it prohibits other claims such as "99% tar free" or "ultra low tar" (App. 6).

test methodology that adjusts for the Barclay filter in a manner that is commensurate with tests measuring all other cigarettes, deception will inevitably occur. This is because tar yields have no intrinsic meaning for consumers *except* for comparison purposes.[47] The district court agreed that the Commission's evidence showed that *all present* methods give an inaccurate rating for Barclay.[48]

The Commission is presently engaged in studying proposals to revise its test methodology to accommodate cigarettes with the Barclay-type filter so that they, along with all other brands, can be commensurately tested by a single method. Until that study is completed and a testing methodology is in place, B&W should not be permitted to make milligram tar claims as they would necessarily be deceptive.[49]

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[47] *Cf. Friedman* v. *Rogers*, *supra*, 440 U.S. at 12 ("[h]ere, we are concerned with a form of commercial speech that has no intrinsic meaning"); *Central Hudson Gas & Elec. Co.* v. *Public Serv. Comm'n.*, *supra*, 447 U.S. at 563 ("[t]he First Amendment's concern for commercial speech is based on the informational function of advertising. * * * The government may ban forms of [commercial] communication more likely to deceive the public than to inform it").

[48] This is true for the "B&W method" and the CORESTA method, both of which are but slight variants of the FTC method (B&W Br. 5). The court further found that B&W could not justify a 1 mg. claim based on cotinine studies (App. 46-48).

[49] B&W may state "3 to 7 mg. (Est.)," as the Commission has approved that claim for use during the interim period (App. 59). B&W may advertise a more specific numerical value if, in advance of the Commission, it develops a test method that takes into account the reduction in ventilation that occurs

The district court properly concluded that even if consumers were informed by a disclaimer that Barclay's tar rating is not one approved by the government, they would still likely take Barclay's "1 mg." designation to be a claim that Barclay delivers to the smoker the same amount of tar as other cigarettes rated 1 mg. tar. B&W contends, however, that the court erred in failing to consider a fuller disclaimer, one that, in addition to disclosing that the FTC has not rated the Barclay, also states that the "FTC does not believe Brown & Williamson's ratings are comparable to its own' (B&W Br. 55).

In support of this argument, B&W asserts that the First Amendment requires that "relief must be limited either to enjoining of the particular claim found to be misleading or to a requirement of a disclaimer if proscribed types of advertising are to be used in the future" (B&W Br. 52).

The cases do not establish any such rule. *In re R.M.J.*, *supra*, involved advertising by a lawyer. B&W quotes the Court's statement that a state may not place an "absolute prohibition" on some types of advertising by legal professionals. But this language was directed to an absolute ban by regulation "on certain types of potentially misleading information, *e.g.*, a listing of area of practice, if the information also may be presented in a way that is not deceptive." 455 U.S. at 203. The decision did not turn on this issue as the Court found that the advertising involved in the case was not potentially misleading. Additional language in the opinion

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[Footnote continued from previous page]

when the Barclay is smoked in the mouths and the rating method meets the Commission's approval.

makes clear that an entry of an appropriate remedial decree is constitutionally permissible "where the particular advertising is inherently likely to deceive or where the record indicates that particular form or method of advertising has in fact been deceptive." *Id*, at 202. The opinion cited with approval *Friedman v. Rogers*, *supra*, in which the Court had directly held that "there is no First Amendment rule * * * requiring a court to allow deceptive commercial speech whenever the publication of additional information would clarify or offset the effects of the spurious communication." 440 U.S. at 12 n. 11.

B&W also relies on cases in which the courts have held that under the FTC Act the Commission cannot proscribe a trade name that has been used deceptively unless it finds that less drastic means will not remedy the deception. *E.g.*, *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1933). That restriction does not derive, however, from the First Amendment. *Friedman v. Roger*, *supra*, 440 U.S. at n. 11. Moreover, it applies only to prevent unnecessary destruction of property interests like trade names that are harmless in themselves, but which were misused.[50] *Id.* It does not protect practices, like

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[50] In this respect, Friedman v. Rogers shows the error of the Third Circuit's statement in *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 619-620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), quoted at B&W Br. 53-54, that the trade names cases support a "least restrictive" alternative requirement under the First Amendment. 542 F.2d at 619-20. That decision involved a property interest—a copyrighted phrase ("Instant Tax Refund")—which arguably parallels the property interest in trade names protected under *Royal Milling* and *Jacob Siegel*. See also *Encyclopedia Britannica, Inc.* v. *FTC*, 605 F.2d 964,

B&W's, that are inherently deceptive. The First Amendment's limited protection for commercial speech is aimed primarily at assuring that the consumer has the information to make an informed choice about when and whether to consider making a purchase. *Id.* at 8-9; *Virginia Pharmacy, supra*, 425 U.S. at 764;*Warner-Lambert* v. *FTC*, *supra*, 562 F.2d at 771. Consumers cannot make such choices where tar claims are based on test methods which provide a misleading rating for Barclay.

Moreover, B&W did not suggest any disclaimer to the district court or offer evidence that a disclaimer would offset any deception, and it cannot be said that the disclaimer that they now proffer (or any disclaimer, for that matter) would assuredly remedy the deceptive implication of the 1 mg. designation.[51]

[Footnote continued from previous page]

973 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980) appearing to construe *Beneficial Corp.'s* holding as turning on this narrower ground.

[51] Even where established trade names are at stake, the courts need not adopt qualifying language that results in contradiction or confusion. *FTC* v. *Army & Navy Trading Co.*, 88 F.2d 776, 780 (D.C. Cir. 1937); *H.N. Heuser & Son* v. *FTC*, 106 F.2d 596 (3d Cir. 1939).

The facts here are quite different from those which prompted the court in *Better Business Bureau, Inc.* v. *Medical Directors, Inc.*, *supra*, to modify the lower court's blanket ban on any reference to the Houston Better Business Bureau by requiring only that reference to the Bureau be accompanied by a prominent disclaimer of Bureau endorsement (B&W Br. 52-53). There was nothing inherently misleading about an accurate reference to the Bureau as long as it was made clear that the Bureau had not endorsed the weight clinic.

More importantly, this litigation determined more than just that the Commission "disagrees" that Barclay's tar yield is properly rated by current, smoking machine tests. The court found that these methods do not in fact properly rate the Barclay and that the 1 mg. tar designation is inherently false and misleading. These issues having been adjudicated adversely to B&W, there should be no restriction on the court's ability to require that the 1 mg. tar claim cease altogether and to assure that any other tar rating designated by B&W for Barclay be one that is based on a test method that takes into consideration the reduction in ventilation that occurs when Barclay is smoked between human lips.

The fact that B&W may believe that Barclay is properly designated a 1 mg. tar cigarette (B&W Br. 51, 55-56) does not require the court to allow continuation of the 1 mg. claim. If B&W's argument is right, then any advertiser could frustrate the laws prohibiting false advertising by insisting that its original position was correct. Nor does the fact that "eminent scientists' and "authoritative bodies" in other countries might agree with B&W (B&W Br. 51, 55) call for a restriction on the decree. The district court heard the expert testimony and examined the studies that B&W submitted to support its claim. The court's authority to stop misleading advertising claims would be nullified if it could act effectively only when the experts are unanimous, for "[i]t is indeed a rare case where medical experts are called which does not involve disagreement." *Ward Labs. Inc.* v. *FTC*, 276 F.2d 952, 954 (2d Cir.) *cert. denied*, 364 U.S. 827 (1960).

Contrary to B&W's assertion, the court's order does not prevent it from disseminating information

which it believes demonstrates the "deficiencies of the present FTC system" (B&W Br. 56). The decree is aimed at preventing deceptive advertising not the public airing of differences with the Commission over the validity of its testing method. *Cf. National Soc. of Prof. Engineers* v. *United States*, 435 U.S. 679, 698-99 (1978); *SEC* v. *Lowe*, Nos. 83-6108, 83-6116 (2d Cir. Jan. 18, 1984), slip op. at 22-23. Nothing in the order prevents communication of criticism, as long as the publication or advertisement does not promote the Barclay cigarette by a tar designation that is not authorized under the order. "Advertising should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger* v. *Young Drug Prods., Corp.*, 103 S. Ct. 2875, 2881 (1953).

B. *The Decree is Not an Authorized Trade Regulation Rule.*

Finally, the district court's order does not "improperly enact a Trade Regulation Rule for the FTC" (B&W Br. 57). A trade regulation rule prescribes substantive standards binding on an entire industry. 15 U.S.C. § 57a. The court's order, on the other hand, proscribes conduct to remedy a law violation based on a set of circumstances peculiar to the nature of the Barclay filter and the differences between its performance and B&W's advertising about that performance. This case is an archetypical example of individualized adjudication.

Even the FTC test methodology is not a "rule" but only a method devised by the Commission to provide important information to the public (see, 15 U.S.C. § 46(a), (f)) that has been voluntarily adopted by the companies to avoid a formal rule. And, even if

the test methodology were viewed as a rule (*cf. Brown & Williamson Tobacco Corp.* v. *FTC*, *supra*, 710 F.2d at 1173), the issue in the case before Judge Gesell was whether B&W's claim for Barclay was misleading given the widespread reliance on the FTC methodology. The fact that the order is a tacit acknowledgment that the cigarette industry will likely continue to use FTC-test methodology does not render the order an improper remedy. "The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *National Soc. of Prof. Engineers*, *supra*, 435 U.S. at 698.

Should B&W's position on the scope of the order be upheld, there would be an open invitation for other manufacturers to design similar cigarettes that test one way on the smoking machine and another in the mouth. The result would undermine the integrity of the present widely-accepted system that uses FTC-approved methodology and would lead to a resumption of the "tar derby" of the 1950's, in which companies made a variety of "tar" claims based on whatever test gave them the best results, *supra*, p. 2.[52]

It would have been unrealistic for the district court itself to determine what revisions should be made in the current test method to accommodate the fact that the Barclay filter disproportionately yields more tar to smokers than is reflected by current

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[52] As the Philip Morris Company pointed out to the Commission, B&W's competitors will likely introduce their own pressure sensitive filters if Barclay's 1 mg. rating is permitted to continue. Govt. Exh. 3, attachment 10 at 3.

machine-smoking tests. The Commission is logically the agency for the court to turn to for this task. It was also reasonable, if not imperative, that the order require that any future tar designation for Barclay be one derived from methodology approved by the Commission for that cigarette. Any relief short of that would allow non-commensurate tar claims for Barclay.[53] "An equitable decree properly may prohibit more than what the statute on which the decree is based prohibits, in order * * * more securely to prevent a repetition of the alleged violation by making the decree easy to administer." *Larsen* v. *Sieloff*, 702 F.2d 116, 118 (7th Cir. 1983).[54] *Grolier Inc.* v. *FTC*, 699 F.2d 983, 988 (9th Cir.), *cert. denied*, 104 S. Ct. 235 (1983); *Arthur Murray Studio of Wash., D.C.* v. *FTC*, 458 F.2d 622, 625-26 (5th Cir. 1972). "Having been caught violating the Act, respondents 'must expect some fencing in.'" *FTC* v. *Colgate Palmolive Co.*, *supra*, 380 U.S. at 395, quoting *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). If the court is to carry out the objectives of the Act, "it cannot be required to confine its road block to the narrow road the transgressor has traveled," but must be able "to close all roads to the prohibited goal." *FTC* v. *Ruberoid Co.*, 343 U.S. 470,

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[53] The district court, of course, retains jurisdiction over its decree and should the Commission arbitrarily decline to take appropriate action, B&W can apply to the court for relief. *Cf. National Soc. of Prof. Engineers*, *supra*, 435 U.S. at 698-99.

[54] *Cf.* cases upholding orders requiring respondents to obtain Commission approval of future acquisitions similar to those adjudicated by the Commission to be anticompetitive. *Seeburg* v. *FTC*, 425 F.2d 124, 129 (6th Cir.), *cert. denied*, 400 U.S. 866 (1970); *Abex Corp.* v. *FTC*, 420 F.2d 928, 933 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970).

473 (1952). *See also National Soc. of Prof. Engineers* v. *United States*, *supra*, 435 U.S. at 698.

CONCLUSION

In reviewing the district court's decision, this Court should be guided by the principle that fact-finding is the basic province of the district court and the latter's choice of remedy should not be overturned absent an abuse of discretion. The district court's decision is carefully reasoned and fully explicates the record evidence. The Court should affirm the judgment below.

Respectfully submitted,

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March 1984

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FEDERAL TRADE COMMISSION

CIGARETTE TESTING

Tar and Nicotine Content Results

The latest results of cigarette testing were published in the FEDERAL REGISTER on Monday, December 13, 1976, 41 FR 54221. Results of retesting of reformulated Parliament brand of cigarettes were published in the FEDERAL REGISTER on Friday, April 15, 1977, 42 FR 19925.

As a result of a request from Lorillard, the manufacturer of Kent Golden Lights Cigarettes, the Federal Trade Commission authorized its Tobacco Research Laboratory to conduct two retests of Kent Golden Lights: first, by inserting the cigarettes to the standard depth of 11 mm. into the cigarette holders of a cigarette smoking machine, and second, by inserting the cigarettes to a depth of 5 mm. At this time, the FTC rejects the results of the 5 mm. test as inappropriate in measuring tar and nicotine levels. The results by the standard 11 mm. method used by the Tobacco Research Laboratory were as follows:

[In milligrams per cigarettes]

	TPM dry	Nicotine
Kent Golden Lights, king size, filter, soft pack.....	8	0.6

In testing cigarettes by FTC's Tobacco Research Laboratory routinely inserts them ¼ (11 mm.) into the cigarette holders on its cigarette smoking machine. Recent developments in ventilated filtration systems have raised the question of whether and to what extent of the depth of insertion

should vary from the 11 mm. standard. An 11 mm. insertion would affect a ventilated filtration system that utilized that portion of the cigarette within 11 mm. of the tip, and therefore the "tar" and nicotine figures. Of special concern when considering any such modification of the standard 11 mm. insertion is whether the insertion depth would and should be decreased beyond the point where consumers cover the cigarette with their lips, fingers, or both when they puff. The Commission believes that additional information is necessary before deciding whether further action should be taken in connection with this matter.

By direction of the Commission dated April 11, 1977.

JOHN P. DUGAN
Acting Secretary.

[FR Doc. 77-11738 Filed 4-22-77; 8:45 am]

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FEDERAL REGISTER

Friday, September 12, 1997

Part III

Federal Trade Commission

Cigarette Testing; Request for Public Comment; Notice

FEDERAL TRADE COMMISSION

Cigarette Testing; Request for Public Comment

AGENCY: Federal Trade Commission.

ACTION: Request for public comment on proposed revisions to the Federal Trade Commission methodology for determining tar, nicotine, and carbon monoxide yields of cigarettes, and a proposed format for disclosing the resulting ratings in advertising.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") is soliciting comments on proposed revisions to the testing method used to determine the tar, nicotine, and carbon monoxide ratings of cigarettes, and the disclosure of those test results.

DATES: Written comments must be received by November 17, 1997.

INSTRUCTIONS: Six paper copies of each written comment should be submitted to the Office of the

Secretary, Federal Trade Commission, Room 159, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580. To encourage prompt and efficient review and dissemination of the comments to the public, all comments also should be submitted, if possible, in electronic form, on either a 5¼ or a 3½ inch computer diskette, with a label on the diskette stating the name of the commenter and the name and version of the word processing program used to create the document. (If possible, documents in WordPerfect 6.1 or Word 6.0, or earlier generations of these word processing programs, are preferred. Files from operating systems other than DOS or Windows should be submitted in ASCII text format to be accepted.) Submissions should be captioned: "FTC Cigarette Testing Methodology," FTC File No. P944509.

FOR FURTHER INFORMATION CONTACT:

Shira D. Modell, Division of Advertising Practices, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, (202) 326-3116.

SUPPLEMENTARY INFORMATION: Cigarette ratings for tar, nicotine, and carbon monoxide are determined through testing conducted pursuant to what is generally referred to as the "FTC cigarette testing methodology" or, more simply, the "FTC method"—a reference to a smoking machine testing protocol that the Commission adopted in 1967.

The Commission is seeking comment on proposed changes to that methodology. The proposed methodology would require that each cigarette variety be tested under two different sets of smoking conditions, rather than the single set used under the current system. The revised test method would

produce tar, nicotine, and carbon monoxide yields using both the current testing parameters and more intensive smoking conditions, thus producing a range of potential yields for each cigarette. In addition, the Commission is requesting comment on the feasibility of generating the upper tier of tar, nicotine, and carbon monoxide ratings through mathematical formulas, rather than actual testing on a smoking machine. The Commission is also placing on the public record two different legends that could be used in advertising to disclose the ratings and is seeking comment on the usefulness and feasibility of these potential disclosure formats. Finally, the Commission is requesting comment on alternative approaches that were considered but are not being proposed by the Commission.

I. Cigarette Testing Methodology

A. History and Purpose of the Current Test Method

The current FTC system for tar and nicotine testing is an outgrowth of the Commission's authority to prohibit deceptive or unsubstantiated claims in advertising. *See* 15 U.S.C. 45. The Commission's earliest involvement in this area was in cases addressing competing tar and nicotine claims in cigarette advertising. One problem with these early claims was that the tar and nicotine numbers reported by different manufacturers were obtained using varying methodologies, and therefore were not comparable. In 1966, to provide a uniform basis for advertising claims, the Commission authorized establishment of a Laboratory to analyze mainstream cigarette smoke (*i.e.*, the smoke that is drawn through the cigarette rod during puffing), and invited public comment on what modifications, if any, should be made to the "Cambridge Filter

Method" for purposes of the laboratory's procedures, and how the test results should be expressed.[1]

The Commission's cigarette testing laboratory began operation in 1967.[2] The testing methodology adopted by the Commission called for cigarettes to be smoked by a smoking machine that was calibrated to take one puff of two seconds' duration and 35 milliliters volume every minute. Cigarettes were to be smoked to a butt length of 23 millimeters or the length of the filter and overwrap plus 3 millimeters, whichever was longer. One hundred cigarettes of each variety were to be smoked to determine the tar and nicotine ratings.[3]

In 1970, the Commission proposed a trade regulation rule that would have required disclosure of tar and nicotine ratings in all cigarette advertising.[4] The rulemaking was suspended indefinitely a short time later, when five of the major cigarette manufacturers and three small companies agreed voluntarily among themselves to disclose clearly and prominently the ratings produced by the Commission's protocol in certain types of advertising. That voluntary agreement, modified to reflect the closing of the Commission's laboratory in 1987,

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[1] 31 FR 14278 (Nov. 4, 1966). The Cambridge Filter Method had been described in Ogg, *Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke*, 47 J. Ass'n. Official Agric. Chemists 356 (1964), although the actual parameters appear to have been identified 30 years earlier by researchers for The American Tobacco Company.

[2] 32 FR 11178 (Aug. 1, 1967).

[3] Testing for carbon monoxide was added to the protocol in 1980.

[4] 35 FR 12671 (Aug. 8, 1970).

remains in effect today, and it forms the basis for current disclosure of tar and nicotine yield.[5]

The Commission's test method was not designed "to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by a machine in accordance with the prescribed method."[6] The purpose of the program was to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands.[7] This goal was consistent with the then-consensus of the scientific community that lower tar and nicotine cigarettes should be less harmful than higher tar and nicotine brands.[8]

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[5] In early 1987, the Commission decided to close its cigarette testing laboratory. Since then, most of the tar, nicotine, and carbon monoxide ratings reported by the Commission are determined through testing conducted by the Tobacco Institute Testing Laboratory using the Commission's testing parameters. Thus, although some changes have been made, the modified Cambridge Filter Method adopted by the Commission in 1967 remains essentially in place today.

[6] FTC Press Release—Statement of Considerations 2 (Aug. 1, 1967).

[7] Indeed, since the adoption of the FTC test method, the sales-weighted average tar rating of cigarettes sold in the United States has declined from 21.6 mg. in 1968 to 12.1 mg. in 1994. Federal Trade Commission, *Tar, Nicotine and Carbon Monoxide of the Smoke of 1206 Varieties of Domestic Cigarettes for the Year 1994* Table 1 (1997).

[8] The year before the Commission's laboratory began cigarette testing, the Public Health Service stated that "The preponderance of scientific evidence strongly suggests that the

B. Current Concerns About the FTC Cigarette Testing Methodology

Changes in cigarette design and increased knowledge about human smoking behavior have highlighted the limitations of the existing test method. In particular, research indicates that smokers switching to cigarettes at the lower end of the range of machine measured nicotine yields tend to take larger and more frequent puffs to satisfy their need for nicotine. This compensatory smoking behavior substantially reduces the informative value of the current ratings. As a result, public and private health groups and others have questioned the usefulness of the FTC ratings over the past few years, suggesting that they may mislead consumers with respect to the relative risks of smoking cigarettes with various levels of tar and nicotine ratings.

The Commission has been especially concerned that some consumers may believe that the existing machine measured yields are literal indicators of how much tar and nicotine they will get from particular brands of cigarettes. To the extent that smokers interpret current tar and nicotine disclosures in this manner, they may fail to understand that the amount of tar and nicotine they get from a cigarette depends in part on how that cigarette is smoked. In addition, smokers—

[Footnote continued from previous page]

lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect." U.S. Dept. of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette* at 1 (1981) (quoting 1966 Public Health Service statement).

especially those who engage in compensatory smoking—may underestimate the risk associated with lower rated brands by assuming that a very low tar yield necessarily translates into a correspondingly low health risk. In fact, even the lowest rated cigarette represents an important adverse health risk.

C. *National Cancer Institute Conference: Its Conclusions and Recommendations for the FTC Cigarette Testing Methodology*

In July 1994, due to many of these same concerns, the Commission requested that the National Cancer Institute ("NCI") convene a consensus conference to address certain issues concerning the FTC's cigarette testing methodology and ratings system. On December 5 and 6, 1994, NCI conducted the requested conference before an Ad Hoc Committee of the President's Cancer Panel.

The Ad Hoc Committee heard presentations on such issues as changes in cigarette design over time, attitudes and beliefs about low-yield cigarettes, the relationship between tar and nicotine yields and the incidence of smoking related diseases, and smokers' perceptions of the meaning of the ratings produced by the current test method. Before adjourning, the Ad Hoc Committee issued a summary of its conclusions and recommendations.[9] The Committee

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[9] The proceedings of that conference have been published by the National Institutes of Health. *Smoking and Tobacco Control Monograph 7—The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes: Report of the NCI Expert Committee* (1996) ("NCI Monograph").

concluded that significant changes should be made to the current FTC protocol and specifically reached the following conclusions, among others:

I.* * *

A. The smoking of cigarettes with lower *machine-measured* yields has a small effect in reducing the risk of cancer caused by smoking, no effect on the risk of cardiovascular diseases, and an uncertain effect on the risk of pulmonary disease. A reduction in *machine-measured* tar yield from 15 mg. to 1 mg. tar does not reduce relative risk from 15 to 1.

B. The FTC protocol was based on cursory observations of human smoking behavior. Actual human smoking behavior is characterized by wide variations in smoking patterns which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior which may negate potential health benefits.

C. Accordingly, the committee recommends the following changes to the FTC protocol:

1. This system should also measure and publish information on the range of Tar, Nicotine, and Carbon Monoxide yields that most smokers should expect from each cigarette sold in the U.S.

2. This information should be clearly communicated to smokers.

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4. The system must be accompanied by public education to make smokers aware that individual exposure depends on how the cigarette is

smoked and that the benefits of switching to lower yield cigarettes are small compared with quitting.

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F. The system should be re-examined at least every five years to evaluate whether the protocol is maintaining its utility to the smoker.

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II. [T]he committee recommends that in order to avoid confusing smokers, no smoke constituents other than tar, nicotine and carbon monoxide be measured and published at the present time. * * *

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C. The available data suggest that smokers misunderstand the FTC test data. This underscores the need for an extensive public education effort.[10]

D. The Proposed New Method

Consistent with the Ad Hoc Committee's conclusion that a ratings range would provide superior information to consumers than the unitary ratings generated by the current test method, the Commission seeks comment on a proposal to replace the existing FTC cigarette test method with a system that would provide information on the tar, nicotine, and carbon monoxide yields obtained under two different smoking conditions. As with the current system, these ratings would not be intended to convey to any individual smoker what he or she would get from any particular cigarette. Instead, they would be intended to convey: (1) That a cigarette's yield depends on how it is smoked; and (2)

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[10] *NCI Monograph* at vi—viii.

a range of yields for individual cigarettes smoked under less intensive and more intensive smoking conditions. In addition, the Commission intends to accompany the revised testing methodology with a consumer education campaign.

1. Proposed Testing Parameters for the New Test Method

The Commission is proposing the following modifications to its cigarette testing methodology:

(1) All current procedures for the collection, storage, and conditioning of cigarettes would remain in place, except that the 100 cigarettes selected for testing would be randomly divided into two groups of 50 cigarettes each;

(2) 50 cigarettes of each variety would be tested under the conditions called for by the current FTC test method (*i.e.*, a 2.0 second, 35 milliliter puff every 60 seconds);

(3) 50 cigarettes of each variety would be tested under conditions identical to those currently used, except that smoking machines would be calibrated to take a puff of 2.0 seconds duration and 55 milliliters volume every 30 seconds.

The puffing parameters used in the current test method would be retained as the less intensive of the two testing conditions. Retaining these parameters would preserve the historical continuity of the existing test method, and thus permit long term trends in ratings to be identified. Furthermore, because they reflect relatively low intensity smoking,

at least for most of today's cigarettes,[11] they should—when coupled with additional ratings reflecting testing under more intensive smoking conditions—provide consumers meaningful information about the potential variability of their own tar and nicotine exposure.

The Commission and its staff considered whether the smoking conditions that would be used to generate the ratings at the upper end of the range should reflect the median puffing parameters identified in the Surgeon General's 1988 report. The Commission is proposing, however, that insofar as its goal is to provide meaningful information about the "yields most smokers should expect," (*see NCI Monograph* at vii), the upper tier ratings should be determined using puffing parameters substantially more intensive than the "average" smoking conditions identified by the Surgeon General; a revised cigarette test method that had as its upper endpoint ratings produced by using the parameters identified in the Surgeon General's report would be skewed too low.

At the same time, the Commission does not believe the upper tier of its proposed two-tier test method needs to incorporate puffing conditions

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[11] The Surgeon General's 1988 report reviewed 33 smoking studies, determined the average puffing parameters observed in each study and then determined the medians of those averages: a 1.8 second, 43 milliliter puff every 28 seconds. U.S. Dept. of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction* 156¬57 (1988). The average puff volume seen in those surveys ranged from 21 milliliters to 66 milliliters; the average interpuff interval ranged from 18 to 64 seconds. *See also* NCI Monograph at 154 (Table 1).

designed to produced the maximum yield possible from individual cigarettes, in order to inform consumers about the importance of their own smoking behavior in influencing what they get from their cigarettes. Even if some smokers might take even deeper and more frequent puffs than those reflected in the Commission's proposed upper tier smoking conditions (*i.e.*, a 2 second, 55 milliliter puff every 30 seconds), the dual ratings produced by the revised test method will still effectively communicate the impact of a smoker's own behavior in determining what he or she gets from any given cigarette.

The primary objective of the proposed parameters is to provide smokers with a strong message that the amount of tar and nicotine they get from a particular cigarette is not fixed, but rather can vary greatly according to the way they smoke. Coupled with an appropriate legend in advertising and public education, the new system is intended to alert smokers to the phenomenon of compensatory smoking and to reinforce the message that smoking even the lowest rated cigarettes poses a significant health risk.

2. Communication of Ratings Through Advertising

The Commission is also seeking comment on ways to improve the communication to consumers of tar and nicotine ratings, as well as the importance of individual smoking behavior. The Commission is also publishing two alternative disclosures for cigarette advertising (see Attachments A and B). Each would set out the ratings produced by the Commission's proposed new test method; the disclosures differ in the additional information they provide consumers about the importance of their own

smoking behavior.[12] The Commission seeks comment on the merits of these two alternative disclosures, as well as comment on any other statements that commenters might deem appropriate for communication of this information.

3. Carbon Monoxide Ratings

The proposed disclosures do not include carbon monoxide ratings. The carbon monoxide ratings produced by the revised test method would continue to be published in the Commission's tar and nicotine report, however, and would be included in smoker education efforts. The Commission solicits comment on whether tar and nicotine ratings can serve as proxies for carbon monoxide ratings.

4. Use of "Multipliers" To Generate the Upper-Tier Ratings

An alternative to actual cigarette testing under the upper-tier parameters would be to approximate the ratings that would be produced under those new conditions by use of mathematical models or "multipliers." The four largest cigarette manufacturers (Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company) have done exploratory testing of a number of cigarette varieties using the Commission's proposed upper-tier smoking parameters, have plotted the resulting tar, nicotine, and carbon monoxide yields against the yields obtained for the

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[12] The Commission is focusing at this time primarily on the contents of the disclosure, and not specifically on such questions as what types of advertising it should be included in and what size it should be in those advertising media.

same cigarettes using the current FTC method, and have computed quadratic equations that they believe define the resulting curves. A report summarizing this work is being placed on the public record.[13]

Based on its review of the report, the Commission believes that the equations proposed by the companies produce results that closely approximate the results of actually testing cigarettes under the new upper-tier parameters. Accordingly, the Commission proposes that the companies be permitted to use these equations to calculate the tar, nicotine, and carbon monoxide yields that otherwise would be obtained by testing under the new method. The Commission solicits comment on this issue.

5. Alternative Approaches That Were Considered

Under the Commission's proposed test method, all cigarettes are tested at the same puff intensities, even though smokers of lower rated cigarettes tend to smoke more intensively than smokers of higher rated brands and may engage in other behavior, such as filter vent blocking, that increases tar and nicotine yields. The Commission considered incorporating compensatory smoking behavior into its proposed protocol for the upper-tier by varying the puff parameters according to the type of cigarette being tested. Such a plan would use higher puffing parameters for lower tar cigarettes and lower puffing parameters for higher tar cigarettes. As a result, rating ranges would be proportionally larger for

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[13] The report is entitled *An Experiment to Determine the General Relationship Between Cigarette Smoke Yields using an Alternative Puffing Regimen (55/30/2) and the Standard FTC Method* (June 23, 1997).

lower tar cigarettes, reflecting the effect of compensatory smoking. The Commission decided not to propose this approach at the present time.[14] Existing research on smoking behavior may not be sufficiently detailed to provide an adequate basis for specifying different puff parameters for different groups of cigarettes. In addition, using different puff parameters for different groups of cigarettes could artificially distort the rankings of brands near the dividing line between those groups.[15]

The Commission also considered including some degree of ventilation hole blocking in its new, more intensive smoking conditions, but decided not to do so at this time.[16] Instead, the Commission intends to implement a consumer education program to inform smokers of the presence and function of aeration

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[14] The Commission also considered using the possibility of using a mathematical equation based on the pattern and magnitude of compensatory smoking behavior to approximate the effect of compensatory smoking on tar and nicotine yields.

[15] For example, if brands are assigned to different upper-tier puff parameters based on their ratings under the current test method, a brand just below the dividing line would be tested under more intensive upper-tier parameters than a brand just above that line. Use of the more intensive parameters could boost the upper-tier ratings of the first brand substantially higher than those of the second brand (even though their ratings under the current test method are nearly the same).

[16] Aeration holes in the filters of many brands reduce their ratings for tar, nicotine, and carbon monoxide by diluting the smoke with air before it reaches the smoking machine. Blocking these holes (which can be invisible) prevents dilution, and can greatly increase the yields of those smoke constituents. Research suggests that a significant number of smokers of ventilated "low tar" and "ultra-low tar" cigarettes block some aeration holes some of the time.

holes, the importance of not blocking them, and the magnitude of the effect that blocking them can have on exposure to harmful smoke constituents.[17]

Finally, the Commission considered keeping the current unitary rating system and adding disclosures warning smokers that the amount of tar and nicotine they get will vary depending on how a cigarette is smoked. This plan has the advantage of avoiding the costs and complexities involved in moving to a two-tier system. It would emphasize the artificial nature of the smoking machine measurements and the fact that ratings produced by machines do not indicate what smokers actually get from their cigarettes. The advertising disclosure, along with appropriate education efforts, could potentially inform smokers about compensation and ways to avoid it. The Commission believes, however, that unitary ratings will be less effective than a range of ratings in communicating to smokers the variability in potential smoke ingestion.

The Commission is seeking comment on the desirability and feasibility of these alternative approaches to revising the test method.

6. The Industry's Recent Agreement With the State Attorneys General

In June 1997, a proposed agreement between the four largest U.S. cigarette manufacturers and the

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[17] Research also shows that many smokers are unaware either of the existence of the vents or of the fact that vent blocking increases tar yield. *See* Kozlowski, *Smokers are Unaware of the Filter Vents Now on Most Cigarettes: Results of a National Survey*, Tobacco Control (forthcoming 1997). Thus, consumer education could also address this lack of knowledge

Attorneys General of forty states was announced. The agreement contemplates that if Congress passes and the President signs legislation reflecting the terms of the agreement, responsibility for cigarette testing will be transferred from the Commission to the Food and Drug Administration ("FDA"). If FDA ultimately does receive the statutory authorization contemplated in the agreement, the agency would need time to review this area and promulgate rules setting forth its test method. In the interim, the Commission believes that it is important to improve the existing method, and that, in the confines of a voluntary system, the actions proposed in this notice are responsive to many of the concerns about the limitations of that method. The cigarette manufacturers' use of an improved advertising disclosure and accompanying consumer education efforts should advance consumer understanding about the important issue of compensatory smoking. Moreover, experience under the revised system will provide a basis for evaluating possible future changes to the system.

7. Conclusion

The Commission believes that the proposed changes can be implemented quickly by the industry within the existing voluntary system significantly in advance of other possible approaches, and these changes address many of the problems identified in the NCI Monograph.

Whatever changes are adopted, the Commission intends to review its test method every five years to assess the operation of the system and determine whether further changes to that method and/or the disclosure format are appropriate. The Commission

encourages research that would provide additional data in all of the areas addressed by these revisions.

E. Request for Comments and Responses to Specific Questions

The Commission is seeking comment on the revisions to its current testing methodology proposed above. The Commission is also seeking comments on the following specific questions and on any other issues relevant to the potential modification of the testing methodology:

1. The Proposed New Testing Methodology

a. What effect, if any, are the dual ratings that would be provided by the Commission's proposed two-tier test method likely to have on consumers' purchases of cigarettes and/or their smoking behavior? Will this information affect smoking intensity, brand choice, and/or the decision whether to quit smoking, and if so, how?

b. If the proposal for testing all cigarettes under the same two sets of parameters is adopted, and if the parameters incorporated in the Commission's test method are intended to produce yields covering the range likely to be experienced by most smokers, are the proposed parameters appropriate? Why or why not? If not, what parameters would be more appropriate and why?

c. Should the butt length specified in the current FTC test method—that cigarettes be smoked to a length of 23 millimeters or to 3 millimeters beyond the filter and overwrap, whichever is longer—be changed? Is there evidence that smokers smoke more than 3 millimeters beyond the end of the overwrap? If so, what is the effect of that behavior in

terms of the number of puffs they get from their cigarette?

d. What effect, if any, would reducing the sample size from 100 to 50 cigarettes, as proposed, have on both the reliability and the replicability of the machine yield estimates? If there is an effect on reliability, does the fact that consumers would be given dual ratings, rather than a unitary rating, lessen the importance of that reduction?

e. Can the machines presently used to smoke cigarettes pursuant to the FTC test method operate under the parameters in the Commission's proposed new protocol? If not, could they be modified to operate under those parameters or would new machines have to be purchased? What testing would be necessary to ensure the validity of the proposed modifications to the test method—that is, to ensure that the revised protocol will produce highly reliable and replicable results? How long would such validation take?

f. Could the ratings for the upper tier of the revised test method be obtained from mathematical equations or "multipliers"? Why or why not? Would the continuing validity of the equations have to be reconfirmed periodically through actual machine smoking and, if so, how often?

g. Should the cigarette manufacturers be permitted to use the mathematical equations they submitted to the Commission to calculate the ratings that would be produced by testing under the proposed upper-tier parameters? Why or why not? If the industry is permitted to use such mathematical equations, should it continue to use 100 cigarettes, rather than 50, to determine the lower-tier ratings? Why or why not?

h. How much would the proposed two-tier testing system cost the cigarette industry to implement as compared to the current system? How much would the proposed two-tier testing system cost the cigarette industry to implement if 100 cigarettes, rather than 50, were smoked under each test condition? How much would the proposed revisions to the test method cost the industry to implement if mathematical equations were used to generate the upper-tier ratings?

2. Alternative Options for Revising the Test Method

a. Should the upper tier of the two-tier test method reflect the tendencies of smokers of lower rated and heavily aerated (*i.e.*, vented) cigarettes to smoke more intensively (by taking more puffs, bigger puffs, etc.) or to block some or all of the ventilation holes while smoking? If so, how should the test protocol be modified in order to obtain tar and nicotine ratings that would accurately reflect the effect of these and other forms of compensatory smoking behavior? Would ratings generated by such a test protocol affect smoking intensity, brand choice, and/or the decision whether to quit smoking, and if so, how?

b. Could compensatory smoking behavior be incorporated into the test by using different test parameters for different groups of cigarettes (*i.e.* higher test parameters for lower rated cigarettes and lower test parameters for higher rated cigarettes)? If so, how many different groups of cigarettes should there be, and what parameters should be applied to each group? Where should the line(s) separating the groups be drawn? Would using different sets of parameters overemphasize differences in yields between brands on either side of the dividing line(s)?

Would it cause cigarettes on either side of the dividing line(s) to "switch rankings" with respect to their upper tier ratings? If so, do these potential outcomes make the use of different parameters for different cigarettes undesirable?

c. Could the effect of compensatory smoking behavior be incorporated into the test by blocking some or all of the aeration vents during testing? What does the available evidence demonstrate about the prevalence of vent blocking and about the percentage of vents that are blocked by those smokers who do engage in vent blocking? What effect, if any, does vent blocking have on smokers' puff frequency, puff volume, and puff duration? If vent blocking were to be included in the upper tier of testing, how should that blocking be accomplished? If vent blocking were used to generate upper-tier tar and nicotine yields, would this lead cigarette companies to switch from filter aeration to some other method of creating lower yield cigarettes? If so, what would be the effect on the relevance of the upper-tier yields?

d. Could the effects of compensatory smoking behavior be incorporated into mathematical equations or multipliers that could be applied to the current FTC ratings to calculate "compensation-adjusted" ratings? Do existing studies of smoking behavior provide a sufficient basis to create an equation or set of multipliers that could be used to approximate the compensation effect? How closely could equations approximate the compensation effect? What degree of accuracy is necessary? Would an approximation be acceptable? Can existing studies measuring nicotine intake of smokers be used to make inferences about tar intake, or is the

effect of compensation behavior likely to be different for tar and nicotine?

3. Advertising Disclosures and Consumer Education

a. Is the language of either of the proposed disclosures for cigarette advertising (Attachments A and B) likely to communicate effectively to consumers that their tar and nicotine intake from a cigarette will vary depending on how they smoke it?

b. Are the proposed disclosures likely to be more effective in conveying useful information to consumers than current advertising disclosures? What changes, if any, should be made to either the content (including the specific words used) or the layout of either of the disclosures? Are there other disclosure formats that would be more effective?

c. What effect, if any, is either of the proposed disclosures likely to have on consumers' purchases of cigarettes and/or their smoking behavior? Is there reason to believe this information will affect smoking intensity, brand choice, and/or the decision whether to quit smoking, and if so, how?

d. The proposed disclosures do not contain information regarding carbon monoxide ratings. Should information regarding carbon monoxide ratings be included in any disclosure format that is adopted? Why or why not? If such information is provided, how should it be done? How closely do carbon monoxide ratings obtained in smoking machine tests correlate with tar and nicotine ratings?

e. Should the disclosures include information concerning the ratio of the cigarette's tar and nicotine ratings?, Would these ratios provide useful information to smokers?

f. Would it be necessary to require that the disclosures be printed in black text on a white background, or would it be sufficient to retain the standard embodied in the cigarette manufacturers' 1970 agreement—that is, that the disclosure be clear and prominent?

g. What kinds of disclosures and public education efforts should be undertaken to inform smokers about compensatory smoking? What evidence exists on the likelihood that smokers will change their behavior when advised of compensatory smoking techniques and how to avoid them? Can graphic techniques used by researchers to measure compensatory smoking (*e.g.*, color and stain pattern matching) be used by consumers to evaluate the extent of their own compensatory smoking?

h. What kinds of consumer education, messages should be created to inform smokers of the presence of filter vents and of the importance of not blocking, them with their fingers or lips?

i. What other kinds of consumer education messages should accompany the Commission's revision of the cigarette test method?

j. How would the proposed new testing method and each of the various alternative methods that were considered likely complement or detract from possible consumer education initiatives?

4. Other Possible Policy Options

a. Rather than move to a two-tier test method, would it be preferable to continue to test cigarettes under a sung protocol and use consumer education and an advertising disclosure to inform consumers what the ratings do and do not represent, and that what smokers get from any particular

cigarette depends in large part on how they smoke it? If so, should cigarettes continue to be tested under a protocol that uses a 2 second, 35 milliliter puff every minute, or should different smoking parameters he, used? What form should such consumer education take (*e.g.*, informational materials at the point of purchase) and what should it say?

b. Rather than move to a two-tier test method, would it be preferable to drop all FTC approval of the tar and nicotine testing system? Are all potential ratings so inherently flawed and misleading, and the possibilities for improving the system so unlikely to succeed, that use of any numerical tar and nicotine ratings should be ended? Would such a change affect smoking intensity, brand choice, and/or the decision whether to quit smoking, and if so, how?

c. Should the cigarette test method attempt to measure or otherwise account for the bioavailability of the nicotine in different cigarettes? If so, how should it do so? Is the alkalinity of the nicotine a surrogate for bioavailability? Is there a mathematical model by which bioavailability can be computed from nicotine yield, alkalinity, and other information?

d. If the effect of compensatory smoking behavior is not incorporated in the tar and nicotine ratings, should a disclosure warning smokers about compensatory smoking behavior be required in all ads? Would such a disclosure likely be effective in reinforcing the consumer education efforts?

5. Other Issues

a. What available evidence exists concerning how consumers view cigarettes with relatively low tar and nicotine ratings and their perception of the relative risks of smoking such cigarettes rather than full flavor cigarettes?

b. Do the biological markers used to estimate nicotine ingestion in human smoking studies provide adequate estimates of likely tar ingestion? If not, what other evidence can be used to predict tar intake?

c. Earlier this year, the National Institutes of Health issued *Smoking and Tobacco Control Monograph 8—Changes in Cigarette-Related Disease and Their Implication for Prevention and Control.* The Monograph, which presents the results of three large new epidemiological studies and additional follow-up data for two older studies from the 1950's, notes (pp. ix–x) that:

> When observations from the more contemporary studies are compared with those from the 1950's, one important but disturbing conclusion is apparent—mortality risks among continuing smokers, both males and females, have increased.

What effect, if any, do the findings reported in this Monograph have on the Ad Hoc Committee's conclusion that the smoking of "cigarettes with lower *machine-measured* yields has a small effect in reducing the risk of cancer caused by smoking"?

II. Cigarette Descriptors

Cigarette manufacturers use a number of descriptive terms (such as "low tar," "light,"

"medium," "extra light," "ultra light," "ultra low," and "ultima") in advertising and labeling information about their cigarettes. The Ad Hoc Committee of the President's Cancer Panel concluded that "[b]rand names and brand classifications such as "light" and "ultra light" represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer."

There are no official definitions for these terms but they appear to be used by the industry to reflect ranges of FTC tar ratings. Generally, the term "low tar" is used to mean tar ratings of 7 to 15 milligrams, and the term "ultra low tar" is used to mean tar ratings of 6 milligrams or less. The Commission is beginning the process of examining these questions by seeking comment on the following issues:

1. Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes? If yes, why? If no, why not?

2. What data, evidence or other relevant information on consumer interpretation and understanding of terms such as "ultra low tar," "ultra light," "low tar," "light," "medium," "extra light" and "ultima," as used in the context of cigarettes exists? Do consumers believe they will get significantly less tar from cigarettes described as "light" or "low tar" than from regular or full flavor cigarettes, and do they believe they will get significantly less tar from cigarettes described as "ultra low tar" or "ultra light" than from "light" or "low tar" cigarettes? Do the descriptors convey implied health claims?

3. Do consumers use descriptors, rather than the FTC tar and nicotine ratings, as their primary source of information about the tar and nicotine

yields of different cigarette brands? What data or evidence examines this question? If consumers use descriptors as their primary source of information about tar and nicotine yields, what implications does this have for the proposed revisions to the test method and the advertising disclosure?

By direction of the Commission.

Donald S. Clark,

Secretary.

Attachment A

There's no such thing as a safe smoke. Even cigarettes with low ratings can give you high amounts of tar and nicotine. It depends on how you smoke.
2 mg.-6 mg. tar, 0.2 mg,-0.6 mg nicotine per cigarette by FTC method.

Attachment B

2 mg.-6 mg. tar, 0.2 mg. –0.6 mg. nicotine per cigarette by FTC method

How much tar and nicotine you get from a cigarette depends on how intensely you smoke it.

[FR Doc. 97-24246 Filed 9-11-97; 8:45 am]

Billing Code 6750-01-P

FEDERAL TRADE COMMISSION

CIGARETTES

Testing for Tar and Nicotine Content

The Federal Trade Commission, having been advised by the staff that the cigarette testing laboratory has satisfactorily completed its trial tests, hereby issues directions to its staff to commence the first formal test, under the following conditions:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,

2. Base results on a test of 100 cigarettes per brand, or type,

3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection",

4. Determine particulate matter on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture contents,

5. Determine and report the "tar" content after subtracting moisture and alkaloids as nicotine) from particulate matter,

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

The Commission directs that the test cover approximately 50 of the major brands and types (many brands are sold as regular, and king size, or filter, etc.) and all brands for which any tar or

nicotine statement appears on the label or in the advertising. With respect to the latter, one purpose of the test will be to determine the accuracy of such statement. Cigarettes for testing will be purchased on an open market in 50 localities throughout the United States.[1]

Issued: July 31,1967.

By the Commission.

JOSEPH W. SHEA,
Secretary.

[F.R. Doc. 67-8976; Filed, July 31, 1967; 8:51 a.m.]

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[1] A statement of considerations (Commissioner MacIntyre not participating) and the separate statement of Chairman Dixon filed as part of the original document. Copies of these statements may be obtained from the Federal Trade Commission, Washington, D.C. 20580.

BEFORE THE

FEDERAL TRADE COMMISSION

Petition of	)
The American Heart Association,	)
The American Lung Association,	)
and	)
The American Cancer Society,	)
	)
United as	)
	)
The Coalition on Smoking OR Health	)
	)

PETITION.

The American Heart Association, the American Lung Association and the American Cancer Society, united as the Coalition on Smoking OR Health, hereby petition the Federal Trade Commission to issue an Administrative Complaint against Philip Morris, U.S.A., and the other major American tobacco companies pursuant to Section 5 of the Federal Trade Commission Act concerning the advertising of Merit "Ultima" cigarettes and other similarly situated cigarettes advertised as low tar, light, ultra low tar, or lower in tar.

Merit "Ultima" is being advertised by Philip Morris, U.S.A. with promotional slogans, such as, "The Ultimate Lowest from Merit," and "Discover a New Way to Smoke at the Lowest Levels of Tar and Nicotine". Promotional material prepared by Philip Morris, U.S.A. describes Merit "Ultima" as a "Technological Breakthrough" and "Sets a New Standard for the Lowest 'Tar Segment'".

Merit "Ultima" is only latest in a long line of cigarettes introduced, advertised and promoted by the major American tobacco manufacturers which make claims regarding tar and nicotine levels that are perceived by consumers to imply that these cigarettes are safe or safer than other brands of cigarettes, and that by smoking these cigarettes, consumers avoid or greatly reduce the health risks of smoking.

In truth and in fact, although switching from the unfiltered high tar cigarettes of 40 years ago to lower yield filter cigarettes appears somewhat to reduce the risk of lung cancer, the benefits of smoking lower yield cigarettes are minimal compared with giving up smoking entirely and there is no definite evidence that smoking lower yield cigarettes is associated with reduced risk of other cancers, cardiovascular disease, chronic obstructive lung disease and fetal damage. Switching to low-yield brands may even increase the health risk for smokers who compensate for reduced nicotine intake by increasing the number of cigarettes smoked per day, the frequency of puffing, and the depth and duration of inhalation.

Therefore, the package labels and advertisements for Merit "Ultima" cigarettes and other low-yield cigarettes which imply that these cigarettes are a safer alternative to the use of other tobacco products are false and misleading. Neither Philip Morris, nor any other tobacco manufacturer has any reasonable scientific basis to substantiate these implied health claims. As the direct result of these implied, unsubstantiated health claims, millions of consumers are being mislead and are making purchasing decisions under the false belief

that they are greatly reducing or eliminating the health risks of tobacco use. For all of these reasons, the Coalition on Smoking OR Health requests that the Federal Trade Commission to:

1. Declare that the advertisements and labels in question constitute an unfair and/or deceptive act or practice" in violation of the Federal Trade Commission Act;

2. Order that Philip Morris, U.S.A. and the other tobacco companies immediately cease and desist in advertising lower yield tobacco products in any manner which implies that these products will reduce a consumer's health risk from tobacco use; and

3. Order Philip Morris, U.S.A. and the other major tobacco manufacturers to pay for the placement of corrective advertisements to fully and accurately inform consumers about the documented health risks of the use of low-yield cigarettes.

Factual Background

1. In 1989 the Coalition on Smoking OR Health filed a Petition with the Food and Drug Administration requesting that the FDA declare that low tar and low nicotine cigarettes promoted with a message that implies that these cigarettes will mitigate or prevent the onset of disease are "drugs" within the definition of the Food, Drug and Cosmetic Act, 21 U.S.C. § 321, *et seq.* In that Petition, the Coalition on Smoking OR Health set forth in great detail the history of tobacco industry advertising and marketing practices designed to imply that lower yield cigarettes reduce the risk of disease and are safer than cigarettes having higher tar and nicotine levels. That Petition set forth in detail tobacco

industry advertising tactics designed to mislead consumers about the relative health effects of low-yield cigarettes, as well as data which demonstrate that many consumers falsely believe that lower yield cigarettes are a safe alternative to traditional tobacco use. The Coalition incorporates by reference the evidence presented in that Petition. Therefore, this Petition shall, only present certain additional facts not available at the time the Coalition's Petition was filed with the FDA.

2. On January 17, 1992 Philip Morris, U.S.A announced that it was going to introduce Merit "Ultima", a cigarette which Philip Morris, U.S.A. described as "A new ultimate lowest addition to the Merit brand family".

3. At the time Philip Morris, U.S.A. announced the introduction of Merit "Ultima", Philip Morris, U.S.A. declared that Merit "Ultima" represented a "technological breakthrough" and further stated that "New Merit "Ultima" sets a new standard for the lowest segment of the market."

4. At the time Philip Morris, U.S.A. announced that it was introducing Merit "Ultima" it also announced that it would advertise Merit "Ultima", as "The Ultimate Lowest From Merit." Philip Morris, U.S.A. also stated that it: would use the following advertising copy for Merit "Ultima": "Discover a New Way to Smoke at the Lowest Levels of Tar and Nicotine."

5. Merit "Ultima" is only the latest in a long line of cigarette introductions from Philip Morris, U.S.A. and the other major tobacco manufacturers which seek to reach an increasingly health-conscious consumer by implying through their marketing and advertising that these particular tobacco products

either eliminate or dramatically reduce the health risks of tobacco use.

6. In May 1991 the Coalition filed a Petition with the FTC raising similar issues with regard to another Philip Morris product "Next" cigarettes. The FTC's failure to respond to that Petition is one reason this type of misleading advertising continues unabated.

7. Consumers are being misled by advertising such as that presented by Philip Morris, U.S.A. with regard to Merit "Ultima" and other low tar cigarettes. A 1980 survey conducted by the Roper Organization and cited approvingly by the FTC in the 1981 Staff Report on the Cigarette Advertising Investigation found that in response to the following false statement: "It has been proven that smoking low-tar, low-nicotine cigarettes does not significantly increase a person's risk of disease over that of a non-smoker," nine percent of smokers said they know that false statement is true, 27 percent said that they think it is true, and 32 percent said they did not know if it was true or not. A 1987 survey cited in the 1989 Report of the Surgeon General found that 30 percent of respondents believed that "people who smoke low tar cigarettes are less likely to get cancer than people who smoke high tar and nicotine cigarettes."

8. According to the 1986 Adult Use of Tobacco Survey conducted by the United States Public Health Service, 45 percent of current smokers believe that some kinds of cigarettes are probably more hazardous to others.

9. The 1989 Surgeon General's Report also concludes that increased consumer demand for lower yield cigarettes during the past two decades is

probably attributed to consumer beliefs that lower yield brands are less hazardous. Then Director of the Office on Smoking and Health, Dr. Ronald M. Davis concluded that this inaccurate consumer belief may have resulted in part from cigarette advertising implying that low-yield cigarettes are less hazardous or safe. Davis, R.M., Current Trends in Cigarette Advertising and Marketing, *New England Journal of Medicine* 316(12): 725-732, March 19, 1987.

10. Lower tar and nicotine cigarettes, such as Merit "Ultima" do not present a safe alternative to traditional tobacco use. The 1989 Report of the Surgeon General summarized the best available scientific data on the effect of using lower yield cigarettes. The Report concluded, "There is no conclusive evidence that the lower yield of cigarettes are associated with reduced risks of overall mortality, cancers other than lung, chronic obstructive pulmonary disease, or heart disease. The Report also concluded that "Compensatory smoking behavior in response to lower nicotine intake might actually increase the .intake of tobacco smoke toxins in some individuals." Thus, the Report concludes that while smoking filtered lower tar cigarettes reduces somewhat, the risk of lung cancer compared with smoking unfiltered, higher tar cigarettes, there is no conclusive or substantial evidence teat smoking cigarettes like Merit "Ultima" opposed to other currently available filtered higher tar cigarettes eliminates or even dramatically reduces the overall health risks from smoking.

11. The only relevance of tar-related and nicotine-related claims in current tobacco advertising practices to consumers is the misperception of consumers that these figures have a substantial

health significance. The pervasive advertising of cigarettes as being "lowest" in tar and nicotine is designed to and does, in fact, mislead consumers into falsely believing that these products present a safe alternative, to the use of other tobacco products.

12. Advertising claims that imply or mislead consumers about the relative health effects of smoking lower yield cigarettes, such as Merit "Ultima" are unfair and misleading.

13. The advertising for Merit "Ultima" and other low tar cigarettes also fails to disclose material information, such as the fact that Philip Morris, U.S.A. has added certain chemicals and other additives to its lower yield tobacco products and that the health effects of inhaling these products when burned are unknown at best. Philip Morris, U.S.A. and the other major tobacco manufacturers have also failed to disclose to consumers that how they smoke these products and the frequency with which they smoke these products may effect their overall tar and nicotine intake. Philip Morris, U.S.A. and the other major tobacco manufacturers also have failed to disclose to consumers that over 40 known carcinogens have been identified in the constituents of their tobacco products, including the low-yield tobacco products.

Legal Claims

14. Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive advertising practices. Material misrepresentations which are likely to mislead consumers acting reasonably violate the prohibition against unfair or deceptive advertising.

15. An advertisement, series of advertisements, or advertising campaign is deceptive if it/they contain a representation or series of representations or if it/they create an overall impression that is likely to mislead consumers acting reasonably under the circumstances. *Cliffdale Associates, Inc.*, 103 FTC 110, 164-165 (1984), *appeal dismissed sub. nom., Koven v. FTC*, No. 84-5337 (11th Cir. 1984).

16. Advertisements or statements in advertisements that are unsubstantiated or lack a reasonable factual basis are considered to be unfair and deceptive. *Thompson Medical Company, Inc. v. FTC*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

17. A representation, omission, or series of representations may be deceptive whether the claims are expressed or implied. Implied claims may use language and imagery which create the same impact as an expressed claim, even if the advertisement contains language that says one thing but overall strongly suggests another. *Thompson Medical Company, Inc. v. FTC*, 104 FTC 648, 788-789 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

18. Whether an advertisement or series of advertisements makes a particular claim depends on the net impression created by the interaction of different elements in the advertisement or advertisements, rather than on an unduly narrow focus on any individual element of the advertisement in isolation. *Thompson Medical Company, Inc., supra.*

19. In determining how an individual will interpret an advertisement for the purpose of

determining what claims an advertisement makes, the totality of the advertisement or advertising campaign is relevant. In determining the claims an advertisement makes, the FTC considers the headlines, general tone, the presence or absence of elements contradicting a general impression, the interaction of all of the different elements of the ad, and the position of different phrases and words within the ad. *Thompson Medical Company, Inc., supra*; *Cliffdale Associates, Inc., supra*; *FTC Deception Policy Statement*, 103 FTC at 178.

20. An advertisement is unlawful if it is capable of being reasonably read in a misleading way, even though other non-misleading interpretations are equally possible. *Thompson Medical Company, Inc., supra*; *FTC Deception Policy Statement*.

21. An advertisement or a series of advertisements can be deceptive if it/they omit material information which is necessary to prevent the claim for being misleading.

22. The advertisements and statements by Philip Morris, U.S.A. with regard to Merit "Ultima" create an unmistakable message: Merit "Ultima" cigarettes are the result of a revolutionary new process that renders Merit "Ultima" substantially safer than other tobacco products in that it significantly reduces the health risks of smoking. These claims are false, deceptive, unfair and misleading.

23. The advertisements and statements by Philip Morris, U.S.A. and the other major tobacco manufacturers with regard to other tobacco products advertised as low tar, lowest tar, ultra low tar, light, or low-yield create the came implied, but powerful

message, that is, that these cigarettes provide a substantial health benefit over other tobacco products. These claims are false, deceptive, unfair, and misleading.

24. The failure of Philip Morris, U.S.A. and the other major tobacco manufacturers to disclose the fact that chemicals and other additives are added to lower yield cigarettes and that the addition of these chemicals or other additives may effect the overall health impact is a material omission in violation of the Federal Trade Commission Act.

25. The failure of Philip Morris, U.S.A. and the other major tobacco manufacturers to disclose that while the tar yield of their low tar cigarettes may be less than other tobacco-related products, there are numerous known carcinogens in the constituents of these tobacco products, carcinogens which pose a health hazard to the consumer, is a material omission in violation of the Federal Trade Commission Act.

26. The false, deceptive and misleading statements expressly and impliedly made by Philip Morris, U.S.A. are material because of consumer concern about the health effects of tobacco products.

27. The false, deceptive and misleading statements expressly and impliedly made by other tobacco manufacturers which advertise and market their products as low tar also are material because of consumer concern about the health effects of tobacco use.

28. Misrepresentations, whether expressed or implied, and material omissions relating to health and safety are of particular concern and of great significance to consumers. *FTC Enforcement Policy* -

Deceptive Acts and Practices, supra. Misrepresentations and material omissions relating to health and safety impose a particuler obligation on the act.

Conclusion

For years tobacco manufacturers have advertised and promoted tobacco products in a manner which contributed to the false perception by consumers that products lower in tar and nicotine represent a safe alternative to traditional tobacco use. As a result, consumers have been misled into believing that selection of a lower tar tobacco product dramatically reduces their health risks from smoking and have made consumer choices as a result of this tobacco industry promulgated misperception.

The advertising for Merit "Ultima" represents the latest step in the ongoing effort of the tobacco industry to mislead consumers concerned about the health effects of tobacco use into selecting low tar tobacco products rather than quitting or not starting. The FTC can no longer continue to bury its head in the sand and ignore this pervasive, massive effort on the part of Philip Morris, U.S.A. and the other major tobacco manufacturers to mislead American consumers.

WHEREFORE, the Coalition on Smoking OR Health urges the Federal Trade Commission to:

1. Order Philip Morris, U.S.A. and other major tobacco manufacturers to provide the FTC with any and all scientific evidence in their possession in support of the implied health claim that Merit "Ultima" and other comparable lower tar yield cigarettes dramatically reduce the health risks from smoking;

2. Order that Philip Morris, U.S.A. and the other American tobacco manufacturers cease and desist in running advertisements which state or imply that use of cigarettes lower in tar are a safe alternative to the use of higher tar filtered cigarettes or that the use of these lower tar yield cigarettes dramatically reduces the overall health risks from smoking;

3. Order Philip Morris, U.S.A. and the other major tobacco manufacturers to pay for public education materials designed to offset consumers' misperception about the relative health effects of lower tar cigarettes.

Respectfully submitted,
/s/_____
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* * *

FEDERAL TRADE COMMISSION

Commission Determination Re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications

AGENCY: Federal Trade Commission.

ACTION: Announcement of Commission Determination, Amendment of Past Report, and Request for Comment on Possible Testing Modifications.

SUMMARY: This document announces the Commission's determination that the present FTC testing methodology does not assess accurately Barclay cigarettes and requests comment on possible testing modifications. In accordance with this determination the Commission is amending its March, 1983 *Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 208 Varieties of Cigarettes*, 48 FR 13268 (March 30, 1983).

ADDRESS: Comments should be filed in Room 130, Federal Trade Commission, 6th & Pennsylvania Avenue, N.W., Washington, D.C. 20580, no later than June 30, 1983.

FOR FURTHER INFORMATION CONTACT: Judith P. Wilkenfeld, Federal Trade Commission, Bureau of Consumer Protection, (202) 724-1499, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: In June, 1981 the Federal Trade Commission initiated an

inquiry to examine allegations that its current "tar," nicotine, and carbon monoxide testing methodology, with the specifications as set forth in the Commission's announcements of July 31, 1967, 32 FR 11178, and January 18, 1979, 44 FR 3777, does not assess accurately Barclay cigarettes.

The 'Commission's inquiry has been assisted by extensive comments and scientific studies submitted by Lorillard, R.J. Reynolds and Philip Morris, as well as Brown and Williamson, the manufacturer of Barclay cigarettes. The Commission also utilized three independent consultants to review the information submitted by these companies and make recommendations to the Commission and its staff. The consultants' reports were subsequently circulated to the companies for further comment.

Based on the information developed during the inquiry, the Commission has determined that its present testing methodology for "tar," nicotine, and carbon monoxide does not measure accurately Barclay cigarettes. The Commission has therefore determined it will not accept test results based on the current FTC method as substantiation for claims made about the "tar," nicotine, and carbon monoxide content of all varieties of Barclay cigarettes.

Without a new testing methodology, precise statements as to the appropriate "tar", nicotine, and carbon monoxide rankings for Barclay cigarettes are not possible: Independent estimates by the Commission's consultants for Barclay's 80's and 85's, which are ranked by the present method as 1 mg. "tar" cigarettes, range from 3 to 7 mg. "tar." Similarly, the relative delivery of nicotine and carbon monoxide of these products is greater than suggested by the present FTC tests.

The Commission is therefore amending its March, 1983 *Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 208 Varieties of Cigarettes*, 48 FR 13268, by appending copies of this Notice to the Report. By this action, the Commission does not mean to imply that Brown and Williamson, the manufacturer of Barclay cigarettes, has violated any provision of the Federal Trade Commission Act for its past use and reliance on the FTC method to assess "tar", nicotine, and carbon monoxide levels. Unless and until the Commission adopts a new testing methodology that is able to measure Barclay cigarettes accurately, however, future reports will not include test results for these cigarettes.

The Commission has further determined that there is a significant likelihood that the current testing method does not assess accurately Brown and Williamson's Kool Ultra and Kool Ultra 100's each of which uses the Actron filter design used in Barclay cigarettes. The Commission is today requesting comment on the following limited issues: (1) Are Kool Ultra and Kool Ultra 100's assessed accurately by the current FTC method? (2) If not, how should these products be assessed?

The Commission wishes to reiterate that its "tar", nicotine, and carbon monoxide data are for comparative purposes only. How much "tar", nicotine, and carbon monoxide a particular cigarette delivers depends on the way it is smoked. "Tar", nicotine, and carbon monoxide delivery per cigarette will increase if the cigarette is inhaled more deeply, or puffed more frequently, by the smoker. If consumers who switch to lower yield cigarettes change their smoking pattern, for example, by

smoking more cigarettes per day, they may receive a greater yield than suggested by the FTC test results.

All ventilated filter cigarettes pose a special problem. Many "lower tar" cigarettes achieve lower yields in part by use of a ventilated filter. Perforated holes or vents on the filter allow air to mix with the smoke during puffing, thus diluting the smoke and decreasing the yield. If the holes or vents are blocked, however, delivery will increase. Consumers will only achieve the relative "tar", nicotine, and carbon monoxide yields suggested by FTC tests for ventilated filter cigarettes if they avoid blocking the holes or vents on the filter with their lips or fingers while smoking the cigarettes.

If consumers avoid blocking ventilation holes, cigarettes smoked in the same fashion will yield "tar", nicotine, and carbon monoxide in general accordance with their relative FTC rankings. The Barclay filter, however, poses a unique problem. Reduced ventilation when smoking Barclay apparently occurs inevitably and cannot be avoided by informed consumers except by use of a cigarette holder. Therefore, the Commission is taking this action to correct the "tar", nicotine, and carbon monoxide figures for Barclay cigarettes previously disclosed in the FTC's 1983 Report.

Based on the evidence obtained in this inquiry, the Commission decided in June 1982 to solicit comments on proposals to modify its testing machine so that the relative yields of all cigarettes, including Barclay, may be assessed accurately. The Commission prepared a statement that shows how it determined that it needed to explore possible testing modifications. The Commission's statement and the underlying evidence are now under seal by a court

order. Several members of the cigarette industry who participated in the investigation had access to the evidence prior to the imposition of the seal. The statement and the evidence, if available, would be helpful to those parties who did not participate in the investigation in preparing informed comment in response to this notice. The Commission does not know whether or when the court order sealing the evidence will be lifted. Therefore, to avoid further delay, the Commission has decided to seek public comment now rather than waiting to see if the seal will be lifted.

The Commission is seeking comments on each of the following proposed holders for its testing machine:

(A) The MK II "Filtrona" holder, manufactured by Cigarette Components Ltd. of London and sold in the United States by American Filtrona Corp., Richmond, Virginia. This holder increases the pressure on the filter, thereby reducing air flow through the channels on the Barclay-type filter.

(B) A modified version of the Cambridge holder currently used on the machine, containing a ring of foam rubber so as to abut the mouth end of the cigarette and block the exit channels on the Barclay-type filter.

(C) A cigarette holder designed so that one or more of the ventilation channels on the Barclay filter are blocked.

Each of these holders is intended to simulate the reduction in ventilation that occurs when humans smoke Barclay. The Commission has not yet determined whether any of these modifications

are technically feasible and practicable, or whether some other modification will insure that all cigarettes, including Barclay can be ranked accurately.

The Commission also is requesting comments on the following specific questions and any other issues relevant to possible modifications of its testing methodology given the Commission's determinations regarding Barclay:

(1) Which of the proposed modifications, or what other modification, would yield the most appropriate test results for all cigarettes, given the Commission's finding in this matter and the consultants' estimates of Barclay's tar delivery?

(2) How quickly and easily, and at what cost, could the Commission implement each of the proposed modifications, or any other proposed modifications?

(3) Regarding proposal (C), which would more appropriately rank Barclay cigarettes—for example, a holder blocking two channels or one blocking three channels?

(4) Does the current FTC method accurately assess the relative "tar," nicotine, and carbon monoxide of Kool Ultra and Kool Ultra 100's each of which utilizes the Actron filter utilized in Barclay? If not, how should these products be assessed?

(5) Given the Commission's endings, what action other than modification of the testing methodology, if any, is appropriate?

(6) Would there be unintended consequences from modifying the cigarette testing method and/or

machine? What effect might modification have upon possible innovation in the cigarette design?

(7) Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hole blocking by smokers of different ventilated filter cigarettes? How does behaviorally reduced air dilution affect the relative rankings of various brands? Are there problems regarding compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of categories or "bands" of "tar" content rather than specific numerical estimates? Also, should consumers be advised that the cigarettes' actual "tar" delivery depends on how it is smoked?

In addition to responses to these questions, the Commission will carefully consider any additional research, such as studies of blood cotinine in smokers and air dilution in ventilated filter cigarettes, or other relevant information bearing on the appropriate relative rankings of these products.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 83-9899 Filed 4-12-83: 8:45 am]

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Optional Form No. 10
May 1962 Edition
GSA FPRM (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO: Commission Date: NOV 9 1970

FROM: Allen F. Brauninger, Attorney,
Division of Food & Drug Advertising,
Bureau of Consumer Protection.

SUBJECT: Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising - Rejection Recommended.

Pursuant to the Commission "minute" dated October 27, 1970, the staff has examined carefully the proposal to disclose tar and nicotine content in cigarette advertising on a voluntary basis, and the memorandum supporting the proposal, submitted jointly by eight cigarette manufacturers on October 23, 1970. The staff recognizes the desirability of settling this matter in a voluntary fashion, if such settlement will protect the public interest involved in the matter. It is the opinion of the staff that this proposal is not adequate to protect the interests of cigarette consumers and the general public because:

(1) It fails to include point-of-sale display materials in the advertising covered by the proposal.

(2) It allows in some instances the use of tar and nicotine data from laboratories operated by the manufacturers.

(3) It contains a format for disclosing tar and nicotine content which would not convey

clearly to the general public the date of the Commission test results to which reference is made.

(4) It lacks any enforcement mechanism.

Before discussing each of these deficiencies in detail, it should be noted that by "minute" dated September 16, 1970, the Commission directed the General Counsel, the Acting Assistant Director for Food & Drug Advertising, and the undersigned to meet with representatives of the Tobacco Institute, Inc. to explore the possibility of reaching an agreement with all cigarette manufacturers to disclose tar and nicotine content voluntarily in cigarette advertising. During the meetings which occurred pursuant to this "minute," representatives of the Tobacco Institute offered proposals generally similar to the one now presented to the Commission. At that time the Commission staff pointed out to the Tobacco Institute representatives objections of the same kind which will be discussed below. Therefore, it cannot be supposed that the deficiencies in the industry submission to the Commission are the result of inadvertent omissions, or that representatives of the cigarette industry have not had opportunity to consider the staff's objections.

1. *Failure to Include Point-of-Sale Materials in Advertising Covered by the Proposal.* The principal purpose of the proposed Trade Regulation Rule to require disclosure of tar and nicotine content in all cigarette advertising is to provide cigarette smokers with reliable information about the quantity of tar and nicotine produced by the smoke of the many varieties of cigarettes advertised in this country. The staff believes that this information is needed by cigarette smokers to prevent deception

and to provide the basis for a more rational choice among the competing varieties. Point-of-sale materials (such as posters, counter displays, and calendars) are designed to catch the customer's eye and deliver a last-minute appeal to purchase the featured variety. The staff believes that these materials should disclose the tar and nicotine content of the featured variety because they are highly visible to cigarette smokers and are placed at the ideal location to influence choice among competing varieties.

At the risk of laboring an obvious point, the text of the proposed Trade Regulation Rule requires disclosure of tar and nicotine content "in all advertising"; the proposal offered by the cigarette manufacturers "in lieu of any formal Trade Regulation Rule Proceeding" would disclose tar and nicotine content in "some" advertising.

The industry claims that point-of-sale materials are too inflexible and too trivial to be subject to the requirement that tar and nicotine content be disclosed. We disagree; we believe that it would be clearly in the public interest for all such material to disclose the most recent tar and nicotine figures with an indication of the date of such test.

Reports have been circulated in the advertising trade that after the ban of cigarette advertising from broadcasting media takes effect on January 2, 1971, the cigarette industry can be expected to place much greater emphasis on point-of-sale promotional materials than in the past. Only the manufacturers know definitely if this will be the case. In any event, the program submitted by the manufacturers leaves a "loophole" available for such emphasis in the future.

2. *Use of Tar and Nicotine Data From Laboratories Operated by the Manufacturers.* The proposal submitted by the cigarette manufacturers would allow the manufacturers to use in advertising tar and nicotine data derived from tests conducted by the manufacturers' own laboratories, utilizing the testing methodology adopted by the Commission, in three instances:

a. When a manufacturer introduces a new variety onto the market, the manufacturer would be allowed to use tar and nicotine data derived from its own laboratory tests until that variety was sampled, tested and included in the Commission's published test report of tar and nicotine.

b. If the Commission fails to include any variety in its published report of tar and nicotine content, the manufacturer would be allowed to use tar and nicotine data derived from its own tests until the Commission's published report includes that variety.

c. If a manufacturer determines that tar or nicotine content of any of its varieties differs more than twenty percent from the figures in the most recently published Commission report, submits samples of that variety for retesting by the Commission laboratory, and is not given the results of retesting by the Commission laboratory within thirty working days, the manufacturer would be allowed to use the data obtained from its own laboratory testing until the Commission laboratory made available to the manufacturer the results of its retesting.

Although the industry proposal specifies that the manufacturers' laboratories will use the methodology adopted by the Commission to

determine tar and nicotine content, this methodology requires the use of sensitive instruments by skilled laboratory technicians who must make many careful measurements and several complex mathematical calculations to determine the tar and nicotine content of any given variety. The staff believes that those provisions in the manufacturers' proposal which would allow cigarette companies to use tar and nicotine data developed in their own testing laboratories are undesirable as a practical matter because the Commission has no evidence about the reliability of the testing laboratories of the various cigarette manufacturers. Additionally, those provisions which would allow use of the manufacturers' own tar and nicotine data in cigarette advertising, if accepted, would provide fuel to the argument advanced by some of the more vociferous critics of the Commission that the agency has an unhealthy familiarity with the industries that it is supposed to regulate. Regardless of the merit of such arguments, the appearance of associations which give rise to such criticism should, in the staff's opinion, be studiously avoided.

During the meetings with representatives of the Tobacco Institute the problem of new varieties was discussed extensively. The staff fully appreciates the industry's understandable desire to prevent disclosure of information about the identity of the manufacturer, brand name, physical characteristics, packaging, tar or nicotine content, or marketing plans for new varieties until such varieties are placed on the market. The staff believes that the Commission's laboratory should test any new variety before it is advertised. The staff advised the Tobacco Institute representatives that such testing by the Commission laboratory could be done in such fashion

as to prevent unauthorized disclosure of any information about the manufacturer's identity, brand name, physical characteristics, etc., before the new variety is introduced onto the market.

The staff believes that if a manufacturer desired to advertise a new variety, the Commission laboratory could test samples of that variety, unidentified by trade name, supplied by the manufacturer from the production line, and inform the manufacturer of the tar and nicotine content. At the time the manufacturer desired to advertise that variety, the manufacturer could inform the Commission staff of the brand name to be assigned to the new variety and the Commission laboratory could publish the results of its testing as a supplement to its most recent report.

Essentially the same procedure could be followed if a variety were inadvertently overlooked in the regular market sampling and testing.

The staff recognizes that manufacturers can change the formulation and design of their varieties to alter tar and nicotine content. The staff also recognizes the desirability of encouraging manufacturers to market cigarettes with lower tar and nicotine content. The manufacturers' proposal is drafted to allow manufacturers to submit samples of any variety for retesting when "any company determines that the 'tar' or nicotine values of any of its varieties have become larger or smaller than twenty percent of the most recently published Commission results." As stated earlier, under the terms of the manufacturers' proposal, if the Commission laboratory did not retest the varieties and give the manufacturer the results within thirty working days after receiving samples for retesting,

the manufacturer would be allowed to use tar and nicotine data developed in its own laboratory until the Commission laboratory furnished its results to the manufacturer.

The staff believes that this proposal would allow manufacturers to flood the Commission laboratory with requests for retesting. The industry proposal does not require a manufacturer to state the way in which it determined that the tar or nicotine content of the variety in question is at variance with the figures listed in the Commission's report. A second apparent flaw with this part of the manufacturers' proposal is that, if retesting did establish that the tar or nicotine content of the variety in question had in fact been changed, no obligation is imposed on the manufacturer to withdraw all packages of the previous version of the reformulated variety from the market, or to alter the packaging of the reformulated variety so that consumers could distinguish the new version from the old.

The staff believes that, if a manufacturer reformulated a variety and packaged the new version so that it could be distinguished from the old, and informed the staff of this fact, adequate arrangements could be made to prevent intermixing samples of the two versions collected during the normal sampling procedure. The two versions could then be tested and reported separately during the regular testing cycle.

To summarize, the staff believes that for both practical and policy considerations, it would be highly undesirable to allow cigarette manufacturers to use tar and nicotine data in advertising obtained from the manufacturers' own laboratories. The staff

believes that the three problem areas discussed above can be resolved fairly to the manufacturers and to the public interest without accepting a proposal which would allow cigarette manufacturers to use tar and nicotine data developed in their own laboratories.

3. *Format for Disclosing Tar and Nicotine Content.* It is well known that the production and publication of any advertisement necessarily involves problems of scheduling and deadlines. Some media are more flexible than others, but at some point in the preparation of any advertisement, the text of the advertisement must be submitted in its final form and cannot thereafter be changed. It is also well known that some media, such as daily newspapers, require advertising copy in final form only a few days before publication; others, such as monthly magazines, require copy in final form several months before the periodical reaches subscribers and news stands. During the discussions in September, both the staff and the representatives of the Tobacco Institute devoted considerable attention to the problem of "lead" time for advertising copy. All parties to the discussions could see that, in cases involving media with deadlines far in advance of distribution, an advertisement could be prepared with tar and nicotine data from the "most recently published Federal Trade Commission report," and submitted to a publisher to meet the established deadline for advertising copy, and that, in the interval between the publisher's deadline and the date of distribution, the Commission might release a new report of tar and nicotine content of cigarettes. To meet this problem, the staff suggested that the format for disclosing tar and nicotine indicate the date of the Commission report from which the tar

and nicotine data was taken, as in the following example:

_____ mg. "tar," _____ mg. nicotine per cigarette.

Source: FTC Report of May 18, 1970.

The industry proposal would assign a number to each Commission report on tar and nicotine content of cigarettes,[1] and would identify the report from which the tar and nicotine data used in any cigarette advertisement in the following manner:

_____ mg. "tar," _____ mg. nicotine
av. per cigarette, FTC Report _____.

The staff believes that the industry's proposed format is unacceptable because it adds the unnecessary element of assigning a number to reports which would be more easily and meaningfully identifiable by the date of publication in the Federal Register. (Publication of the reports in the Federal Register is a change to existing practice proposed by the manufacturers to which the staff makes no objection.) The staff believes that reference to a report number in the disclosure of tar and nicotine content would only serve to conceal the date of the Commission report and create confusion in the minds of the general public. (It is noted in passing that the industry desires to insert the abbreviation "av." for "average" into the disclosure format. The staff believes that the disclosure format would be better without the use of "av." However,

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[1] See page 3 of industry's "Explanatory Memorandum Relating to Voluntary Program for 'tar' and Nicotine Disclosure," dated October 23, 1970, attached.

the tar and nicotine values obtained by the Commission testing procedure are in fact averages, and for that reason the staff has no strong objection to the inclusion of the abbreviation "av." in the disclosure.)

4. *Lack of an Enforcement Mechanism.* When the Commission staff first met with representatives of the Tobacco Institute, the staff expressed the view that one essential element of any voluntary scheme for disclosure of tar and nicotine content in cigarette advertising would be an effective and efficient enforcement mechanism. To give a concrete illustration of the mechanism envisioned, the staff drafted and presented to the Tobacco Institute representatives a proposed complaint and consent order in which each cigarette manufacturer would agree to cease and desist from failing to disclose in all advertising the tar and nicotine content of the advertised variety or varieties based on the most recently published Commission test results. The Tobacco Institute representatives told the staff that such a consent order mechanism was completely unacceptable to their member companies. The staff then suggested that they propose an alternative mechanism which would insure compliance with their voluntary disclosure proposal. The submission from the cigarette manufacturers dated October 23, 1970, contains no enforcement mechanism. If the Commission were to accept this proposal, and if at some time in the future one or more participating cigarette manufacturers determined that it would be advantageous to cease disclosure of tar and nicotine content in cigarette advertising, the Commission would be in no better legal position to compel disclosure than it is at this time. The staff believes that the past record of

cigarette manufacturers in matters related to false and misleading advertising makes reliance on their good faith alone for any program of voluntary compliance highly inadvisable.

Although this proposal has no specific provision to insure the participating manufacturers' compliance, the accompanying memorandum has a clearly written escape clause which would allow the manufacturers to withdraw from their agreement if the Commission fails to "conduct and publish new test results at least six months after an earlier test has been published. . . ." While the staff anticipates that the Cigarette testing laboratory would have no difficulty under normal operating conditions in conducting and publishing the results of at least one test for tar and nicotine content every six months, the terms of the manufacturers' accompanying memorandum make no provision for accidents, illness or disasters which might interfere with the mechanics of the testing program and the subsequent publication of test results. As the Commission knows, the testing machine is a delicate, expensive piece of equipment requiring periodic maintenance; a minor breakdown which delayed testing results for only a few days could result in the invocation of the escape clause by the industry. The staff believes that provisions such as this escape clause reveal much about the attitude of the industry in submitting its proposal.

Conclusion and Recommendations. For the reasons set forth above the staff strenuously urges the Commission to reject the industry's proposal in its entirety. The staff believes that further discussions with representatives of the Tobacco Institute are most unlikely to be fruitful, and for that

reason recommends that the Commission reschedule the hearing on the proposed Trade Regulation Rule to require disclosure of tar and nicotine content in cigarette advertising. Attached is a list of persons and groups who have expressed interest in presenting testimony on the proposed Rule.

It is noted that the Commission news release dated October 1, 1970, relating to the Commission action which invited representatives of the cigarette manufacturers to submit their proposal to disclose tar and nicotine content in cigarette advertising, contains the statement: "The written submissions by the industry will be placed on the public record for 30 days for public comment." The cut-off date for public comment on the industry proposal has been set for December 1, 1970. The staff expects to devote most of its time during the months of November and December to the preparation of the Report to Congress on Cigarette Advertising and Labeling, which the Commission is required to submit not later than January 1, 1971, by provisions of the Public Health Cigarette Smoking Act.

If the Commission accepts the staff recommendation to reject the industry proposal and proposed Trade Regulation Rule, the staff further recommends that a date for the hearing be set in January of 1971.

Respectfuly submitted,
/s/ Nov. 4, 1970
Allen F. Brauninger,
Attorney.

APPROVED:
/s/ 11-04-70
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Acting Assistant Director for
Food & Drug Advertising.

/s/ 11-5-70
Paul A. Jamarik
Acting Director,
Bureau of Consumer Protection.

cc: General Counsel, and,
Acting Assistant Director for
Scientific Opinions

Attachments include Statement of the Surgeon General, U.S. Public Health Service on Proposed FTC Rule.

CP: AFBrauninger:rlc

BEST AVAILABLE COPY

No.

IN

Supreme Court of

ALTRIA GROUP, INC., AND PHIL.

v.

STEPHANIE GOOD, ET AL.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX
Volume 2 of 3
(Pages 330a-663a)

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 26, 2007
CERTIORARI GRANTED JANUARY 18, 2008

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UNITED STATES GOVERNMENT

Memorandum

TO : Commission Date: DEC 21 1970

FROM : Allen M. Brauninger, Attorney,
Division of Food & Drug Advertising,
Department of Consumer Protection.

SUBJECT : Modification of Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising-Implementation Recommended.

By memorandum dated November 9, 1970, the undersigned outlined objections to a proposal to disclose tar and nicotine content on a voluntary basis submitted on October 23, 1970, by eight cigarette manufacturers as an alternative to the Commission's proposed rule-making activity. The principal objections to the industry proposal discussed in the previous memorandum were:

(1) Failure to include point-of-sale display materials;

(2) Use of tar and nicotine data from laboratories operated by manufacturers;

(3) Reference to Commission test reports by number instead of by date when disclosing tar and nicotine; and

(4) Lack of an enforcement mechanism.

On December 18, 1970, the eight manufacturers who had proposed voluntary disclosure of tar and nicotine content in cigarette advertising submitted a modification of their original plan and requested reconsideration by the Commission.

The modified proposal adds to the description of advertising in which tar and nicotine content would be disclosed "all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period." The staff believes that the amended language covers the large majority of point-of-sale materials. The staff realizes that a number of such materials would still fall outside the advertising subject to tar and nicotine disclosure, including such items as metal or plastic signs, window decals, clocks, calendars, thermometers, and metal or plastic stands to display cigarette packages. It is believed that these are relatively minor items and that the important point-of-sale materials, such as the counter display cards currently being used in connection with specific advertising campaigns for various brands of cigarettes, are now included in the industry plan.

The modification concerning coverage also deletes the word "paid" from the definition of billboards subject to the proposal. This change clarifies any ambiguity about the status of signs to promote the sale of cigarettes which appear on buildings, vehicles or other property owned by cigarette manufacturers.

In the previous memorandum, the staff discussed at length the problems presented by that portion of the industry proposal which would have allowed industry members to request retesting when "any company determines that the tar or nicotine values of any of its varieties have become larger or smaller by more than twenty percent of the most recently published rounded Commission test

results." The modification to the industry proposal requires that any manufacturer who desires a retest must support his request with laboratory test results. The modification further provides that a market sample for retesting must be collected by Western Union in accordance with the Commission's sampling procedures, at the expense of the manufacturer who desires retesting; allows the Commission 45 working days (nine weeks) in which to conduct the retest; and specifies that in the event the Commission cannot complete the retest within 45 working days, results from the Tobacco Institute Testing Laboratory (not the manufacturer's laboratory) may be used in advertising. The staff believes that these additional provisions should be adequate to prevent any flood of spurious requests for retesting, which was a matter of concern under the earlier proposals submitted by the industry.

The industry proposal still allows use of test data obtained from laboratories operated by the manufacturers in advertising for any variety which is not included on the Commission's published test report—either because the variety was not marketed until after the last test was completed, or because the variety was inadvertently omitted by the Commission laboratory. While it would be desirable for the Commission laboratory to test new varieties before introductory advertising is begun, the staff believes that if a manufacturer deliberately misrepresented tar or nicotine content of a new variety, subsequent market sampling and testing could give grounds for issuance of a complaint, possibly including an order to require disclosure of previous false advertising in appropriate cases.

The previous memorandum also discussed the problems presented in the industry's original proposal to identify FTC test reports by number rather than by date when disclosing tar and nicotine content. The modified proposal requires identification of test reports by the month and year of publication, thus solving this problem.

The modification also provides that the plan shall take effect within 30 working days (six weeks) after the Commission gives notice to the industry that it favors implementation of the manufacturers' proposal.

The modification makes no provision for any enforcement mechanism. The Division of Food & Drug Advertising has previously indicated the dangers inherent in allowing this industry to proceed under self-regulation. However, if the Commission is willing to forego the requirement of an enforcement mechanism, the staff believes that the modified industry proposal is the best attainable alternative to further proceedings on the proposed Trade Regulation Rule.

The staff has read the memorandum dated December 14, 1970, which the General Counsel submitted on the modification to the industry plan, and concurs with the analysis and recommendations contained in that memorandum.

Respectfully submitted,
/s/
Allen F. Brauninger,
Attorney.

APPROVED:

/s/ 12/18/70
Gerald J. Thain,

Acting Assistant Director
For Food & Drug Advertising.

/s/ 12/18/70
Robert Pitofsky
Director,
Bureau of Consumer Protection.

cc: General Counsel,
Acting Assistant Directotr
for Scientific Opinions

CP: AFBrauninger:rlc

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Advertising Practices

August 8, 1994

Matthew L. Myers
Counsel to Coalition on Smoking OR Health
1615 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20009

Re: Petition Concerning Advertising of Low-Tar and Ultra Low-Tar Cigarettes

Dear Mr. Myers:

On February 27, 1992, the American Heart Association, the American Lung Association and the American Cancer Society, united as the Coalition on Smoking OR Health ("Coalition"), petitioned the Commission to issue administrative complaints against the major American tobacco companies concerning their advertising of certain cigarettes as "low-tar," "light", and "ultra low-tar." The Coalition asked that a Commission order require the companies, among other things, to cease and desist from disseminating ads that allegedly imply that low-yield cigarettes are a safe alternative to the use of higher tar cigarettes or that they dramatically reduce the overall health risks from smoking.

The Coalition's petition raised a number of important questions. After giving these matters careful consideration, the Commission has asked the National Cancer Institute ("NCI") to convene a consensus-type conference to address specific issues

relating to the Commission's cigarette testing methodology and rating system. The Commission's intention is to use the data and recommendations generated by that conference "in assessing possible alternatives to, or modifications of, the present system of ratings and in evaluating other available options for addressing tar and nicotine claims in future cigarette advertising and promotions." Letter to Samuel Broder, M.D. from Janet D. Steiger (July 20, 1994). A copy of the Commission's letter to NCI is enclosed for your information.

Commission staff believes that the Coalition's input on this issue has been valuable and that the ultimate result of the process initiated by the Commission's letter to NCI will be to increase the information available to consumers about cigarette tar and nicotine levels. In the interim, Commission staff will continue to review existing advertising claims for low-tar cigarettes to ensure that they comply with the FTC Act.

We hope you will continue to bring to our attention any advertising or marketing campaign that you believe may violate the FTC Act.

Sincerely,

/s/
C. Lee Peeler
Associate Director

Enclosure

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

THE CHAIRMAN

The Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation, Tourism,
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Bob Whittaker
Ranking Republican Member
Subcommittee on Transportation, Tourism,
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Luken and Whittaker:

Thank you for your letter of July 6, 1988 raising certain additional questions concerning our letter of June 17, 1988, commenting on the provisions of H.R. 4543, The Cigarette Testing and Liability Act of 1988. The Commission appreciates the opportunity to provide additional comments on the important issues raised by your proposed legislation.

You first asked how many tests would have to be conducted each year to establish a credible threat of a test to verify the validity of a cigarette company's own test figures. The Commission believes that, for tar and nicotine test figures, random testing of a very small number of brand varieties would establish a very credible threat of

detection of inaccurate tar and nicotine information currently being disclosed to consumers.[1]

There are, however, three major differences between the testing proposed by H.R. 4543 and the industry's existing, voluntary tar and nicotine disclosure program. Although H.R. 4543 appears to envision testing constituents beyond tar, nicotine and carbon monoxide there is currently no standardized testing protocol for testing such constituents. It is impossible to verify testing results without agreement on a precise protocol for the testing.[2]

Second, assuming that such a uniform testing protocol that would produce replicable results (that is, results that would not differ significantly from test to test) were established, H.R. 4543 imposes no legal obligation on the companies to test for any constituent or disclose this information to the

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[1] As indicated in the Commission's May 7, 1988, testimony before this Subcommittee, there are other factors that help insure the accuracy of current tar and nicotine data. Each of the major cigarette companies either has a laboratory of its own or has access to a laboratory to do tar and nicotine assays. Because tar and nicotine ratings are an area of intense competition within the industry, we expect that if a company were to publish incorrect ratings, we would hear quickly from its competitors. Indeed, the *Brown & Williamson* case arose not as a result of Commission testing or monitoring but because of competitors' complaints.

[2] A testing protocol that was designed to simply identify the presence or absence of constituents or whether certain constituents were present in an unusually high amount presumably would be easier to establish than one which seeks to both identify and rank them in its present form. H.R. 4543 appears to envision quantitative testing.

government or consumers.[3] Similarly, there is no current program for voluntarily disclosing information on tobacco constituents beyond tar and nicotine to consumers.

Third, the present tar, nicotine and carbon monoxide testing program is limited to the six major cigarette companies, whose sales are estimated to encompass over 99% of the U.S. market. It is impossible to judge how accurate the results of other smaller and less sophisticated manufacturers and importers would be in the event they were required to disclose this information.[4]

Assuming these three differences could be corrected, however, there is no reason why random testing of a very small sample of brand varieties would not establish a sufficient deterrent to inaccurate constituent reporting.[5]

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[3] We therefore assumed in our prior comment that the Subcommittee intended the Commission to test a much broader sample of brand varieties than would be needed simply to verify industry reported figures.

[4] Significantly, however, the current agreement among industry members for testing of tar, nicotine, and carbon monoxide by the Tobacco Institute Testing Laboratory ("TITL") allows any non-participating company to obtain testing on payment of a user fee. Testing done in the TITL labs would not raise the same verification concerns as independent testing done by small manufacturers and importers.

[5] The Commission has already indicated that random testing is one method that it can use to verify the results of industry-generated tar, nicotine and carbon monoxide figures. *See* Prepared Statement of Federal Trade Commission on Cigarette Tar and Nicotine Testing, Before the Subcommittee on Transportation, Tourism and Hazardous Materials, May 7, 1987.

You next ask whether the data that would be generated by the testing required under Section 2 of the bill would be useful in future advertising enforcement actions by the Commission. As indicated previously, because current cigarette advertising does not disclose constituent information beyond tar and nicotine,[6] and the proposed legislation does not require such disclosure, it is unclear to us how such information would be useful in future advertising enforcement actions.[7]

Incidentally, , we want to correct the record with respect to the Subcommittee's apparent assumption that because the Commission has not challenged the advertisements of any cigarette brand since 1983, it has not taken any enforcement action involving unfair or deceptive advertising in the cigarette industry during that period. As we believed the Subcommittee was aware, the Commission is currently engaged in litigation with

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[6] The Commission's 1981 Staff Report on Cigarette Advertising recommended that Congress consider requiring disclosure of carbon monoxide, and in September 1982 the Director of the Commission's Bureau of Consumer Protection endorsed legislation requiring disclosure of tar, nicotine and carbon monoxide on cigarette packages. *See* Letter from Timothy J. Muris, Director, Bureau of Consumer Protection, to The Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, at 22 (September 1, 1982). Congress has never enacted such a requirement.

[7] In that regard, we note that the Surgeon General and the National Cancer Institute have already identified several thousand constituents of tobacco smoke but have not indicated any specific constituents beyond tar, nicotine and carbon monoxide that they believe should be reported separately.

R.J. Reynolds Tobacco Company over a question involving cigarette advertising.[8]

You have also requested that the Commission submit additional comments on Section 2 of the bill, particularly addressing any evidence on the extent to which the current costs of smoking would be reduced by providing consumers with the additional testing data called for in Section 2. The staff has reviewed the written statements cited in your letter. Each of these statements, to a greater or lesser degree, bases its support for Section 2 of H.R. 4543 on the premise that accurate comparative data on tar, nicotine and carbon monoxide content will no longer be available in light of the Commission's decision to close its cigarette testing laboratory.[9] As we explained in our

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[8] We, of course, express no opinion on the merits of this litigation.

[9] *See e.g.*, Statement of Steven D. Stellman at 3-4 (June 8, 1988) ("I wish to stress the importance of the FTC data collection program to basic research on smoking related disease. . . . [W]e fear that our ability to continue to provide such analytic data, such as our ability to relate differences in cancer mortality to cigarette yield, will be hampered by the absence of reliable and routinely available data on the relative exposures of people smoking different brands."); Statement of Robert E. McAfee, M.D. at 2 (June 8, 1988) ("We believe that the government should again measure cigarette smoke so that, at the very least, a smoker will be aware of the harmful constituents being emitted from cigarettes and how one cigarette type compares with another."); Statement of Alfred Munzer, M.D. at p. 5 (June 8, 1988) ("Second, testing limited to tar and nicotine tells us nothing about carbon monoxide yields of different cigarettes."); Statement of Scott D. Bailin, at 2-3 (June 8, 1988) ("Cigarettes advertised as low tar or low nicotine may have high levels of carbon monoxide and other harmful constituents; yet cigarette companies do not provide consumers

June 17th letter, that is not the case. Comparative tar, nicotine and carbon monoxide figures continue to be generated by the Tobacco Institute Testing Laboratory under a well established methodology. The Commission, through a staff contractor, has unrestricted access to the laboratory to monitor the testing procedure, and in addition, the FTC can verify TITL test results through random testing by a contract laboratory. The industry, in addition, is reporting this information to the Commission, and the Commission will continue to report it to Congress on a regular basis, as it has for many years.

In addition to concerns about continued availability of accurate comparative tar, nicotine and carbon monoxide test data, Dr. Munzer of the American Lung Association testified that the testing program called for by H.R. 4543 was necessary because of concerns about compensatory smoking, concerns about possible alteration of cigarette smoke constituents in low tar cigarettes, and the belief that current tar and nicotine data is deceptive unless accompanied by a full listing of the relative levels of the other constituents in tobacco smoke. Additionally, Mr. Ballin of the American Heart Association expressed concerns that the full listing of chemical additives to tobacco is currently unknown.

With respect to concerns expressed about compensatory smoking, the Commission shares the Subcommittee's concern about studies of the effects of compensatory smoking that raise questions about

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[Footnote continued from previous page]

or the government with this information and the government currently has no way of obtaining or requiring disclosure of this information".).

how consumers perceive and use existing tar and nicotine information. This issue is a longstanding one that was reviewed by the Surgeon General in 1981, was examined in the FTC's litigation with *Brown & Williamson*, and has been raised in connection with the staff's ongoing review of the current testing methodology. Although the existence of compensatory smoking behavior is now well established, a method of adjusting the current testing methodology to reflect it has proved elusive. To date, no cigarette company, scientific agency, or health group has offered the Commission a viable alternative to the present testing system. As indicated in our June 17th letter, however, the Commission staff is currently awaiting the results of a Department of Health and Human Services study on how consumers perceive and use existing data. That study may provide the basis for future recommendations in this area.

The second general concern expressed by Dr. Munzer is that changes in cigarette manufacturing technology designed to lower the tar level of cigarettes may have introduced new constituents into cigarette smoke or harmfully altered previously existing cigarette smoke constituents. This question seems to raise scientific issues that are beyond the scope of a routine constituent testing program administered by a law enforcement agency. Routine random testing by its very nature would seek to determine the amounts of a specific list of constituents, not to test for the presence of new constituents. Similarly, it seems premature to begin random testing of relative levels of constituents until

there is consensus as to what constituents should be tested and what levels are of concern.[10]

With respect to concern about tobacco additives, the Comprehensive Smoking Education Act already requires cigarette manufacturers to provide the Secretary of Health and Human Services with a list of the ingredients added to tobacco.[11] Under the statute, the ingredients list does not identify the supplying company or the brand of cigarette,[12] and the information is expressly non-public.[13] If the Subcommittee determines that disclosing tobacco additive information would have an impact on consumer purchasing decisions, the most logical first step would be to amend the current federal law to delete the provision which prohibits the Secretary of Health and Human Services from disclosing the information that is already reported and, if necessary, require that the information be reported on a brand variety basis.

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10 We note that the agency charged by law with responsibility for conduct and support of research on the effect of smoking on human health, the Department of Health and Human Services, reports spending $3 million on "identification of harmful constituents in tobacco smoke." We question whether additional research is necessary, or whether that research could be conducted with existing funding. *See*, U.S. Department of Health and Human Services, Prevention 86/87 (1987) at 154.

11 15 U.S.C. 1335a.

12 15 U.S.C. 1335a(a).

13 15 U.S.C. 1335a(b) (2) (A) (The Secretary is required to report to Congress information pertaining to any such ingredient judged to be a health risk and may otherwise make the list available to Congress if it is requested by a subcommittee or committee).

Our June 17th letter also expressed the concern that it could potentially cost millions of dollars for the Commission to produce, through testing, the comparative listing of tobacco additives and constituents that may be envisioned by Section 2, and that there was no mechanism for distributing this information to consumers even if it were produced.[14] Similarly, we expressed our concern that consumers would find using a comparative listing of thousands of tobacco constituents (such as "Butylamine" and "Diethylamine") impractical and cited testimony by Dr. Guerin that cigarettes would remain in roughly the same ranking even after this analysis. Indeed, according to Dr. Guerin, if consumers used such information to select a cigarette that was relatively low in a specific commonly known constituent such as ammonia, but had a higher overall tar level, they might actually be injuring their health.

In short, the Commission shares the Subcommittee's concern about the health costs associated with smoking. The government already spends millions of dollars to correct this problem, and it is important in this area as in all others to ensure that our expenditures will obtain the intended results.[15] As indicated in our June 17th

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[14] It is also unclear whether simple reporting of test results of a random sample of brand varieties would provide useful information to consumers. Although the FTC publishes tar and nicotine results for all varieties, consumers are exposed to this information primarily from voluntary tar and nicotine disclosure in all cigarette advertising and on some packaging

[15] The exact expenditures on smoking and health issues is apparently unknown, although the Department of Health and

letter, to the extent that the intent behind Section 2 of H.R. 4543 is to provide consumers with additional information about the constituents of cigarettes, we continue to believe that the most efficient means is simply to identify the constituents involved and require the cigarette companies to disclose this information on the labeling for cigarettes, rather than providing a taxpayer-subsidized Federal testing program to supply this information.

Your final question relates to the preemption provision of the bill. Referring to the advertising expenditure figures contained in the Commission's 1986 Cigarette Report to Congress, you ask whether Congress should permit state and local governments to regulate cigarette advertisements in newspapers, magazines, on billboards or other outdoor structures, on transit vehicles, and at point-of-sale. You ask, specifically, whether Section 3 of the bill would have varying effects on these different types of advertising. You further ask what impact there would be on these types of advertising if Congress prohibited additional, non-federal cigarette warning labels but otherwise gave state and local governments the power to regulate cigarette advertising and promotion.

The impact of proposed Section 3 of H.R. 4543 would clearly vary depending upon the type of advertising. Newspapers and magazines are often

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[Footnote continued from previous page]

Human Services alone reports spending $40.5 million in 1986 on "smoking control." U.S. Department of Health and Human Services, *Prevention* 86/87 (1987) at 158. Of this amount $3.7 million is reported to have been spent on "identification of harmful constituents in tobacco smoke." *Id.* at 159.

distributed across state lines and are frequently distributed nationally. For such advertising, complying with individual state health warning or affirmative disclosure requirements could serve as a functional ban on advertising. Transit advertising also can cross state lines; however, the geographical distribution is obviously more certain and limited, making it more possible to comply with different state health warning and affirmative disclosure requirements so long as the states do not themselves impose mutually inconsistent requirements. This would, however, leave open the concern of whether the state warnings are inconsistent with or otherwise undermine the Surgeon General's warnings.

Outdoor billboard advertising and point-of-sale advertising are obviously fixed in a particular geographic location and, therefore, are more suitable for state regulation. Even for these media, however, the possibility of inconsistent or conflicting state and Federal warnings remains.

With regard to the question of legislation prohibiting non-federal cigarette warning labels, but otherwise giving state government the power to regulate cigarette advertising, the effect would again vary based on the type of advertising and regulation. For advertising that is interstate in nature, allowing such regulation could result in circumstances in which a single state imposes its decisions on citizens of other states or the entire country. For example, if one state were to decide that it is deceptive, per se, to advertise the tar, nicotine and carbon monoxide content of low tar cigarettes, that decision might operate to prohibit those disclosures in magazine and newspaper advertising in other states. Similarly, if a state prohibited cigarette transit advertising, that

decision would presumably act to ban transit advertising in surrounding states if the vehicles cross into those neighboring states. Finally, such a revision would not end the potential for significantly inconsistent results. For example, if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict for advertising that appeared in both states. We believe that results such as these are very real possibilities, and urge the Subcommittee to carefully analyze the potential results of this proposal.

I hope that you will find this information helpful to your consideration of H.R. 4543.

By direction of the Commission,*

Daniel Oliver
Chairman

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* Commissioner Strenio dissenting. He will forward his views to the subcommittee separately

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

MEMORANDUM

TO :Commission DATE: November 24, 1970

FROM :Miles W. Kirkpatrick, Chairman

SUBJECT :Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising

The staff recommends rejection of the tobacco industry's proposal for voluntary disclosure of tar and nicotine content in cigarette advertising. This recommendation is based on four objections to the industry proposal. First, it fails to include point-on-sale display materials in the advertising covered by the proposal. Secondly, it allows in some instances the use of tar and nicotine data from laboratories operated by the manufacturers. Thirdly, it contains a format for disclosing tar and nicotine content which would not convey clearly to the general public the date of the Commission test results to which reference is made. Finally, it lacks any enforcement mechanism.

Since the cut-off date for public comment on the industry proposal has been set for December 1, 1970, it will be appropriate to begin discussion of our course of action at our next meeting, and I invite the staff to attend this discussion.

THE TOBACCO INSTITUTE, INC.
1775 K Street, Northwest
Washington, D.C. 20006

296-8434

Horace R. Kornegay
President & Executive Director October 23, 1970

Federal Trade Commission
Washington, D.C. 20680

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar' and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed Letter signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., trading as The House of Edgeworth; Liggett & Myers Incorporated, Cigarette and Tobacco Division; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco -Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that, "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have

been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and published, constitutes a violation of law.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

October 23, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade Commission published test results, under its present methodology, in all advertising in newspapers, magazine, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, and advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary

deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all advertising in newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

__ mg. "tar", __ mg. nicotine
av. per cigarette, FTC Report __

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

___ mg. "tar", ___ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines that the "tar" or nicotine values of any of its varieties have become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company will submit that variety of cigarettes to the Commission for testing. If within thirty working days the Commission supplies that company with its test determinations, the company will thereafter utilize those results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within thirty working

days, then the company will utilize, in accordance with this program, its own test results until such time as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin as soon as practicable after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON
TOBACCO
CORPORATION

By /s/ _____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY,
INC.,
TRADING AS THE HOUSE OF
EDGEWORTH

By /s/ _____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS
INCORPORATED
CIGARETTE AND TOBACCO
DIVISION

By /s/
Kenneth McAllister, President

LORILLARD, a Division of Loew's Theatres, Inc.

By /s/
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/
Colin Stokes, Chairman of the Board

STEPHANO BROTHERS

By /s/
Constantine Stephano

UNITED STATES TOBACCO COMPANY

By /s/
Louis V. Breezle
Vice President

October 23, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of October 23, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals, as well as advertising on billboards, on handbills and in direct mail circulars. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Paid media billboard advertising messages on he following structures exposed to the general public:

2-30 Sheet Billboards
Painted Billboards
Spectacular Billboards; and

(2) Paid advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms
Transportation Terminals.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such

as closing date and delivery in final form to the printer in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing-individual cigarettes, but are instead averages of the averages

obtained by smoking five cigarettes on each of twenty ports.

In the first legend, relating to a Commission market pickup, FTC reports identified by number are employed rather than dates because the existence of a date would be more confusing to consumers than merely report numbers. This is particularly true because the only value of a date or report number is to permit consumers to distinguish between different sets of figures in terms of which published result is more recent. This distinction can be more easily made on the basis of report numbers. In view of the previous FTC testing, it is recommended that the report numbers to be covered by this program might begin with No. 10.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately 4-6 months. Obviously if the Commission should, for some reason, totally discontinue its testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick

up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own-test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that' situation by disclosure of "tar" and nicotine on the basis of the company's own testing in

accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of Cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. Under this procedure each company will submit cigarettes of the variety which has changed in "tar" or nicotine content to the Commission for its testing, and if that is not feasible, the company will disclose "tar" and nicotine on the basis of its own testing in accordance with the Commission methodology until the next Federal Register publication. During the period in which cigarettes have been submitted to the Commission, the company will utilize the latest published Commission test results.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the General Counsel

~

John D. Graubert
Deputy General Counsel

September 10, 1998

Lucia M. Valente, Esq.
Counsel to the Attorney General
Office of the Attorney General
120 Broadway
New York, NY 10271-0332

Dear Ms. Valente:

This is in response to your facsimile transmission of September 9, 1998, requesting a list of closed Federal Trade Commission investigations relating to the tobacco industry. Because the list, while nonpublic, would not be exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. § 552, I am providing you with this information without any further restrictions on its use.

We appreciate the opportunity to assist your offices in its law enforcement activities.

Sincerely,

/s/
John D. Graubert
Deputy General Counsel

Attachment

* * *

P511026
Cigarette Testing
1/7/75
10/27/94
1820
The Commission tests all domestic cigarettes for tar, nicotine and carbon monoxide content and reports the results to Congress and the public.

P814511
Cigarette Testing Methodology Barclay
9/25/81
6/25/90
1803
Commission is currently in the process of evaluating comments on how to modify its cigarette testing methodology in order to more accurately measure Barclay cigarettes.

* * *

P884507
R J Reynolds – New Cigarette
3/24/88
10/16/89
1803
This matter is being initiated to study and analyze R.J. Reynolds new smokeless cigarette to insure that its manufacture or advertising will not violate Section 5.

P884514
Low Tar Cigarettes
8/23/88
6/25/90
1820
Cigarette labeling with FTC tar content may mislead

consumers about the safety of smoking "low tar" brands

* * *

P834504
Low Tar Cigarette Petition (SOH)
10/5/93
8/8/94
1820
Investigate allegations contained in petition filed by Coalition on Smoking Or Health that advertising for low-tar cigarettes makes implied health claim that violate Section 5.

* * *

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

JOSEPH W. SHEA
Secretary

October 25, 1967

Mr. Howard H. Bell, Director,
The Code Authority,
National Association of Broadcasters,
1771 N Street, N.W.,
Washington, D.C. 20036

Dear Mr. Bell:

This will reply to your letter of September 20, 1967, in which you inquire as to the Commission's current policy regarding (1) statements in cigarette advertising relating to health implications of tar and nicotine content of cigarettes, and (2) utilization in advertising of the official FTC tar and nicotine yield data. Your letter requests any guidance that the Commission could provide your organization in administering Radio and Television Code policies pertaining to cigarette advertising.

Any discussion of this subject at the present time must begin with the premise, which is correctly stated in your letter, that "the government would like to stress the relative advantages of low-tar and nicotine yield cigarettes". In the Report to Congress on Smoking and Health, submitted on July 12, 1967, the Secretary of Health, Education, and Welfare stated that "the accumulated evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the lower the harmful effect. * * * The cigarette package label and 'advertising should be required to contain information on the 'tar' and

nicotine levels in the smoke of the cigarette, and the identity and quantity of such other substances or agents in the smoke as may subsequently be found by the appropriate Federal agency to contribute to the health hazards of smoking."

To the same effect, the Surgeon General of the U.S. Public Health Service testified before the Senate Commerce Committee on August 25, 1967, as follows:

> "I believe that disclosure of tar and nicotine an on cigarette packages and in advertisements, and the responsible promotion of those cigarettes low in tar and nicotine would be constructive and helpful steps to the extent they provide the smoker as much information as possible on the risks of smoking and enables him to make his own decision as to the amount of dosage he will accept. Public opinion backs such action. A Public Health Service survey shows that 77 percent of people who were interviewed felt that cigarette companies should be required to list tar and nicotine content on packages; among cigarette smokers, 71 percent favored such action. As other substances are found in the cigarette smoke which contribute to the health hazard of smoking, the identity and quantity of such substances, should be included along with tar and nicotine in the package labeling and in advertising.
>
> "The question is will tar and nicotine disclosure on cigarette packages and in advertisements encourage wider use of the brands with lower levels? I believe that a

progressive reduction of tar and nicotine levels will result from such action because of public demand."

In its Report to Congress under the Federal Cigarette Labeling and Advertising Act, transmitted June 30, 1967, the Federal Trade Commission stated: "For the information of cigarette smokers, the Commission favors mandatory labeling of tar and nicotine content on cigarette packages and in cigarette advertisements and other measures that will prompt cigarette manufacturers to develop less hazardous cigarettes. * * * It appears to the Commission, from the switch toward filter cigarettes and the popularity of low tar and nicotine cigarettes, that a substantial segment of the public is most concerned about the health hazards of cigarette smoking. Many smokers would like to give up the habit, but don't and won't. Some of these have switched to brands that they believe, often erroneously, to be less hazardous. The Commission favors giving smokers as much information about the risks involved in smoking as is possible and to that end favors mandatory disclosure of tar and nicotine content, as measured by a standard test." (Pp. 8, 28.)

After review and reexamination in the light of the foregoing, the Commission's current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes may be formulated as follows: As a general rule, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission, as described in its release issued

August 1, 1967. Advertisements which correctly report official FTC tar and nicotine yield data are within this category. On the other hand statements or representations based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public.

Where comparisons of tar and nicotine content with other brands of cigarettes are made, the advertising should be factual, fair, and not misleading. For example, a cigarette testing relatively high or not among the lowest in tar and nicotine yield should not be represented to be otherwise, either expressly or by innuendo. By the same token, a cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public, provided that the basis for comparison is fully and fairly stated. It must also be borne in mind that, while presently available scientific data indicate that a substantial reduction of tar and nicotine intake may lower the harmful effects, there is no reliable evidence that the health hazards of cigarette smoking are thereby eliminated or avoided. Hence, no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as "safe" or "safer".

The Commission recognizes that this statement of enforcement policy is necessarily cast in general terms, and that questions will inevitably arise concerning its application to particular cases. In facilitating the resolution of such problems, the Commission's advisory opinion procedure will be available to you and to members of the broadcasting and cigarette industries.

In view of the substantial public interest of the subject matter, the Commission is making public this exchange of correspondence.

By direction of the Commission.

Chairman Dixon and Commissioner MacIntyre dissented. Their separate statement is attached. Also attached is the separate statement of Commissioner Elman.

/s/ JOSEPH W. SHEA

Joseph W. Shea,
Secretary.

SEPARATE STATEMENT OF CHAIRMAN DIXON AND COMMISSIONER MacINTYRE

In response to the inquiry from the National Association of Broadcasters, the Commission has set forth its current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes. In substance, the policy statement is to the effect that the Commission will not challenge representations as to tar and nicotine content of cigarettes when the representations are substantiated by tests conducted in accordance with testing methods used by the Commission. Moreover, the policy statement asserts that representations based on tests not performed in accordance with the methods set down by the Commission would tend to confuse and mislead the public. Thus, by implication, it is the stated policy of the Commission to challenge such representations.

Prior to the establishment of testing procedures by the Commission, various manufacturers had made representations as to tar and nicotine content of their individual cigarettes, based on the

Cambridge Filter Method of testing, which tested cigarettes to a 30 mm. butt length. The Commission, however, in establishing its testing procedures, did not adopt the 30 mm. butt length of the Cambridge method but set 23 mm. as the standard for testing. This is the shortest butt length to which a cigarette can be tested in the Commission's testing machine. All that will be shown as the result of this standard is the *maximum* amount of tar and nicotine that a smoker may inhale.

Certainly, we would agree to the use of the 23 mm. butt length for testing purposes if it were established that this is the average length to which all smokers smoke their cigarettes. Unfortunately, however, this is far from being the fact. In the first place, it is physically impossible to smoke most filter brands of cigarettes to a 23 mm. butt length. As has been pointed out in a previous statement on this issue, of approximately 120 brands of cigarettes on the market, only 49 can be smoked to 23 mm. Secondly, it is agreed that because smoking habits vary greatly, smokers of nonfilter as well as filter brands smoke their cigarettes to varying butt lengths, either shorter or longer than a 23 mm. butt length.

It is generally agreed that the shorter the butt length of a cigarette, the more tar and nicotine are generated in the mainstream smoke of the cigarette. In other words, the yield of tar and nicotine is not uniform for the entire length of the cigarette. Thus, the mainstream smoke of a cigarette at, for example, a 23 mm. butt length will yield more tar and nicotine than the mainstream smoke at 30 mm. Tests performed to a 23 mm. butt length, while giving the maximum tar and nicotine content, will not be a true

indication as to the tar and nicotine content of the same cigarette at 30 mm.

It is our belief that one of the purposes in establishing cigarette testing procedures was to afford smokers a meaningful way of comparing the amount of tar and nicotine yields as between brands. Under the foregoing circumstances, we do not see how the Commission's standards will accomplish this purpose. In our view, it is misleading to require that tests be performed to a butt length which gives a maximum yield of tar and nicotine in nonfilter cigarettes when, in fact, it has not been established that this is an average butt length for smokers, and it is not possible to smoke certain filter brands to that butt length.

We would not challenge representations based on tests performed to a 30 mm. butt length. Since most brands of cigarettes can be tested to that length, the smoker would have a meaningful way of comparing tar and nicotine content regardless of the overall length of the cigarettes. We realize, of course, that there are possibly five brands of cigarettes which cannot be smoked even to 30 mm. However, the 30 mm. standard would serve to minimize the disadvantages inherent in the 23 mm. standard which, in effect, precludes a meaningful comparison between a majority of the brands now on the market.

SEPARATE STATEMENT OF COMMISSIONER ELMAN

It is true, as Chairman Dixon points out, that the Commission's tests will show the maximum amount of tar and nicotine that a smoker of a particular brand will inhale. It is also true, as he notes, that brands of cigarettes on the market vary

in length. Thus, if Brand A is 100 mm. long and Brand B, made of the same tobacco, is 85 mm. long, the tests will show Brand A as containing more tar and nicotine than Brand B. According to Chairman Dixon, this is "misleading". I do not agree.

Suppose, for example, that one were to test the caloric content of chocolate bars. Brand A is sold in a 4 oz. size, and Brand B, made of the same ingredients, is sold in a 3 oz. size. One who eats a Brand A bar will consume substantially more calories than Brand B. Is it "misleading" to report that Brand A contains more calories than Brand B? Chairman Dixon would answer "yes", because it is "not established" that the "average person" will eat the whole bar. Conceivably, he might eat only half of a Brand A bar—in which case he would be consuming fewer calories than if he ate all of Brand B. The Chairman applies the same reasoning to the testing of cigarette brands for tar and nicotine content.

Moreover, even he does not propose that the testing procedure should be to smoke a uniform length (say, 50 mm.) of every cigarette regardless of its actual size. His proposal was, and is, that all cigarettes, regardless of size, be smoked down to a butt length of 30 mm. Thus, if the Chairman's testing procedure were to be used, the machine would smoke 70 mm. of Brand A, 100 mm. long, and 55 mm. of Brand B, made with the same tobacco but 85 mm. long. The Chairman's test results would be just as "misleading" in showing Brand A as containing more tar and nicotine than Brand B.

The Chairman also points out that many filter brands cannot be smoked down to a butt length of 23 mm. Taking that fact into account, the Commission's

testing procedure provides that all such cigarettes shall be tested to a butt length of "the filter and overwrap plus 3 mm." In this respect the Commission adopted the proposal made not only by the health and medical organizations, but also by industry representatives. This testing procedure clearly affords a sensible and meaningful basis for comparing the maximum tar and nicotine yields as between brands of cigarettes; and it is neither accurate nor fair to suggest otherwise.

The fact of the matter is that there is nothing "misleading" in the testing procedure adopted by the Commission. The difference between the Chairman and the majority of the Commission is quite simple. He would test a cigarette for only part of its tar an nicotine content. We would test for all of it. By analogy, the Chairman would determine the alcohol content of a martini by testing the vermouth but not the gin. Query: who is "misleading" whom?*

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* Since the Chairman has seen fit to rehash the arguments considered and rejected by the Commission before adopting its testing procedure, it is appropriate to repeat the following excerpts from the Commission's release of August 1, 1967:

> "No test can precisely duplicate conditions of actual human smoking and, within fairly wide limits, no one method can be said to be either 'right' or 'wrong.' The Commission considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable. Although minor variations may not make one testing method 'better' than another, the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories.

[Footnote continued from previous page]

Use of more than one testing method would produce different results which would only serve to confuse or mislead the public.

"In determining the testing method, the Commission has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the 'average' smoker will draw from any particular cigarette.

"No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both, among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the tar and nicotine quantity in the smoke generated.

"Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen to another person talking, the number of puffs per cigarette, as well as the duration of each puff usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarettes down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

"The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not

[Footnote continued from previous page]

being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.

"Accordingly, the testing method should not be considered defective because it does not rely on 'averages.' There are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an 'average' smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly 'average' smoker."

FOR CONFIDENTIAL STAFF USE ONLY

December 22, 1970

Memorandum for General Counsel,
Director, Bureau of Consumer Protection,
Director of Public Information,
Legal and Public Records:

File 682 3093 – Cigarette Testing
In re: Proposed Methodology for Determination of Tar and Nicotine Content

---

Reference is made to memorandum of December 14, 1970 from the General Counsel reporting pursuant to the action of December 3, 1970.

The Commission took the following action:

In re: (1) Voluntary Plan by The Tobacco Industry for Disclosure of Tar and Nicotine Content in Cigarette Advertising;

(2) Trade Regulation Rule Proceeding Requiring Disclosure of Tar and Nicotine Content in Cigarette Advertising.

The Commission determined to suspend indefinitely the proceeding for a trade regulation rule covering disclosure of tar and nicotine content in cigarette advertising, which proceeding was authorized by action of August 4, 1970, and to afford the tobacco industry an opportunity to implement

the letter and the spirit of the amended plan which it has proposed.

In taking the above action, the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this subject at any time it deems such action to be necessary or desirable in the public interest.

The Commission approved the "Statement of The Commission" to the above effect, as amended at the table and noted on the marked copy; and directed that a notice of suspension of the Trade Regulation Rule be placed in the Federal Register, and that a news release incorporating the "Statement of the Commission" be issued.

For the public record, the five Commissioners voted in the affirmative as to the foregoing action.

By direction of the Commission.

The papers are transmitted to the General Counsel

/s/
Joseph W. Shea,
Secretary.

(B&W) PROTECTED BY MINNESOTA TOBACCO LITIGATION PROTECTIVE ORDER

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Honorable Warren G. Magnuson, APR 11 1966
Chairman,
Committee on Commerce,
United States Senate,
Washington, D.C. 20510

Re: File No. 662 3108

Dear Mr. Chairman:

This is in response to your request that you be informed as to the background and basis for the Commission's announcement of March 25 respecting disclosure of the tar and nicotine content of cigarettes.

The question of permitting, or even requiring, a disclosure of the tar and nicotine content of cigarettes has been a matter of deep and continuing concern to the Commission for the past several years. When it promulgated guides for the use of its staff in evaluating cigarette advertising in 1955, the Commission indicated that no claim should be made that:

> "2. Represents that any brand of cigarette or the smoke therefrom is low in nicotine or tars, or other substances, by virtue of its ingredients, method of manufacture, length, added filter, or for any other reason or without any assigned reason, than any other brand or brands of cigarettes when it has not been established scientific proof

> applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant.
>
> "NOTE: Words, including those relating to filtration, which imply lesser substances in the smoke, through filter comparisons or otherwise, are considered subject to this guide."

In 1960, in the light of evidence then available and the then state of both cigarette advertising and consumer understanding, the Commission informally requested the advertisers of cigarettes to avoid making references to tar and nicotine and the several companies uniformly agreed to do so.

These actions constituted, in effect, the informal advice and guidance to industry with respect to the regulatory posture which the Commission had reason to believe would be established as a basis for issuance of complaints, and subsequent proceedings under Section 5(b) of the Federal Trade Commission Act. They were based upon reports from the staff detailing the testimony which might be expected from the leading experts knowledgeable on the subject, as had been developed during the course of conversations and correspondence with those experts.

In 1964, however, the proceedings leading up to promulgation of the Trade Regulation Act for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking established a formal record, included evidence available to support the proposal and an expression of views by all interested parties

desiring to do so, summarized in a statement of the basis and purpose of the rule. There the Commission developed an evidentiary foundation to support a Rule requiring a positive statement in labeling and advertising, as opposed to advice that the Commission believed that evidence could be developed to support a complaint.

In 1960, then, the Commission was informing the industry that in its opinion the evidence then available would support a complaint against any marketer who made reference to tar or nicotine content, charging that such a reference was false and misleading. The Commission has maintained a continuous review of evidence pertinent to this question and of its attitude thus expressed publicly.

The Report of the Advisory Committee to the Surgeon General of the Public Health Service included the statement that "In general, the greater the number of cigarettes smoked daily, the higher the death rate. For men who smoke fewer than 10 cigarettes a day, according to the seven prospective studies, the death rate from all causes is about 40 percent higher than for non-smokers. For those who smoke from 10 to 19 cigarettes a day, it is about 70 percent higher than for non-smokers; for those who smoke 20 to 39 a day, 90 percent higher; and for those who smoke 40 or more, it is 120 percent higher." The report, however, made no direct findings with respect to the desirability of disclosing tar and nicotine.

In order to re-examine the evidence then apparently available to determine whether it would support the previously expressed opinion that tar and nicotine statements were deceptive and therefore in violation of the Federal Trade

Commission Act, when the Commission announced the initiation of a Trade Regulation Rule Proceeding governing the advertising and labeling of cigarettes, on January 18, 1964, one of the proposals was as follows:

> "Rule 3. No cigarette advertisement shall contain any statement as to the quantity of any cigarette-smoke ingredient (e.g., tars and nicotine) which has not been verified in accordance with a uniform and reliable testing procedure approved by the Federal Trade Commission.
>
> *"Comments on Rule 3.*
>
> "This Rule concerns a specific aspect of the problem dealt with in Rule 2. A quantitative disclosure of cigarette-smoke ingredients is a claim concerning the health consequences of smoking the advertised brand. It is essential, therefore, that such disclosure be meaningful to the consuming public, and not a source of confusion. Confusion can be obviated, and the ability of consumers to make an intelligent choice among competing brands protected, only if the measurement of cigarette-smoke ingredients accords with a uniform, reliable and approved testing procedure. (The Commission is considering approval under this Rule of the so-called 'Cambridge Filter Method', presented at the 77th Annual Meeting of the Association at the 77th Annual Meeting of the Association of Official Agricultural Chemists, October 16, 1963, at Washington, D.C.)"

The record of that proceeding contains the views then expressed of numerous authorities. While there was substantial support for the proposition that an accurate statement of tar and nicotine content would be in the public interest, the Commission concluded that a Trade Regulation Rule on the subject would be inappropriate at that time. The affected industry offered no substantial comment, as an interested party, to any of the proposed rules in response to the opportunity thus provided. It is believed that the views expressed during the proceeding represented those of interested parties concerned with the question, with the exception of the cigarette industry itself which, as indicted, appears to have elected to withhold substantive comment.

At the conclusion of the Trade Regulation Rule proceeding it was the opinion of the Commission that the evidence thus developed was not adequate to provide a basis for a Rule on the subject of tar and nicotine disclosures.

Since enactment of the Federal Cigarette Labeling and Advertising Act, and especially since January 1, 1966, when it became effective, the Commission has continued to study advertising and labeling of cigarettes and available evidence pertinent thereto. Such intensified attention is deemed warranted by the conclusion of the Advisory committee that "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action," by the apparent intent of the Congress that, as stated by Chairman Harris, "we did not intend in any way to restrict the Federal Trade Commission in carrying out its duties and responsibilities under the Federal

Trade Commission Act." (except as to a requirement for a health statement), and by direction of the Statute that the Commission "transmit a report to the Congress not later than eighteen months after the effective date of this Act, and Annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

In this connection the Commission is particularly mindful of the injunction that it be especially watchful for violations of the FTC Act growing out of "any advertising which tends to negate the warning which must be placed on the package in accordance with" the Labeling Act. (Sen. Rep. p. 6; see also H.R. Rep. p. 5)

The Commission is now, with the required statement appearing on the package at this time, of the opinion that the evidence presently available would not support a charge that a truthful statement of the tar and nicotine content of cigarettes would *per se* tend to negate that warning or be otherwise violative of the Federal Trade Commission Act. This opinion is based upon recent conversations with experts whose testimony would be necessary to support such a charge.

On March 17, 1966, three Commissioners including myself, attended a meeting with members of the National Interagency Council on Smoking and Health. If the Commission were to issue a complaint today charging that a reference to tar and nicotine is false and misleading, such a charge would require the support in the form of expert testimony from

precisely such agencies and organizations as are represented on that Council, and I cite the following:

American Association for Health, Physical
Education & Recreation
American Association of School Administrators
American Cancer Society, Inc.
American College Health Association
American Dental Association
American Heart Association
American Pharmaceutical Association
American Public Health Association
American School Health Association
Association of State and Territorial
Health Officers
Department of Classroom Teachers of the NEA
National Congress of Parents and Teachers
National Tuberculosis Association
U.S. Children's Bureau
U.S. Office of Education
U.S. Public Health Service

In this instance, as in some others, we, as Commissioners impressed with the importance of the question presented, did not rely solely upon staff reports but had personal discussions with persons we deem authoritative. The Commission attaches great weight to the information secured at the meeting, largely in response to questioning by the Commissioners. Some of the agencies and organizations represented have since confirmed their views in writing. Excerpts from such letters are recited hereinafter so that your Committee may have

a direct and specific understanding of the nature of the current evidence referred to throughout this report.

From the National Interagency Council on Smoking and Health:

> "The following is a verbatim excerpt from the minutes of the Board of Directors of the National Interagency Council on Smoking and Health, held in Washington on January 13, 1966:
>
> *'Objectives for 1966-67*
> Dr. Diehl suggested several additional program objectives for 1966-67. The objectives were discussed and adopted by the Board as follows:
>
> xxx
>
> 3. Add tar and nicotine content to the label on cigarette packages.
>
> The National Interagency Council on Smoking and Health hopes that you will take the steps necessary to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages."

On March 21, 1966, the American Cancer Society, Inc., by its Senior Vice President for Research and Medical Affairs and Deputy Executive Vice President, expressed its views as follows:

"I am writing to express the conviction of the American Cancer Society that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes.

"All studies of cigarette smoking show that its harmful effects are related to the number of cigarettes smoked, to the length of time that one has smoked and to the degree of inhalation; in other words, to dosage. There is clear evidence also that the tars in cigarette smoke contain chemicals which produce cancer when applied to the skin of animals and to the bronchial mucosa of dogs, and it has long been recognized that nicotine is one of the most powerful poisons known.

"We are convinced, therefore, that it would be in the public interest to let people know how much tar and nicotine they are taking into their bodies when they smoke cigarettes. The customer is given this information concerning the drugs which he takes, the food which he eats, the beverages which he drinks. Why not concerning the cigarette smoke he inhales? Certainly, there is no reason to think that it would be against the public interest to provide this information.

"President Kennedy in a special message to the House of Representatives in 1962 concerning Strengthening Programs for Protection of Consumer Interests, emphasized that among the basic rights of the consumer are:

"1. The right to safety – to be protected against the marketing of goods which are hazardous to health and life;

"2. The right to be informed – to be protected against fraudulent, deceitful or grossly misleading advertising, labeling or other practices and to be given the facts he needs to make an informed decision.

"The American Cancer Society believes that the public has the right to the same protection against the health hazards of cigarette smoking as against the potential hazards in our foods and drugs. And, obviously, the consumer must have information as to the tar and nicotine content of cigarettes in order to make an intelligent decision as to which brands to smoke.

"The American Cancer Society, therefore, respectfully requests the Federal Trade Commission to remove its restrictions relative to providing information concerning the tar and nicotine content of cigarette smoke on cigarette packages and in cigarette advertising; or better still to *require* that this information be provided."

From W.T. Robbins, M.D., as representative for the American College Health Association on the National Interagency Council on Smoking and Health we received a letter on March 23, 1966, in which he stated the he would "... urge that your office take all possible steps toward negation of the ... agreement to withhold printing of tar and nicotine content on cigarette packages."

From George E. Moore, M.D., Ph. D., Director of Roswell Park Memorial Institute (New York State cancer research hospital), in a letter of March 24, 1966:

> "The basic issue considered here is: Should the public be provided with continuing, updated information on the tar and nicotine content of cigarettes?
>
> "There are commanding reasons why the public is entitled to—and should be given—this information. These are:
>
> (1) there is incontestable evidence (both from laboratory experiments and from human experience) that the tars which are condensed from cigarette smoke constitute one of the principal public health hazards of our era.
>
> (2) Government policies should therefore aim at reducing exposure of the population to cigarette tars. All effective measures to achieve this end should be vigorously implemented.

(3) It would be desirable to eliminate further exposure entirely by having smokers withdraw from the habit and by protecting youngsters from acquiring the habit. Progress along these lines is bound to be slow. Consequently it is important to develop effective interim measures to reduce exposure to cigarette tar.

(4) Whatever means, legislative or otherwise, are employed to promote a reduction in tar levels, the process will necessarily be a rather gradual, evolutionary one. To drive such a process, two things are necessary. The manufacturers need a strong incentive to produce cigarettes with low levels of tar and nicotine. Second, the public needs to be informed concerning tar and nicotine levels and encourage to use products with reduced levels.

"Three principal objections have been raised to any publicity concerning tar and nicotine content of cigarettes. The first is the possibility that the manufacturers will publish misleading figures in order to secure competitive advantage. This has happened, for instance, with a brand of cigarettes which was introduced at about the time of the Surgeon General's report. The tar contents reported on the label substantially underestimated the tar content as measured using more conventional assay methods. There may also be times when minor fractional

differences might be exploited as 'major improvements'. To meet these objections we would recommend that the products be tested by a central laboratory which would be responsible for the chemical, biological, and statistical accuracy of the reports.

"Second objection that has been often raised is that the advertising of reduction in tar content would create the false impression that the health hazard had been eliminated when the tar content was merely reduced. This objection has less force now that there is a warning of hazard on the package. The warning would continue to appear even though there had been some reduction in tar content. This would help to avoid any erroneous impression that the hazard had been eliminated.

"The third objection is somewhat more technical. It is conceivable that a reduction in tar content would be primarily a reduction in a fraction of the tar that was relatively unimportant as a health hazard. This objection can not be entirely eliminated at this time. However, all cigarette tars thus far which have been adequately tested and reported are carcinogenic in the laboratory. It is therefore a reasonable and prudent procedure to use the amount of crude tar as an index of hazard. If subsequent scientific findings makes it possible to improve this index, then a charge can be made at that time.

> It is neither good policy nor good science to delay any reporting program until an ideal index comes along.
>
> "When possible disadvantages of informing the public of the current amounts of tar and nicotine are weighed against the advantages of such a policy, it is clearly in the public interest to provide this information. *For this reason we strongly urge* that the FTC exert every effort to favor such a policy."

The Commission determined that if any marketer of cigarettes were to make factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette, . . . "so long as (1) no collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar an nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method, . . ." the Commission could not "have reason to believe that any such (marketer) has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and . . . that a proceeding by it in respect thereof would be in the interest of the public . . ." (FTC Act Sec. 5(b)) so as to justify issuance of a complaint.

In other words, the Commission is of the opinion that testimony and other pertinent evidence available today, with the caution presently

appearing on the packages, would not support the contention that a truthful disclosure of tars and nicotine present in the mainstream smoke of cigarettes, is *per se* false and misleading.

Having reached this conclusion, it appeared that in fairness to the marketers of cigarettes they should be informed of the change in the state of the evidence available and the effect thereof on its regulatory position in enforcement of the Federal Trade Commission Act.

The question of disclosing tar and nicotine content was discussed on March 9, 1966 by four of the Commissioners with Robert B. Meyner, Administrator, Cigarette Advertising Code, Inc., and members of his staff.

It is hoped that the foregoing will make clear that in determining whether the Commission should recede from its regulatory posture the interested parties are in fact those whose testimony must be relied upon to support that position in an adversary proceeding against a cigarette company.

I trust the foregoing will indicate the basis for the recent announcement by the Commission. I trust, too, that you will understand that the Commission is continuing to exercise its best efforts to obey the mandates of the Congress in affording protection from unfair and deceptive practices to the consumer, and prompting fair and free competition, within its statutory authority.

In the event you have additional questions I, of course, stand ready to discuss these matters further and shall be pleased to appear at any time which suits your convenience.

By direction of the Commission.

Paul Rand Dixon,
Chairman.

OPTIONAL FORM NO. 10
5010-104

UNITED STATES GOVERNMENT

MEMORANDUM

TO : The Commission Date: September 18, 1967

FROM : Philip Elman

SUBJECT: Collateral Representations Concerning the Tar and Nicotine Content of Cigarette Smoke
File No. 682 3042

In its March 1966 statement of enforcement policy, the Commission stated that it would not attack factually accurate statements of tar and nicotine content, but that any collateral representations regarding reduction or elimination of health hazards are prohibited. I agree with the staff that this presents a serious problem. It should be the Commission's policy not only to permit but to encourage tobacco companies to manufacture and promote cigarettes which are low, or lower, in tar and nicotine. In relation to a manufacturer like Stephano Brothers, for example, which has come out with a new 70 mm. cigarette which is very low in tar and nicotine, the prohibition on collateral representations appears to work an unjustifiable detriment.

I do not agree, however, that the solution of this problem is for the Commission to hold a broad public hearing to consider "all presently available scientific knowledge relative to the hazard to health of variations in the amount and composition of tar, nicotine or other components of cigarette smoke". It

would be a mistake, in my view, for the Commission to open up and attempt to resolve the fundamental scientific questions which have already been fully canvassed by the Surgeon General, at Congressional hearings, etc. At the present stage, at least, the Commission should stay out of the scientific area entirely, except of course for the testing of tar and nicotine content now being performed by our laboratory. The question is not whether reduction of tar and nicotine also reduces the health hazard. The Commission should operate on the premise that it does. The Surgeon General has found, and so reported to Congress, that all available scientific evidence today supports that conclusion. The Commission is therefore entitled to accept that premise as governing its actions in this area.

The real question—and it is a very hard one—is: What kinds of collateral representations or claims should the Commission publicly announce that it will not challenge? Suppose, for example, a cigarette advertisement simply quotes the statement made by the Surgeon General that the lower the tar and nicotine content of cigarette smoke, the less harmful are the effects. If the cigarette were in fact the lowest, or one of the lowest, in the FTC tests, I would have no problem. But suppose the Surgeon General's statement were quoted, without embellishment, in an advertisement for, Pall Malls or Marlboro or some other cigarette which, while not the highest in tar and nicotine of those tested, was not among the lowest either. Would this be a claim that the cigarette is "low" in tar and nicotine? If so, how low does it have to be for the claim to be truthful?

Or suppose that an advertisement bluntly claims that the cigarette is "low" or "lower" in tar. Should we say that only the lowest in our tests can make such a claim? Or the three lowest? Or those testing under 10 mg? Where do we draw the line?

Before we rush out with a notice of a public hearing, I think the staff should do some hard thinking on this subject and give us the benefit of their views. My own inclination is to wait a few months and see what happens after our test results are published. My guess is that the cigarettes which score well in our tests will have no difficulty informing the public of that fact. The test results themselves, if adequately publicized (and I think they will be), should be far more helpful to manufacturers like Stephano Brothers than any collateral claims or representations. The test scores will speak for themselves, and hopefully will encourage the public to turn to cigarettes which have tested low in tar and nicotine. (In regard to publication of our test results, I think the staff should begin exploring now whether other agencies, both governmental and private, will help disseminate lists of the FTC's test results.)

In sum, my recommendation is that this matter be returned to the staff for further study and report to the Commission in the light of the developments which may be expected to be forthcoming in this area in the next few months.

FRANK R.
LAUTENBERG
NEW JERSEY

APPROPRIATIONS
BUDGET
ENVIRONMENT AND
PUBLIC WORKS
SMALL BUSINESS

HELSINKI COMMISSION

UNITED STATES SENATE
WASHINGTON, DC 20510-3002

November 24, 1998

Honorable Robert Pitofsky
Chairman
Federal Trade Commission
6th and Pennsylvania Ave., NW
Washington, D.C. 20580

Dear Chairman Pitofsky:

I am writing to urge you to begin a proceeding to suspend the right of tobacco companies to market any cigarettes as "Light" or "Ultra Light" or list supposed nicotine and "tar" ratings on their products and advertisements until and unless an accurate system of measuring the health implications of cigarettes is established. I have obtained, and enclose, newly compiled tobacco industry documents which provide strong evidence that the tobacco industry knows that the nicotine and tar ratings used to determine what constitutes "Light" cigarettes are false and misleading to consumers.

These documents show that while the tobacco industry is marketing cigarettes to consumers as "Light," "Ultra Light" or "Low Tar," its own analysis

of these products reveal very different tar and nicotine levels than it advertises pursuant to the so-called "FTC Method." In fact, one document states that smokers are "more likely to be misled than informed" by the reported nicotine and "tar" levels for cigarette brands.

From these internal documents and other independent scientific studies, it appears that the "FTC Method" of measuring tar and nicotine in cigarettes is fundamentally flawed and is being used in a way that gives consumers false comfort that they are smoking a "healthier" cigarette. The companies should be strictly prohibited from making any marketing claim that even insinuates that smoking a certain brand of cigarettes is healthier than another without solid scientific proof.

I know that your agency does not relish the difficult health-related task of measuring these levels in cigarettes, and, in fact, would rather have the task transferred to another government agency. As you acknowledged in your March 3rd testimony before the Commerce Committee here in the Senate: "[M]easuring tar, nicotine, and other smoke constituent yields involves complex scientific and methodical questions. Accordingly, the Commission supports proposals that would transfer responsibility for determining such smoke constituent yields to [the Department of Health and Human Services.]"

I strongly agree with you that this responsibility should rest with the Department of Health and Human Services (HHS), specifically the Food and Drug Administration (FDA) within HHS. However, due to the continued influence of the tobacco industry in Congress, my colleagues and I were unable to pass comprehensive tobacco

legislation this year that would have explicitly transferred this health-related task from the FTC to the FDA.

Thank you for your attention to this critical health and consumer safety issue. Please contact me or my office if you have any questions about the enclosed documents.

Sincerely,

/s/

Enclosures

cc: Honorable Orson Swindle, Federal Trade Commissioner
Honorable Mozelle W. Thompson, Federal Trade Commissioner
Honorable Sheila F. Anthony, Federal Trade Commissioner
Honorable Al Gore, Vice President of the United States
Mr. Bruce Reed, Domestic Policy Advisor to the President
Honorable Jane Henney, Commissioner of the Food and Drug Administration

FEDERAL TRADE COMMISSION
Washington 25

BUREAU OF CONSULTATION

DEC 17, 1959

Mr. John Vance Hewitt
Conboy, Hewitt, O'Brien & Boardman,
39 Broadway
New York 6, N.Y.

Re: Tar and Nicotine Claims

Dear Mr. Hewitt:

To confirm my telephone call of December 15, we wish to advise that all representations of low or reduced tar or nicotine, whether by filtration or otherwise, will be construe as health claims. No hedging statements, such as taste or sales volume qualifications, will be considered as changing the character of reduction claims. Our purpose is to eliminate from cigarette advertising representations which in any way imply health benefit.

This advice is being disseminated on an industry-wide basis and prompt, simultaneous compliance is urgently requested. Any advertising which is not promptly brought into conformance with this request will be forwarded to other Bureaus looking forward to mandatory procedures. As always, the services of this Bureau are available to cigarette advertisers to confer on proposed advertising.

Please advise this office at the earliest possible time of your client's willingness to make necessary changes in the present advertising of any kind and all of its brands to comply with this request.

Very truly yours
/s/
William H. Brain,
Attorney.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, -vs- PHILIP MORRIS, INC., et al., Defendants.	Civil Action No. 99-CV- 02496(GK)

VOLUME I

Tuesday, July 30, 2002

9:09a.m.

30(b)(6) videotaped deposition of C. LEE PEELER, held at law offices of Collier, Shannon, Scott, 3050 K Street, N.W., Suite 400, Washington, D.C., before Judith L. Leitz, a Registered Professional Court Reporter and Notary Public of the District of Columbia.

* * *

Deposition Excerpts of C.L. Peeler

Pages 12-13

* * *

EXAMINATION BY COUNSEL FOR THE DEFENDANTS PHILIP MORRIS, INCORPORATED

BY MR. WAGNER:

Q. Good morning, Mr. Peeler.

A. Good morning.

Q. What is your current title?

A. I'm the deputy director of the Bureau of Consumer Protection of the FTC.

Q. Do you have a role with the — are you the director of advertising practices?

A. I was the director of the division of advertising practices until August of last year, 2001, at which point I assumed my current responsibilities.

Q. Okay. As deputy director of the Bureau of Consumer Protection can you give me a brief description of your job responsibilities?

A. Sure, I assist the — the Bureau of Consumer Protection is one of the three main operating units of the Federal Trade Commission. It is comprised of enforcement divisions and the bureau supervises and formulates policy for those enforcement divisions. I work for the bureau director who is Howard Beales and I assist him in his day-to-day responsibilities and supervising the work of the bureau.

Q. So you have a role with emulating and supervising policy of the FTC, correct?

A. Yes.

Q. Okay. Prior to – when you were the director of advertising practices, when did you assume that position?

A. October of 1985.

Q. And can you briefly describe your role as director of the Division of Advertising Practices?

A. yes, the Division of Advertising Practices is a – one of the operating units of the Bureau of Consumer Protection. It specializes in national advertising issues and as the associate director for the Division of Advertising Practices it was my job to again supervise and manage the work of the division.

* * *

Pages 17-18

understand it and then give an answer.

And you also need to give your

answers orally so that the court reporter

can be taking them down, is that okay?

A. Fine.

Q. One other rule, any time you want a break, say it, we'll take a break.

A. Okay.

Q. I want to make sure that you're comfortable in the deposition.

You are an attorney, right?

A. Yes.

Q. Okay. When did you graduate from law school?

A. 1973.

Q. From?

A. Georgetown.

Q. Are you licensed to practice?

A. Yes, in the District.

Q. Okay. I'm going to mark as Peeler 1 the notice of deposition for today and have you take a look at that, okay?

(Peeler Deposition Exhibit No. 1 was marked for identification.)

MR. SINGER: Just as a clarification, Jeff, and this is a minor one, we received — actually, Lee is here pursuant to Rule 45 under the Rules of Civil Procedure as a 30(b)(6) designee and is not here just under Rule 30 since the FTC has not required it since I don't think the subpoena is attached to this.

MR. WAGNER: Fair enough.

MR. SINGER: Not a big deal but just to clarify the record.

Thank you.

I want you to know we did receive a subpoena, though.

A. Okay. I've looked at this in general.

BY MR. WAGNER:

Q. Have you seen this before today?

A. Yes.

Q. And you understand that you have been designated to testify on behalf of the Federal Trade Commission, correct?

A. Yes.

Q. Okay. And there are a number of topics that are listed on Attachment A to Peeler Exhibit 1, right?

* * *

Pages 33-34

BY MR. WAGNER:

Q. Okay. Nothing lept out and said, "My god, how could he say that, that's definitely wrong"?

A. Well, the only thing I definitely remember is there was some question about FTC reg — an FTC rule making proceeding on tar and nicotine and as you know there's never been an FTC rule making proceeding on tar and nicotine. So I was — I was struck by that. You know, the — in the—in Howard's deposition Howard was, you know, basically, a witness for the other side and so there was a lot that we disagreed with in terms of his study.

Q. When you say there's never been a rule making proceeding on tar and nicotine, did you mean to say that there's never been a trade regulation rule that's actually been passed with respect to tar and nicotine or there's never been a proceeding at all?

A. Well, while I was at the FTC there hasn't been a trade — there hasn't been a rate — a rule making proceeding. We've had proceedings to review the FTC testing methodology, but that's not a rule.

Q. Right.

A. You're correct, though, that in the 1970s there was — or 1960s there was at one point either a proposal for a trade regulation rule or a proposed trade regulation rule.

Q. Right. And there have been noticing comment periods that have been initiated with respect to tar and nicotine at various times, correct?

A. Correct. But not rule making.

Q. But not the formal rules, right, okay.

Now, in order to prepare for the deposition you're also able to draw on your own personal experience at the FTC, right?

A. Yes.

Q. And in particular the 16 years that you've been working within the Bureau of Consumer Protection, right?

A. Yes.

Q. Okay. And when you have been working with the Bureau of Consumer Protection you've also interacted with the

* * *

Page 41

go through these —

A. Sure.

Q. — in detail later.

You did play a role with respect to the FTC's participation in the 1994 National Cancer Institute Conference on the FTC test method, right?

A. Yes, I did.

Q. And you even presented at that conference, right?

A. Yes.

Q. And then you prepared a final paper that was published as part of NCI Monograph 7, correct?

A. Yes.

Q. Okay. Did you play a role with respect to the 1994 FTC investigation of Carlton cigarettes marketed by American Brands, this is the — these are the ads that claim 10 to 1?

A. I supervised that investigation.

Q. You supervised that one, okay.

Did you play a role with respect to the FTC's 1997 investigation of a company called Phase Out America, Inc.?

* * *

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challenge is a fairly complex issue that extends, you know, from the, you know, lowest level of the agencies to the—you know, the people that answer the phones and take consumer —

BY MR. WAGNER:

Q. Okay.

A. — complaints all the way up through the Commission.

A. I understand.

Well, then — then let's try and talk about how the FTC can regulate an industry, the options that are available to it and how the FTC goes about that, okay.

The FTC when it seeks to regulate an industry is looking for all of the actors in the industry to comply with the FTC's policies, right?

MR. SINGER: Objection.

You may answer.

A. You know, you're using a lot of words —

BY MR. WAGNER:

Q. Uh-huh.

A. — in the — in the question that have a lot of different meanings.

Q. Okay.

A. I think the first thing is the FTC doesn't look at itself as a regulatory agency.

Q. Okay.

A. The FTC looks at itself as a law enforcement agency.

Q. All right.

A. It has the authority to take action, to stop unfair or deceptive acts or practices. In some areas the FTC has done that through rule making and some of those rules are industry rules and I think that would be as close as you could get to the concept of the FTC regulating an industry.

But the—the FTC's authority is simply to prohibit unfair and deceptive acts or practices and it doesn't, you know, consider itself to be a regulatory agency in the way the Federal Communications Commission or—or another agency would that has sort of general oversight responsibility over, you know, specific industries.

Q. Well, the FTC can initiate trade regulation rule making proceedings, right?

A. Yes.

Q. And that's one method of regulating conduct, right?

A. It's a method of — well, and—and you know, that—that was the — a big issue in the '70s.

Q. Right.

A. And the overall case law on that says what the FTC can do with its regulatory authority is specify, or I think something with specificity, unfair or deceptive acts or practices. What the FTC can't do and what those case laws say is they can't, you know, take a rule and decide here's the way we want this industry to operate.

What the FTC's doing is saying we're specifying acts or practices in your industry that would be unfair or deceptive and then it has some flexibility to include requirements in a rule making that would be designed to prevent those acts or practices from occurring. Just as it does if it brings a case, it says X or Y is an unfair and deceptive act or practice under the Federal Trade Commission Act and then it has some authority to fence—in that conduct.

Q. Fencing in provisions is something that you mentioned in Peeler Exhibit 2, right?

A. Yes.

Q. Okay. And — and what you're talking about with the trade regulation rule or bringing the cases or the fencing in remedies is telling an industry that certain conduct in the FTC's opinion would violate Section of the act, right?

A. Well, again, I think you're confusing a lot of different things.

Q. Okay.

A. Your question confuses a lot of different things. There are ways where the FTC says, in our opinion, this type of conduct would violate or not violate Section 5 of the FTC act. You know, there are advisory opinions by the Commission, there are advisory opinions by the staff and guidance documents. A rule making under the FTC Act, you know, at least since, I think, 1977 or '75, whenever the Magnuson-Moss rule making provision —

THE REPORTER: I'm sorry, rule making what?

THE WITNESS: Magnuson-Moss.

MR. WAGNER: Magnuson hyphen Moss.

THE WITNESS: Their name is

M-A-G-N-U-S-O-N — M-O-S-S.

A. — rule making provisions were enacted is a — you know, basically a determination by the Commission based on an evidentiary record that certain facts or practices by an industry would be unfair.

BY MR. WAGNER:

Q. And what is the FTC's goal when it is bringing an enforcement action with respect to a particular act or practice that it has deemed unfair?

A. The FTC's goal is always to protect consumers.

Q. Okay, I asked the question unclearly, I apologize.

Is it fair when — I mean, you — you mentioned things like advisory opinions and guides and other indications that the FTC can issue to inform industry actors about FTC policies, right?

A. Yes.

Q. Okay. And is it fair to say that one of the FTC's goals in issuing those types of pronouncements are to have the industry conform their conduct so that they do not violate Section in the FTC's view so that they comply with the — the FTC's statement of what would be and would not be proper conduct?

MR. SINGER: Objection to form.

You may answer.

A. The goal of putting out guidance is to encourage — and I think there's a statement in the FTC's rule — I know there's a statement in the FTC rules and practices setting out what the goal is, but what the goal is to encourage voluntary compliance by industry members with those statements.

BY MR. WAGNER:

Q. Okay. And in addition to trade regulation rule making proceedings, the FTC can and has promulgated advertising guides for various industries, right?

A. Trade regulations are different because trade regulation rules are enforceable.

Q. Understood.

A. Okay.

Q. But the FTC has promulgated advertising guides, right?

A. The FTC has guides on different advertising issues.

Q. One of them, for example, are the cigarette advertising guides, right?

A. Well, that's an interesting issue.

Q. Okay.

A. I assume — I assume we're talking about the 55 guides—

Q. Yes.

A. — right?

Q. Yes, sir.

A. Okay. You know, as far as I know I could not find any official revocation of those guides. They have never been in the CFR while I've been at the FTC.

Q. Right.

A. And the only place that I know they even exist is in CCH's trade regulation reporter. In the tobacco area, you know, the—the standards we have applied while I've been at the FTC have been the general standards of whether the practices are unfair or deceptive or violate any specific statute involving the FTC Act.

Now, many of the principles in those guides appear consistent with that, although, you know, as time changes and evidence changes and things like that, you know, you have to look at all of that in terms of whether a practice would be unfair or deceptive. So, you know, it's hard — it's hard to characterize those guides as something that the staff today or the staff since I've been at the FTC looks at for guidance. In fact, I think that they were sort of unusual guides, weren't they, staff guides?

Q. Well, the FTC published them, didn't they?

A. I —

MR. SINGER: Objection to form.

A. You know, I don't know. I assume they did.

BY MR. WAGNER:

Q. Okay.

A. But, again, while I've been at the FTC they've never been in the CFR —

Q. Okay.

A. — or, you know, available to the staff through anything other than the CCH which is an outside —

Q. Sure.

A. — reporting function.

Q. Has the FTC promulgated advertising guides for other industries?

A. Yes.

Q. Okay.

A. Well, for other industries — I'm not sure they promulgated guides for the industry, we have advertising guides that are general, like, guides on testimonials, guides on the use of the word "free."

Q. Okay.

A. And guides like that.

Q. And the purpose of those guides is to inform people that if they engage in that activity here is the kind of conduct that the FTC believes appropriate versus inappropriate, right?

A. The FTC is — again, while I have been there — has always seen its role as telling people what's not appropriate.

Q. Okay.

A. As opposed to telling people what is appropriate.

Q. Fine. So with the advertising guides, then, the FTC can be signalling all people who want to engage in that activity as to what would be inappropriate conduct?

A. Well, what the guides say is that if you follow these approaches you're unlikely to be challenged by the Federal Trade Commission.

Q. Okay. The FTC also has from time to time negotiated voluntary agreements with industries, correct?

A. Yes.

Q. Okay. And the FTC also has initiated and conducted investigations into conduct that it believes violated the FTC Act, right?

A. Conduct it believes may violate the FTC Act.

Q. May violate the act, okay.

The FTC also has announced certain policies via press release; isn't that right?

MR. SINGER: Objection to form.

You may answer.

A. Well, you know, I guess these last couple of questions, you know, are — we get to the — to the time issue. Certainly in the materials that have been, you know, discussed during this series of depositions there are examples of the FTC announcing policies via press release.

BY MR. WAGNER:

Q. Okay.

A. You know, it's not a practice that has any current adherence that I know about.

Q. But historically the FTC has done so?

A. In the past in this area the FTC appears to have done that.

Q. And the FTC also has announced various policies via letter, right?

A. What kind of letters?

Q. Letters to tobacco companies, for example?

A. You know, I'm not — I'm not aware of specific instances of that. I would — you know, it may — it may well be, but—

Q. Okay. The FTC has announced its policies via Federal Register Notices, right?

A. Yes.

Q. Okay. And when the FTC — go ahead.

MR. SINGER: Thank you.

MR. WAGNER: Okay.

BY MR. WAGNER:

A. When the FTC wants to inform industry actors regarding what would constitute inappropriate conduct, does the FTC have to use any of the particular vehicles that we've just discussed or can it choose from among them and decide which one it believes is most appropriate under the circumstances?

MR. KLONTZ: Objection.

A. And, again, with the — with the two caveats that we talked about before which is — you know, there is — there are decisions made throughout the organization —

BY MR. WAGNER:

Q. Sure.

A. — some at the staff level, some at the office level, some at the FTC level and also the — you know, I'm not aware—I can't remember instances of the Commission itself announcing policies by letters as opposed to maybe staff writing letters. The FTC gets to — has the ability to choose the types of approaches that it thinks will work best in particular circumstances to—if it's trying to take action to stop unfair or deceptive acts or practices —

Q. Okay.

A. — under the FTC Act.

Q. Does the FTC have an institutional preference for any specific type of regulatory option over another?

MR. SINGER: Objection to form.

You may answer.

A. The Commission's approach on philosophy to those types of tools varies and varies from commission to commission and varies based on what the learning is from past efforts, so it's almost a constant effort on the part of the staff and part of the bureaus and part of the commissioners to decide what's the best, you know, combination, what's the best approaches and, you know, some things—

BY MR. WAGNER:

Q. Okay.

A. — work sometimes and sometimes they don't.

Q. Sometimes they don't.

One of the things that you mentioned in Peeler Exhibit 2 are self-regulatory initiatives, right?

A. Right.

Q. All right. Is it true that the FTC has found that particularly with respect to cigarettes, now, that formal rule making takes a long time and they can often be more efficient to bring a single action against the first offender in order to stop the practice so that rule making becomes unnecessary?

MR. SINGER: Object to the form.

You may answer, if you can.

A. I'm — I'm not aware of that issue being done for tobacco specifically, although, you know, that's clearly one of the issues that the FTC and the staff and the bureaus look at.

BY MR. WAGNER:

Q. I'm going to mark as Peeler 3 an excerpt from some testimony.

MR. WAGNER: This is for you, John.

MR. SINGER: Thank you.

(Peeler Deposition Exhibit No. 3 was marked for identification.)

BY MR. WAGNER:

Q. This was a hearing — an excerpt from a hearing held before the "Subcommittee on Transportation, Tourism, and Hazardous Materials

of the Committee on Energy and Commerce of the United States House" on May 17th, 1987.

A. Okay.

Q. Daniel Oliver was testifying, the chairman of the Federal Trade Commission at the time. And I'll direct your attention in particular to Pages 17 through 19.

A. All right.

Q. If you look at the very bottom of Page 17 you'll see Mr. Oliver testifying regarding rule making.

A. I apologize for taking so long. I have to figure out what the —

Q. No, that's okay, take your time.

A. —context—what proposal —

Q. Sure.

A. —what staff proposal he's talking about.

Q. Sure.

A. Okay. I'm not sure what the question is at this point, but —

Q. Well, let me ask the question then.

A. Should I just expound on this?

Q. No. Let's—let's get a question.

He'll get upset.

MR. SINGER: Just perform, if nothing else.

MR. WAGNER: He'll get upset, everybody will yell "objection" and then we'll be in the soup, so let's not do it that way.

BY MR. WAGNER:

Q. Now, Chairman Oliver testifies that it's, in the FTC's view, more efficient to bring a single case against the first offender in order to stop practices that violate the FTC Act rather than proceed to rule making, right?

A. That's what this testimony says that Chairman Oliver's opinion was.

Q. Actually, he's there testifying for the FTC, right, in this hearing?

A. I think he—I'm not sure if he was. And I'd have to look at the testimony. I know at one of these hearings the chairman was testifying on his own behalf for—for Mr. Lukens and, so, I'd have to look at what the front page of the testimony says. The—and—and I didn't see it in here.

The other thing, though, is that—and it's standard Commission practice that an official who testifies before the committee presents the testimony of the Commission in the form of, you know, "I'd like to offer this testimony for the record" and, then, normally says what is, you know in fact, true, which is his oral remarks, and answers to questions represent his own views and don't necessarily—if it's the commissioner, don't necessarily represent the views of the other commissioners or if it's Lee Peeler doesn't represent the views of the chairman or any of the commissioners or any of the bureaus. So—and I think even this particular statement is qualified as, you know, I think, therefore, it is more efficient.

Now, having said all of that, you know, the—one of the things the Commission class that we look at is, you know, what's the right mix of enforcement remedies. Is it rule making, is it cases, is it guidance, is it industry self-regulatory programs, the

Commission struggles with that all the time and there have been very different approaches while I've been at the commission.

In the '70s it was all rule making. A lot of those rules didn't work very well. There was a movement back to cases and I think now there's sort of a mix of rule making and case work.

A. And the Commission can choose

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would surprise me if they did because it would depend—

Q. Okay.

A. — on a wide variety of factors.

Q. What Chairman Oliver has testified, to your knowledge, has the FTC ever notified Congress that that testimony is wrong?

MR. KLONTZ: Objection.

MR. SINGER: Objection to form.

You may answer.

A. Two things, I'm not aware of the Commission notifying the Congress that that testimony is wrong and I would think that this testimony is Chairman Oliver's views and that those are his views. You're asking me what the position of the Commission—

BY MR. WAGNER:

Q. Correct.

A. — is. And the position of the Commission and the position of any individual commissioner or chair—even chairman are not always the same.

Q. Are — are you aware of any time when the FTC took a position that Chairman Oliver's testimony in Peeler 3 is incorrect?

* * *

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A. Yes.

Q. Okay. That's the only point I'm – I'm getting at with these questions.

A. Okay.

Q. Okay. But now —

A. The point I was trying to make is that the, you know, operation of the cigarette lab was really something that was unique and, you know, was designed to prevent a certain type of deception, but, you know, as we said when we closed the lab it was unusual for a program like that to be maintained by the Commission.

Q. Right. We're going to talk about that specifically. There are other industries that run testing and it was unusual for the Commission itself to be running the testing for the cigarette industry, right?

A. It is both unusual for the Commission to be running the testing and to be the agency that specified the testing methodology because –

Q. Okay.

A. — I can't recall any other

* * *

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characterizes the guides as industry-wide regulation.

Q. Okay. And in your comments to the NCI Conference if you go back to Peeler, I think it's 4, at Page 11, you discuss the advertising guides, right?

A. Peeler 4, Page 11?

Q. Yes. The last paragraph of the page.

A. Yes.

Q. Okay. And there you say that the — it's the Commission that published the cigarette advertising guidelines, right?

A. Yes.

Q. Okay. And you also said that "these guides prohibited claims that a particular brand of cigarettes was low in tar and nicotine, or lower in other brands, when that claim was not supported by competent scientific proof that the claim is true, and that such differences were significant."

Do you see that?

A. Yes.

Q. Okay. So your view as you represented it to the NCI Conference in 1994 was that the advertising guides prohibited certain types of claims, right?

A. Yep, prohibiting claims if they weren't supported by competent scientific proof that the claim was true and that such differences were significant.

Q. Okay. Prohibition is a form of regulation, isn't it?

MR. SINGER: Objection to form.

A. You know, and — and, again, this gets into a more philosophical debate.

BY MR. WAGNER:

Q. Okay.

A. But an industry guide — do you have the guides, by the way, can I see those?

A. Sure.

Q. An industry guide is, you know, an expression of FTC opinion and I think our CFR says it's done for the purpose of encouraging voluntary discontinuance of industry-wide — discontinuance of practices. It's not — you know, I don't think we view this as a regulatory—as regulation of an industry as opposed to encouraging compliance with FAR statute.

Q. I've just marked this Peeler 6, the industry advertising guides which you asked for.

(Peeler Deposition Exhibit No. 6 was marked for identification.)

BY MR. WAGNER:

Q. Those are the guides you were referring to?

A. Yep.

Q. Do you know whether the industry views the advertising guides as a form of regulation?

MR. SINGER: These particular guides or guides in general?

MR. WAGNER: Yes, these cigarette advertising guides.

A. I don't know how the industry viewed them and, as I said, really since I had began having any responsibilities for tobacco advertising, this has been more of a historic document than a working document.

BY MR. WAGNER:

Q. Do you know as a matter of history whether the FTC has viewed the cigarette advertising guides as a form of regulation?

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says what it says.

BY MR. WAGNER:

Q. Well, that notion is consistent with what you just explained to me, though, right?

MR. KLONTZ: Objection.

A. Could you restate it, I'm sorry.

BY MR. WAGNER:

Q. Sure. That the FTC had an understanding that the — it would be a benefit to human health if the FTC through its offices could help promote the development and marketing of cigarettes that had a progressively lower tar yield?

MR. SINGER: I'm going to object.

MR. KLONTZ: Objection.

MR. SINGER: I think that mischaracterizes what Mr. Peeler just states, so the record will state that and you may expand.

BY MR. WAGNER:

Q. But I'm asking whether you agree or disagree with that proposition?

A. At some point during this process the Commission based on advice it received from outside the Commission determined that lowering the overall tar/nicotine content of cigarettes generally would be of benefit to consumers.

Q. And when you say "lowering" you mean lowering based upon the standardized test method results — the standardized test method that the FTC ultimately adopted, right?

A. Well, the standardized test method was a vehicle to address one problem which was comparability of results.

Q. Right.

A. And that addressed a specific advertising and marketing problem.

Q. Right.

A. So it's not the FTC's test method that drives lowering. It's competition that drives the lowering of machine tested results.

Q. Okay. I understand that distinction. But we would only be able to -- or — strike that.

I understand the distinction. But what I'm asking you is whether or not we would define the lowering -- whether or not we will be able to see the lowering by FTC test method results?

MR. SINGER: Objection.

You may answer.

MR. KLONTZ: Objection.

A. Well, I mean, this gets back to the — I mean, now, we're getting into the whole question of compensation and what the actual effect of the test method is. But, you know, I think what I was trying to say is that the test method is a way of encouraging uniformity in testing results.

BY MR. WAGNER:

Q. Right.

A. It's a metric that the FTC has used. You know, the real — the ultimate question is does that produce, you know, lower tar/nicotine intakes by consumers and then after you answer that question the remaining question is does that have any health benefit —

Q. Right.

A. — to consumers. And, obviously, as these documents show that's been an ongoing debate for years.

Q. Okay. And is it fair to say that at least the operating assumption of the FTC since the promulgation of the FTC test method that lower FTC test method ratings meant that the cigarette was delivering lower tar and nicotine?

A. I believe the Commission has always been aware—I mean, I looked at the Federal Register Notice announcing the—

Q. Yes.

A. — opening of the lab and that expresses an awareness that consumers don't necessarily smoke these the same, and the—

Q. Right.

A. — consumers are going to get more tar—more or less tar/nicotine. I mean, this is a—you know, an artificial construct to some extent.

Q. Uh-huh.

A. It was designed to move groups of cigarettes that move the cigarette market to a certain result and that's lower tested tar/nicotine contents. And the assumption there is that the lower test tar/nicotine content will result at some point in lower tar and nicotine consumption by consumers and that on an aggregate basis it would have a positive effect.

Q. On human health?

A. On human health.

(Peeler Deposition Exhibit No. 10 was marked for identification.)

BY MR. WAGNER:

Q. Okay. I'm going to show you Peeler Exhibit which is a memorandum dated August 28th, 1958, from John P. Sullivan to file. It has Bates numbers FTCDOCS-0125-0051 through 0053.

A. Okay.

Q. Okay. This is a document from the FTC's files, right? It's a FTC memorandum?

A. Yep.

Q. Have you ever seen it before?

A. Never seen it before.

Q. Okay. I'm sorry to keep pulling these out of the vintage bin, but you're the only one I can ask about these. The document references an August 28th, 1958, meeting with Dr. Ernst Wynder, W-Y-N-D-E-R,

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Q. Have you seen this document before?

A. No.

Q. Okay. This document is a letter by which the Federal Trade Commission informs Philip Morris or confirms a telephone call that took place a couple of days earlier advising Philip Morris and I'll tell you that an identical letter went to the other cigarette manufacturers, that from now on the FTC's view is that all representations of low or reduced tar or nicotine whether by filtration or otherwise will be considered as health claims.

Do you see that?

A. I do see that.

Q. And the FTC's purpose is to eliminate from cigarette advertising representations which any — which in any way imply health benefits, right, that's what the letter says?

A. You know, that's — that's what the letter says. You know, whether or not this was FTC policy at this point or not is, you know, not — not clear.

Q. Why is that not clear?

A. Because it's a letter from an individual attorney on Bureau of Consultation letterhead that

may or may not — I — which I don't know whether it was approved by the Commission or not. I do know that later in 1960, I believe, the Commission did issue a press release where Earl Kintner said that there was an agreement to — to stop tar and nicotine advertising. So, you know, the letter is — again, says what it says.

I — I don't know enough about it to be able to put it in context of what else may have been happening at the FTC just like these other documents, you know, are obviously Commission documents, they're from our file. I don't know what mix of information they were in, but there is, as — as my statement before NCI said, a record of specific steps—official steps that the Commission took in this process.

Q. Is there something not official about a letter that goes out on FTC letterhead that is disseminated on an industry-wide basis?

A. Well, and, again, this is what we wanted to — you know, what we were talking about before.

Q. Right.

A. There are various levels of action that can occur at the FTC.

Q. Right.

A. A staff attorney can send out a letter that may or may not have been reviewed by a bureau by an office director or bureau director or a commissioner. There are various actions that staff can take on its own. There are various actions that, you know, are clear that they have to be reviewed. And — and I can tell you based on my experience what was likely to happen from — you know, while

I've been at the FTC. I have no idea what the procedures were back in 1959 or what level of autonomy or not autonomy the—an attorney in the Bureau of Consultation would have had.

Q. Well, let's look at the face of the letter. The second paragraph says that "prompt, simultaneous compliance is urgently requested. Any advertising which is not promptly brought into conformance with this request will be forwarded to other Bureaus looking forward to mandatory procedures."

Do you see that language?

A. Yep.

Q. Now, wouldn't it be reasonable for a recipient of such a letter to believe that the FTC was articulating its policy on cigarette advertising with respect to tar and nicotine claims?

MR. SINGER: Objection to form.

You're asking —

MR. KLONTZ: Objection.

A. You know, I — I don't know what went on in the telephone call, I don't know what representations were made. You know, the letter is here and it says what it says. It's very hard for me to give it a context beyond what it — what it is. You know, obviously, if this were a letter that went out, you know, this year, I could tell you that the person either would have had to have it reviewed or it would be off the reservation, but I have no idea what the policies were back then.

BY MR. WAGNER:

Q. You just don't know whether or not it is a statement of policy then?

A. You know, for these old documents, you know, I really can't tell you much beyond that these are documents, they came from our files and they say what they —

Q. Okay.

A. — they say what they say.

Q. And you have a memory of a press release in which ultimately the FTC announced its policy to ban advertising of tar and nicotine yields, right?

A. Well, right, it's cited in my testimony and I think there's a copy of it someplace in all of these documents.

Q. Right. The FTC —

A. And that's -- that was a FTC, you know, press release by Earl Kintner.

Q. Okay. And the policy was announced at the press release, right?

A. Right.

Q. Okay. It wasn't announced in a trade regulation rule, was it?

* * *

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has the comment in it is – seems to be talking about something different than Rule 3 which is talking about tar and nicotine content. But as I described in my written statement, you know, at some point, and I'm not sure if it's here or in the process of this rule making, the Commission did decide that it should

encourage tar and nicotine claims with the specific reservation that there shouldn't be anything other than the tar and nicotine numbers, no accompanying health claim.

BY MR. WAGNER:

Q. And one of the goals underlying that FTC decision was to encourage the development of a marketplace competition for the research, development and marketing of lower yield cigarettes, right?

MR. KLONTZ: Objection

BY MR. WAGNER:

Q. Just one of the goals?

A. The purpose was to encourage competition in among companies in lowering machine measured tar and nicotine yields in cigarettes.

* * *

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of the FTC test method?

A. No.

Q. Okay. Now, in addition to ending – we can strike that.

And a second goal of the FTC in adopting the FTC test method was to encourage the development of a marketplace competition for lower tar and nicotine cigarettes as measured by the FTC test method, right?

A. That's my understanding.

Q. Okay. Now, when the FC announced its new policy in March of 1966, the policy did not

permit advertisements of tar and nicotine yields as is set forth in Peeler 16. The FTC also requested comment from interested individuals, right?

A. On the – on what?

Q. On – on the test method. On the proposed test method.

MR. SINGER: Are you talking, I'm sorry, about Exhibit 14 or 15.

MR. WAGNER: 16.

MR. SINGER: 16, okay, I'm sorry.

MR. WAGNER: Right.

* * *

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testing for approximately 20 years, right?

A. Yes.

Q. Okay. And then the FTC closed its lab and responsibility for conducting the tests shifted to TITL, the Tobacco Institute Testing Lab, right?

A. Well, during the time the FTC had been doing the test the Tobacco Institute Testing Lab had also been doing the test and there had been collaboration between the two labs to ensure that the test results were the same. And the record over that period was that the test results were remarkably uniform and so we didn't see a need to retain our testing lab.

Q. There was no basis to believe that the test run by the Tobacco Institute Testing Lab were inaccurate, right?

A. The –

MR. SINGER: Objection to form.

You may answer.

A. — experience was that the results of the FTC testing lab and the TITL testing lab were quite comparable.

BY MR. WAGNER:

Q. Okay. Now, I think you testified earlier that having the FTC run the testing lab is unusual.

A. Among government programs it seems very unusual to have an agency actually doing the testing for the industry.

Q. Okay. When it comes to, for example, energy efficiency rating, appliance manufacturers run their own tests, right?

A. Right. The normal course is the government would say this is the type of testing methodology we would like to see followed and the industry would do the test.

Q. And when the FTC has such a procedure in place it expects compliance with the testing method that it—that it has discussed with the affected industry, right?

A. Could you—

Q. Yeah.

Well, you said the usual course of business is for the industry to run its own tests, right?

A. Yes.

Q. Okay. And—well, let's just move on then.

Now, the FTC closed its lab so that the cigarette testing would then be done by TITL and they would submit their data to the FTC, right?

A. Yes.

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Okay. And the FTC took certain steps in order—

A. But can I go back?

Q. Sure.

A. TITL simply continued the testing that they had been doing before, it's not like they started testing only after we closed our lab.

Q. Understood.

And the FTC insisted on certain oversight provisions, correct?

MR. SINGER: Objection as to form.

You may answer.

A. Well, it's a voluntary program and one of the—one of the things that happened when we closed—back a couple of steps. It's a voluntary program that's defined by an agreement among the tobacco companies. One of the things that happened—and that agreement was premised on the existence of an FTC test—testing facility so that when we abolished the FTC lab there had to be some changes made in the agreement, the voluntary agreement, to accommodate the fact that it was going to be TITL that was doing the testing and not the FTC. And as part of that review of that agreement, the industry agreed that Harold

Pillsbury would have access on—at any time on an announced basis to inspect the testing procedures and that, I think, is incorporated in the voluntary agreement. It may also be evidenced by a separate letter.

Q. Okay.

A. So I'm not—I'm not positive about the second part.

Q. Okay. The ability of Dr. Pillsbury to have unrestricted access to the lab and to the data and to make unannounced visits and inspections was something that was important to the FTC, correct?

A. It was important to us. I think it

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Page 211-215

A. You know, again, it would require me to speculate. We proposed rules and don't go forward with them based on what we hear in the comment period.

BY MR. WAGNER:

Q. All right. You may learn something during the course of the comment period that could change the FTC's mind, that's always possible, right?

A. Right.

Q. But does the FTC generally or with—specifically with respect to this particular rule does it make a proposed rule without first studying and analyzing the issue?

MR. SINGER: Objection.

You may answer.

A. The Commission in proposing a rule would obviously review evidence and consider staff's arguments both for and against a rule and make a determination about whether they believed it was correct to go ahead with the publication of a proposed rule.

BY MR. WAGNER:

Q. That's what I thought. And what the FTC is seeking should – through this rule is industry-wide compliance, right?

MR. KLONTZ: Objection.

MR. SINGER: Objection

A. Rules are promulgated to define with specificity and facilitate industry-wide compliance.

BY MR. WAGNER:

Q. Okay. And I think as we've discussed even back at the beginning of the deposition, rule making is only one means by which the FTC can obtain industry-wide compliance, there are other vehicles that the FTC can use, right?

A. That's correct.

Q. Okay. And for this particular matter another vehicle for the FTC to obtain industry compliance appeared in the form of an industry-wide agreement, right?

MR. KLONTZ: Objection.

A. That's – you know, my understanding is we propose the rule, there was a proposal for the industry for voluntary – to voluntarily adopt this pursuant to an agreement among the manufacturers and the FTC withdrew the rule.

BY MR. WAGNER:

Q. Okay. Is obtaining industry-wide compliance versus – not versus, via voluntary agreements something unique to the cigarette industry or is it something that the FTC also obtains in other industries?

A. The Commission has a number of programs designed to encourage, you know, voluntarily compliance in a whole variety of industries.

Q. Okay. Is there anything nefarious about the FTC obtaining an industry-wide agreement in lieu of a formal rule?

MR. KLONTZ: Objection.

MR. SINGER: Objection to form.

You may answer.

A. The – the idea of proceeding on a voluntary basis is something the Commission has done in a variety of circumstances with a variety of industries and the Commission looks at these programs to try to make sure that they are done, you know, correctly and in the public interest.

BY MR. WAGNER:

Q. What happens if there's a violation of such an agreement, how can—how does the FTC use such a violation?

MR. SINGER: I'm going to object—

MR. KLOTZ: Object.

MR. SINGER: — to the extent, I don't know if you can give a very specific answer to this general of a question, but to the extent you can, please do.

A. I don't know how we could use a violation of a voluntary agreement of—of this type. The only rationale that we have is if there were some advertising or communication of it to consumers and then there were violations of it that could constitute a deceptive practice under Section 5, but just the fact of a violation of a voluntary agreement isn't actionable.

BY MR. WAGNER:

Q. It may not be enough in and of itself, right?

MR. KLONTZ: Objection.

A. The FTC could only take action if a company is engaged in unfair or deceptive practice or a practice that violates the specific statute.

BY MR. WAGNER:

Q. Okay.

MR. WAGNER: If you want to change that out, you can.

We have to take a one-minute break to change the tape.

THE WITNESS: Okay.

MR. WAGNER: Unless you would like five minutes to stretch and—which you can do as well.

THE WITNESS: Let's take five.

MR. SINGER: Sounds good.

VIDEO TECHNICIAN: The time is 2:15:46. Going off the record. This is the end of Tape No. 2. Going on to Tape No. 3.

(Recess taken)

VIDEO TECHNICIAN: The time is 2:24:09. This is the beginning of Tape No. 3 and we're back on the record.

(Peeler Deposition Exhibit No. 20 was marked for identification.)

BY MR. WAGNER:

Q. Mr. Peeler, I just need to spend a few minutes here discussing the

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Q. Okay. And the industry is expressing its willingness in this letter to enter into negotiations with the Federal Trade Commission to obtain such an agreement, right?

MR. KLOTZ: Objection.

A. It says that "We can hope that the Commission can properly indicate its willingness to explore this voluntary agreement path in lieu of formal proceedings, and we are prepared to present to the Commission the implementation and lead time refinements involved."

BY MR. WAGNER:

Q. All right. And you're reading—

A. The only thing I would—my understanding of the—what I have seen about this is the actual voluntary agreement itself and my understanding is it's an agreement among industry members. I don't think it's signed or adopted by the FTC as opposed to, you know, this was an agreement that was—

Q. Right.

A. — proffered and the FTC withdrew

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Page 228

MR. KLOTZ: Objection.

BY MR. WAGNER:

Q. And we're not aware of any enforcement action that has been brought by the FTC alleging a failure to comply with that plan, right?

A. I'm not aware of any enforcement action brought by the FTC alleging failure to comply with that plan, although, I'm not sure that the plan itself is enforceable.

Q. Okay. And as we discussed before the break, one of the policies that the FTC was pursuing when it initiated the trade regulation rule making proceedings was to have the cigarette manufacturers publish FTC test method results in their cigarette advertising, right?

A. That's correct.

Q. Okay. And the FTC has then achieved its goal of having the cigarette manufacturers so publish FTC test method results by negotiating the voluntary agreement with the industry, right?

MR. KLOTZ: Objection.

A. The voluntary agreement when it was

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The tobacco companies were clearly articulating that the FTC test method would not be predictive of the

delivery of tar and nicotine to humans during actual smoking, right?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. They were clear on that point, right?

A. That's correct.

Q. Okay. So the FTC was –

A. Between any – between any individual smoker.

Q. Any particular individual smoker?

A. Any particular individual smoker.

Q. Correct.

A. Right.

Q. So the FTC wasn't fooled into adopting the FTC test method based on any belief that the FTC test method results were predictive of tar and nicotine delivery to humans during smoking, was it?

MR. KLONTZ: Objection.

A. No.

BY MR. WAGNER:

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Pages 314-321

got the right ones. Peeler 43, I'm just going to focus on this puff parameter analyzer for a minute.

Peeler 43 is a letter dated August 31st, 1981, signed by Hadrian, although, it's spelled -- I don't know how to say it, so I'll probably get it wrong, H-A-D-R-I-A-N, Katz, K-A-T-Z, sent to Matthew Myers of

the Division of Advertising Practices at the Federal Trade Commission.

It's a one-page letter with a three-page attachment and it bears Bate stamp numbers 2023094123. And the preceding — well, actually, the attachment was Bate stamped before that, so the Bate stamp is 4120 and 4121 and 4122 are the Bate stamps of the attachment.

Have you ever seen this document before?

A. No, I haven't.

Q. Okay. By this document dated August 31st, 1981, Mr. Katz on behalf of Philip Morris identifies a puff parameter analyzer to the FTC, doesn't he?

MR. KLONTZ: Objection.

A. Well, let me read it.

He certainly identifies a puff parameter analysis. I think it's in a much different context from the documents that I'm remembering.

BY MR. WAGNER:

Q. Okay. But doc — but —

A. And this is really sort of a question of whether the — seems to be a question of whether the — how the Barclay filter performs in a puff parameter analyzer rather than how the puff parameter analyzer would allow you to estimate human smoking patterns.

Q. Okay. At the very least, the identification or existence of the puff parameter analyzer is clear from the face of this document, right?

A. Yes.

Q. And on the first page of the attachment we also see the sentence, I think, I was referring to earlier that, "Almost all commercial diluted filter cigarettes have ventilation perforations starting about 12 millimeters from the mouth end of the filter," correct?

A. That's what it says.

Q. Okay. And that was conveyed to the FTC in August of 1981, correct?

A. You know, again, it's a — it's a signed letter. It's not necessarily from our files. But I know there was some proceeding and I'm sure there's a public record with that in it.

(Peeler Deposition Exhibit No. 44 was marked for identification.)

BY MR. WAGNER:

Q. Okay. The next document, Peeler 44, is an excerpt of a document only because I'm trying to not only minimize —

A. Good.

Q. — the burden on copying machines, but since the point we need the document for is small.

Peeler 44 is the cover page and the first two pages of a February 16th, 1982, memorandum of Philip Morris, Incorporated, to the Federal Trade Commission in reply to questions raised by the Commission's staff in connection with the investigation of the Barclay filter. It bears Bate stamp numbers 2501010593 through 595.

The only thing I want to call your attention to is the sentence at the bottom of Page 1 that carries over to page 2. You see that Philip Morris is submitting

here with the report of the United States Testing Company on the results of that company's recent extensive study of cigarette dilution involving more than 500 smokers?

A. Okay, that what it says.

Q. Do you see that language?

(Peeler Deposition Exhibit No. 45 was marked for identification.)

BY MR. WAGNER:

Q. Okay. Now, we're going to mark as the next document Peeler 45, that report, Peeler 45 is a document from the United States Testing Company. It is a report of "In Vivo" V-I-V-O "Air Dilution Test of Ventilated Cigarettes" February 1982. And it bears Bate stamp numbers 502001209 through 1298. I'm not going to ask you to read the whole thing. I want to focus on this particular puff parameter analyzer.

Now, if we flip through the document we see that in the first few pages there's a discussion of the background and purpose of the test that was run by United States Testing Company, right?

MR. SINGER: Can you give reference to some pages.

MR. WAGNER: Pages 1 and 2.

MR. SINGER: Thank you.

BY MR. WAGNER:

Q. That's the background section, right?

A. Okay, I looked at these —

Q. Go ahead.

A. — what they're trying to do.

Q. All right. There's a summary of results that appears in the second section?

A. Right.

Q. Okay. And if we flip ahead, beginning on Page 9 there's a "Summary of the Research Design," right?

A. Okay.

Q. And if we go ahead to Page 14, which is within that section, they describe the testing procedure in the second bullet paragraph, refers to the subjects of the experiments smoking their own brand of cigarettes and that they were then attached to a puff parameter analyzer.

Do you see that?

A. Yes.

Q. Okay. And then on the next page, the last paragraph, you'll see a disclosure that three puff parameter analyzers were used throughout the study.

Do you see that?

A. I'm sorry, where is it? Okay.

Q. The last paragraph.

Do you see that?

A. Yes, I do.

Q. And, then, if we go all the way to Page 52.

A. I'm sorry, on Page 52?

Q. 52.

A. 52. Okay.

Q. Now, we see a section entitled "Puff Analyzer in Detail."

Do you see that?

A. Yes.

Q. And, then, on the next two pages there's actually a picture of the machine, right?

A. It's a drawing of a machine.

Q. Correct. There's a drawing. And the drawing shows that there are measurements for total puff volume, percent dilution, flow rate, duration flow rate, total flow rate and duration in seconds, right?

A. That's what it says.

Q. Okay. And if you keep going in the document, beginning on Page 55 there is a description of the switches and the functions that they perform, right?

A. Uh-huh. Yes, there is.

Q. And, then, on the next page, Page 56, there's a description of the display and the status of the lights, right?

A. Yes.

Q. And, then, on Page 57 there's an explanation of how to check the duration in seconds and how to check the percent dilution.

A. That's correct.

Q. It's a pretty thorough explanation of a puff parameter analyzer, isn't it?

A. It seems to be.

Q. Okay. And are you aware that the puff parameter analyzer used by the United States Testing Company that was thoroughly described in Peeler 45 was, in fact, Philip Morris' puff parameter analyzer?

MR. SINGER: Objection to form.

You may answer.

A. I wasn't aware of this document, no. I wasn't aware of that fact.

BY MR. WAGNER:

Q. Okay. Given your review of these documents, now, is it your view that the ability to measure and analyze smoker puffing behavior with these machines was available to the FTC in or about February of 1982?

MR. SINGER: Objection.

You may answer.

A. Yes, assuming this was submitted as part of the Barclay record, which it seems to be, the FTC would have known about it.

BY MR. WAGNER:

Q. Okay. After the submissions, these

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test method, right?

A. Well, that was certainly what we decided at that point in time and that is also the question that we have now posed to the public health agencies for an answer.

Q. That's the question that I think you testified at the very beginning of today that's still open, right, you have not come to a final determination yet?

A. Yes, we've asked—we have—the agency has decided that it's not the right place to answer that question and has asked the Public Health Service to answer that question for us. Public health agencies to answer that question for us.

Q. Okay. And so, the FTC has not come to a final determination then yet on what to do, if anything, about the FTC test method, whether to keep it, abandon it, or revise it?

A. That's correct.

MR. WAGNER: Why don't we break for the day, then.

Thank you for all of your cooperation. I know it was a lot of

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Tuesday, July 30, 2002

9:08a.m.

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requirements for industry actors to follow?

MR. KLOTZ: Objection.

A. What the FTC has done is it has a program under which manufacturers voluntarily include tar and nicotine ratings in their cigarette ads.

BY MR. WAGNER:

Q. Correct. And we've discussed other elements of the program, right? Correct?

A. Right. Well, that's—

Q. Okay.

A. The program is the program that results in the voluntary disclosure of the tar and nicotine ratings in the cigarette ads.

Q. Well, we've just discussed, did we not, other requirements that the FTC has implemented from time to time in order to obtain industry compliance with its policies, right? We just finished discussing some of those requirements, right? That cigarettes—that disclosures be made—that cigarettes be tested via uniform testing method?

A. Right. And that's to avoid

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the cigarettes that are under 15 milligrams, it seems like a very common sense proposition.

BY MR. WAGNER:

Q. Okay.

A. But it also seems to be a very temporal proposition.

Q. And the FTC had a policy goal of encouraging the marketplace competition for the development – for the research, development and marketing of lower tar cigarettes, we discussed that yesterday, right?

A. The FTC had a policy of trying to encourage broad reductions in the tar and nicotine yields of cigarettes.

Q. And it – on Page 19 in the second full paragraph the FTC is specifically stating its belief that the promotion of lower tar and nicotine – of low tar and nicotine yield cigarettes can be profitable, right?

A. Where is this?

Q. The first sentence of the second full paragraph on page 9 – Page 19.

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Pages 459-465

this is the same legal analysis that you would bring to a comparative claim now, is that, you know, given what the market was at that point and given where these cigarettes fell in the market at that point, that an implied claim to a consumer that these cigarettes were lower in tar than other cigarettes was deceptive and the relief if designed to correct that by requiring disclosures.

Q. I agree with all of that. The simple question, though, is just 20 and 21 milligrams of tar are higher than 15, aren't they?

A. The answer to that is 20 and 21 are higher than 15, but I'm not sure I see what the relevance of it is to this particular complaint.

Q. The pluses you indicate, the range on the tar yields on the market went from 4 milligrams of tar to 36 milligrams and the particular brands at issue came in at 56th and 77th out of 122 brands tested, right?

A. That's what it says.

Q. Okay. Now, the FTC ultimately resolved this complaint with a consent order, right, that's Peeler 57?

A. That's correct.

Q. Okay. Now, the FTC did not bar or prohibit American Brands from using words such as "low, lower, reduced or like qualified terms" in its cigarette advertising, did it?

A. No, it imposed affirmative disclosure requirements on them.

Q. Right. Instead of prohibiting those terms the FTC permitted the use of those terms as they met certain conditions, right?

MR. KLOTZ: Objection.

A. Well, what this order does is not—this order doesn't affirmatively permit anything. What this order does is say what you can't do and it says you can't use any of these terms unless you provide a disclosure of the tar and nicotine content in the smoke produced by the advertised cigarette and if the tar content of the advertised brand is compared to that of another brand or brands of cigarettes the tar and nicotine content of—the milligrams of the smoke produced by that brand or those brands and the tar and nicotine content and milligrams of the lowest yield domestic cigarette.

BY MR. WAGNER:

Q. Okay. And if you meet those conditions, then the use of terms such as "low, lower, reduced or like qualifying terms" are not prohibited, right?

A. They're not prohibited by this order.

Q. Okay. And there's one additional aspect to the order, right, that the FTC is referring to the tar—there must be a clear and conspicuous disclosure of the tar and nicotine content in milligrams of the smoke produced by the advertised cigarette, correct, that's Condition No. 1?

A. That's correct.

Q. And the Commission defines exactly what it means by tar and nicotine content in milligrams in Section 2 of the order, right?

A. That's correct.

Q. And the FTC specifically directs that when tar and nicotine disclosures are made in milligrams it means the total particulate matter, for example, with tar, the total particulate matter in the mainstream smoke of a cigarette as determined by the testing method employed by the Federal Trade Commission, right?

A. That's what it says.

Q. And the same thing is true for nicotine as well, right?

A. That's what it says.

Q. Okay. So the conditions on using the words "low, lower, reduced or like qualified terms" are that they must be accompanied by a statement of the tar and nicotine content in milligrams as determined by the FTC test method, right?

A. For American Tobacco Company.

Q. For American Tobacco Company, that's what this order does, that's how it resolves the case, right?

A. That's right.

Q. Okay. And the FTC did not keep this complaint and consent order private, did it?

A. No.

Q. The FTC, in fact, published it on the public record to seek comment, right?

A. I assume it did. That's the normal process.

Q. Okay. And by—

A. This is—we only have the final. There's usually an interim—

Q. Okay.

A. — agreement that's published for comment. And then the order is issued after the agreement. This says—huh.

Q. Why does the FTC publish its orders, its consent orders?

A. Can I just read the first page here?

Q. Sure.

A. Well, it's interesting, this decision and order doesn't seem to say that it was published for public comment. It normally—if it was published for public comment there's a recitation of that in the decision and order. So, you know, our current rules are settlements, administrative settlements are published for comment, but I—I don't see any indication that this was.

Q. Well, you'll just have to take my representation on that. I just—

A. Okay.

Q. — took the exact order on that and it was published—it is published in the FTC reporter, correct?

A. Okay, to go back for a minute.

Q. Yeah.

A. The process we use now is if there is an administrative settlement it's published for comment but that's only if it's a settlement. If there's a litigated settlement, they're not published for comment.

Q. Why does the FTC publish consent orders?

A. We published consent orders and other final agency actions for a whole variety of reasons, one of which is that the Administrative Procedure Act requires you to do that.

Q. Okay.

A. The other is that one of the purposes of bringing cases is to give guidance to other industry members about what type of conduct we would challenge. The one thing that is confusing sometimes to people is that an order contains—often contains provisions that are designed to fence-in conduct so that they don't necessarily—they're not necessarily—it's the complaint that states the violation of the laws and it's the—the order is a remedial provision.

Q. Okay. I want to focus on the phrase you used "to give the industry guidance." Is there any question in your mind that the publication of the decision and order in the matter of American Brands was intended to guide the industry regarding anyone's, any industry actor's use of the words "low,

lower, reduced or like qualifying terms" in cigarette advertising?

A. It would be designed to do that, it would be designed to do that in the context of the ads that are challenged.

Q. Okay. And the consent order evidences the FTC's determinations regarding, among other things, the public interest made after careful study and

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Pages 474-475

you include a disclosure of here's what the low end of the market looks like.

Q. Okay.

A. And the low end of the market would be whatever the lowest is based on the most recent FTC test—

Q. Okay.

A. — as I—as I read the order.

Q. The order says if there is a direct comparison with other cigarettes you need to disclose the tar and milligram—the tar and nicotine content in milligrams of whatever cigarette you're comparing it to by using those FTC test method results as well, right?

A. Yeah, whatever one you're—and also the—are there two or three?

Yeah, if you're comparing it to a specific brand, the tar and nicotine content of the specific brand, but also the tar and nicotine content of the lowest yield domestic cigarette

Q. Okay. So under the American Brands decision, one element, just one of the elements, is if you're going to use words like "low, lower, reduced or like qualifying terms," you must disclose the tar and nicotine content in milligrams of the cigarettes you're advertising using the FTC test method results, correct?

A. That's correct.

Q. Okay. And in the Lorillard advisory opinion we see the FTC giving guidance that says "and only FTC test method results may be used, do not use any other test method results," correct?

A. Well, in the context of an ad where it's going to say by FTC method.

Q. Right.

A. And if you say by FTC method, I mean, again, that goes back to the Brown & Williamson.

Q. I understand.

That comes a little bit later, but as long as you're going to say by FTC test method, which is part of the voluntary agreement, and you're going to use only FTC test method numbers, right?

A. Right.

MR. WAGNER: Okay. Now, we have to

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Pages 493-495

mean that a law violation has occurred.

BY MR. WAGNER:

Q. I'm sorry, I didn't understand that last thing.

A. When we close an investigation, we are quite clear that the fact that we're closing an investigation does not mean that a law violation has not occurred. Just as the fact that we're pursuing an investigation doesn't mean that a law violation has occurred. So investigations can be closed for any of a variety of reasons.

Q. Okay. As a result of this investigation, though, no action was taken against Philip Morris or the other cigarette manufacturers by the FTC to suspend or restrict their right to market cigarettes using the lights descriptor, was there?

A. There was—it's my remembrance that this investigation at some point was closed. I think there may have been a letter back to a petitioner. I'm not sure about that. I don't think we could find a letter back to this petitioner. And, again, the fact that we've closed it doesn't mean we've authorized people to do anything and it doesn't mean we've not authorized them to do anything.

Q. Right.

But my question is, as a result of this investigation, did the FTC make a determination to suspend or restrict the right of Philip Morris or the other cigarette manufacturers from continuing to market their cigarettes using the lights descriptor?

MR. KLONTZ: Objection, and to the prior question, too.

A. The first thing is, you know, this is ordinarily done at the staff level. So that the FTC, if you're referring to the Federal Trade Commission, doesn't—normally doesn't get involved in this unless there is a recommendation from the staff.

The second thing is that the—the ordinary response to a situation like this is that, you know, the FTC staff is not recommending action at this time. I don't know whether that's in a letter to this particular respondent or not, but it's a fairly usual statement that we make.

BY MR. WAGNER:

Q. Okay. Do you know whether or not the FTC staff in this case recommend that action be taken to restrict or suspend the cigarette manufacturers right to market its cigarettes—their cigarettes using the descriptor lights?

A. Well, I don't think we can get in—

MR. KLONTZ: Objection.

A. I don't think I can get into what we recommend or didn't recommend. There was no formal action taken by the FTC to challenge these particular ads. As I said, that does not mean that we made any formal determinations that these ads were okay or that they weren't okay.

BY MR. WAGNER:

Q. But the FTC did examine the ads and deliberated upon their existence and their effect on consumer perceptions and consumer behavior, correct?

MR. SINGER: I'm going to object to form just because FTC whether you mean staff

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Page 533-536

Q. Okay. Now, the staff groups together in Category 1, ultra low tar, ultra light, extra light and ultima.

Do you see that?

A. I do see that.

Q. And the staff is proposing to limit the use of all of those descriptors to cigarettes that yield 3 milligrams or less of tar under the current FTC test method system, right?

A. Yes.

Q. In the second category staff equates low tar and light, right?

A. Yes.

Q. Is that, by the way, the FTC's or—is that the FTC's view, that low tar and light as descriptors are synonymous?

A. The FTC does not have a view on the use of descriptors in—on cigarette packages or in cigarette advertising. This is a, you know, clear effort to follow up on the recommendation of the National Cancer Institute that, you know, the brand names be regulated.

Q. Okay.

A. And it's an approach similar to that used by the Food and Drug Administration for food claims.

Q. Does FTC staff have an understanding that the descriptors "low tar" and "light" are used synonymously?

A. There is some document in all of this that says "Here's what we've been" – "Here's how we've been told they are used." And I don't remember

exactly what document it is. But I know at some point we called around and said "How do you use these terms?" And, actually, I don't think we called around. I think we reviewed our tar and nicotine – our tar and nicotine data survey allowed us to look and see where those terms are used on brands.

Q. And the tar and nicotine data survey that you did or that staff did showed that the descriptors "low tar" and "lights" are used to describe the same categories of cigarettes if categories are defined by FTC test method yields, right?

A. I think what we found – do you have – do you know what document –

Q. No. Otherwise I would help you.

A. I think it was – do you have the '77 notice?

Q. Yes.

A. Can I have it?

Q. Yes. The '77 notice is Peeler 30 and the '78 notice is 35. I don't know if that helps you or not.

A. Oh, we're not talking – I'm talking about the '97 notice, I'm sorry.

Q. Oh, we haven't marked that one yet. We're getting to that. Would you – would you like to see that in order to answer the question?

A. If I could just look at that very briefly without –

Q. No problem. We'll mark that. We were going to get to it shortly, anyway.

Peeler 69, the September 9th, 1997, notice and comment.

(Off the record.)

(Peeler Deposition Exhibit No. 69 was marked for identification.)

BY MR. WAGNER:

Q. Okay. We marked that as Peeler 69.

A. This is the – that is what I was remembering. Unfortunately, it doesn't address the question that you asked, which is, are low tar and light the same – used in the same way in the brand descriptors. But my remembrance is that that's correct, that when we look at how the terms are used on cigarette packages that they were used for the same group of cigarettes. I can verify that, but that's my remembrance.

Q. Okay. After Peeler 68 was sent to the cigarette manufacturers, they were continuing discussions back and forth between staff and the cigarette manufacturers concerning these proposals, right?

A. Yes, they were.

Q. And those discussions covered a number of topics, one of which was the merits of a two-tiered testing regime, right?

A. Yes, absolutely.

Q. Okay. And another topic that staff

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surprised if we didn't, but I don't—I don't recall whether we specifically got data or not.

Q. Okay. After two extensions for time were—were requested by public health community members and, then, granted the time for comment on

this notice expired on February 4th, 1998. Does that comport with your memory?

A. I know that there were a number of exceptions and I know there were requests for comments by the public health community.

Q. Okay. And the cigarette manufacturers submitted a lengthy response on February 4th, 1998.

Do you recall that?

A. I do recall that a quite lengthy response we received.

Q. Did you read the response?

A. I read parts of it. I don't have a specific memory of what was in there. It would have been something that would have gone to the staff that was working—

Q. Okay.

A. —on this for review, but I

* * *

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clarify to Mr. Wagner that if the Federal Trade Commission had reached a decision that a hundred percent compensation was occurring with respect to smoking, it would not continue the system because there would be no value in it at all. So, you know, the whole issue of how much compensation of what health benefits are is what the Commission's examining now.

Q. It would not continue which system?

A. The tar and nicotine testing system.

Q. Okay.

MR. WILLIAMS: Jeff, do you have any follow-up?

BY MR. WILLIAMS:

Q. All right. Is it all right if we move away from low tar cigarettes for a little while?

A. I was just getting interested in it.

MR. SINGER: What's left?

BY MR. WILLIAMS:

Q. Mr. Peeler, I'd like to start by asking you about how the FTC in its law enforcement capacity goes about monitoring the advertising and marketing practices of

* * *

Federal Trade Commission

"TAR", NICOTINE, AND CARBON MONOXIDE OF THE SMOKE OF 1262 VARIETIES OF DOMESTIC CIGARETTES FOR THE YEAR 1996

Issued 1999

Report of "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1262 Varieties of Domestic Cigarettes For the Year 1996

This report contains data on the "tar," nicotine, and carbon monoxide yields of 1262 varieties of cigarettes manufactured and sold in the United States in 1996.[1]

Limitations of the Cigarette Test Method

Cigarette ratings for "tar," nicotine and carbon monoxide are currently determined by machine testing conducted in accordance with a methodology adopted by the Commission in 1967. The "tar" and nicotine testing program was intended to provide smokers seeking to switch to lower "tar" cigarettes with a single, standardized measurement with which to choose among the then-existing brands.[2]

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[1] This report is another in a series that the Federal Trade Commission (FTC) has prepared since 1967.

[2] When the test method was adopted, the public health community believed that "[t]he preponderance of scientific evidence strongly suggests that the lower the "tar" and nicotine content of cigarette smoke, the less harmful would be the effect." U.S. Dep't of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette* 1 (1981) (quoting 1966 Public Health Service statement).

Over the past 30 years that the current system has been in place, there have been dramatic decreases in the machine-measured "tar" and nicotine yields of cigarettes. Since 1968, the average sales-weighted machine-measured "tar" yield has fallen from 21.6 mg. to 12.0 mg. Today, 70% of all cigarettes sold have machine-measured "tar" yields of 15 mg. or less.

Despite these substantial decreases in machine-measured yields, the Commission has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces as indicators of how much "tar" and nicotine they actually get from their cigarettes. In fact, the current ratings tend to be relatively poor predictors of "tar" and nicotine exposure. This appears to be due primarily to compensation — the tendency of smokers of lower rated cigarettes to take bigger or more frequent puffs, or otherwise alter their smoking behavior to get the amount of nicotine they need. Such variations in the way people smoke can have significant effects on the amount of "tar," nicotine, and carbon monoxide they get from any particular cigarette. The Commission is concerned that smokers may incorrectly believe, for example, that they will get three times as much "tar" from a 15 mg. "tar" cigarette as from a 5 mg. "tar" cigarette. In fact, if compensation is sufficiently great, it is possible for smokers to get as much "tar" and nicotine from relatively low rated cigarettes as from higher rated ones. Although these limitations have been present in the system since its initiation in 1967, they have become of substantial concern more recently because of changes in modern cigarette

design and a better understanding of the effects of compensatory smoking behavior.

Some public health agencies have also expressed concerns that new studies may question the basic assumption underlying cigarette testing — that cigarettes with lower machine-measured "tar" and nicotine ratings are less harmful than ones with higher ratings. For example, in 1997, the National Cancer Institute issued a monograph noting that the apparent mortality risk among current smokers has risen in the last forty to fifty years, even though machine-measured "tar" and nicotine yields have fallen during the same period.[3] In attempting to understand this fact, the monograph suggested that the increased mortality risk might be due to increases in current smokers' lifetime exposure to cigarette smoke or that the reduced "tar" levels of modern cigarettes may have less benefit than previously believed. In addition, a number of studies have also found that changes in smoking behavior and cigarette design appear to have resulted in an increase in a type of cancer that occurs deeper in the lung than the lung cancer traditionally associated with smoking.[4]

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[3] *Smoking and Tobacco Control Monograph 8: Changes in Cigarette-Related Disease Risk and Their Implications for Prevention and Control*, National Institutes of Health, National Cancer Institute (1997).

[4] *See* Thun, M.J., et al., "Cigarette Smoking and Changes in the Histopathology of Lung Cancer," 89 *J. of the Nat'l Cancer Inst.* 1580 (1997); Emster, V.L., "The Epidemiology of Lung Cancer in Women," 4 *Annals of Epidemiology* 102 (1994); Levi, F.S., et al., "Lung Carcinoma Trends by Histologic Type in

In light of these concerns, in 1998 the Commission requested that the Department of Health and Human Services ("HHS") conduct a complete review of the FTC's cigarette testing methodology.[5] This review will be completed in September 2000.

While that review is underway, the Commission believes that all smokers should know the following facts:

> "Tar" and nicotine ratings were never intended to reflect what any individual consumer would get from any particular cigarette;
>
> How much "tar" and nicotine an individual gets from a cigarette depends on how he or she smokes it – smokers of cigarette brands with lower "tar" and nicotine ratings who take larger or more frequent puffs may get as much "tar" and nicotine as smokers of higher rated brands;

[Footnote continued from previous page]

Vaud and Neuchatel, Switzerland, 1974-1994," 79 *Cancer* 906 (1997).

[5] Among other things, HHS's review is designed to reconcile the findings of recent studies suggesting that cigarettes with lower "tar" ratings may not be less harmful with the findings of other studies suggesting that there may be some risk reduction from the use of lower "tar" cigarettes. *See* Parish, H., et al., "Cigarette smoking, tar yields, and non-fatal myocardial infarction: 14,000 cases and 32,000 controls in the UK," 311 *Brit. Med. J.*, 471 (1995); Tang, J., et al., "Mortality in relation to tar yield of cigarettes: a prospective study of four cohorts," 311 *Brit. Med. J.* 1530 (1995).

Many cigarettes have ventilation holes that, when blocked, substantially increase exposure to the harmful constituents in smoke;

There is no such thing as a safe smoke, no matter what the "tar" and nicotine ratings are; and

People who are concerned about the health effects of smoking should quit.

The Commission also believes it is vital that there be a mechanism for implementing the recommended changes once the HHS review is completed. Although the Commission brings a strong, market-based expertise to its scrutiny of consumer protection matters, it does not have the specialized scientific expertise needed to design scientific test procedures. Indeed, when evaluating medical or other scientific issues, the Commission often relies on other government agencies and outside experts with more knowledge in the relevant areas. Therefore, in its July 1999 "Report to Congress for 1997, Pursuant to the Cigarette Labeling and Advertising Act," the Commission recommended that Congress consider giving authority over cigarette testing to one of the Federal government's science-based, public health agencies.

The Source of the Data in This Report

The FTC obtained the test results published in this report from the five largest cigarette manufacturers in the United States. These companies are: Brown & Williamson Tobacco Corporation; Liggett Group, Inc.; Lorillard, Inc.; Philip Morris, Inc.; and R.J. Reynolds Tobacco Company, Inc.

The Tobacco Institute Testing Laboratory (TITL), a private laboratory operated by the cigarette industry, conducted much of the "tar," nicotine, and carbon monoxide testing for these varieties.[6] The Commission collected the results of the TITL testing directly from the individual companies under compulsory process. Generic, private label, and other brands not widely available were not tested by TITL. The Commission obtained the information on these other brands directly from the manufacturers, pursuant to compulsory process. Results of such non-TITL testing are indicated by asterisks. The methodology, processes, and procedures that the five cigarette companies and TITL employ are identical to those the Commission, in its own testing lab, had followed in the past.[7] Harold Pillsbury, the former director of the FTC laboratory and currently a contractor to the Commission, had unrestricted access to the TITL laboratory to review TITL's testing methodology and protocols and to monitor the actual testing process. TITL provided the results to the respective cigarette companies, which then

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[6] In early 1999, the Tobacco Institute was disbanded pursuant to the multi-state tobacco settlement. The Tobacco Institute Testing Laboratory's facilities have continued operation under the name Tobacco Industry Testing Laboratory.

[7] The Commission decided in early 1987 to close its laboratory. The Commission found that closing the laboratory was necessary for several reasons: chiefly, the cost of the laboratory was significant, and the Commission would have had to commit significant additional funds to continue the program. The Commission was also persuaded that the information could be obtained from other sources, and other means were available to verify the accuracy of industry testing results.

provided TITL's data regarding their own brands to the Commission in response to compulsory process.

A Description of the Cigarette Test Method

The cigarettes were tested using the Cambridge Method. The Commission approved this methodology, and it has been the standard for cigarette testing since 1966. The testing was conducted under conditions originally prescribed by the Commission in 1967, 32 Fed. Reg. 11,187 (1967), as modified by the Commission's 1980 adoption of procedures for measuring carbon monoxide yields.[8] The conditions prescribed in the FTC's 1967 announcement were:

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[8] On April 13, 1983, the Commission announced it had determined that its testing methodology understated the measured deliveries for Brown & Williamson's Barclay cigarettes. Therefore, Barclay cigarettes were removed from the Commission's reports for "tar," nicotine, and carbon monoxide until a new, accurate methodology could be tested and adopted. The Commission found that there was also a significant likelihood that the same problem existed with two other Brown & Williamson varieties —Kool Ultra and Kool Ultra 100's.

On July 25, 1986, the Commission informed Brown & Williamson that as a result of a review of data presented by Brown & Williamson regarding "tar" and nicotine rating for two varieties of Barclay cigarettes with a new filter, the Commission would authorize, under certain conditions, the following legends for advertising purposes:

1. For Barclay King size:
   3 mg. "tar," .2 mg. nicotine avg. per cigarette as authorized by FTC.
2. For Barclay 100's:
   5 mg. "tar," .4 mg. nicotine avg. per cigarette as authorized by FTC.

1. Smoke cigarettes to a 23mm. butt length, or to the length of the filter and overwrap plus 3mm. if in excess of 23mm.;

2. Base results on a test of 100 cigarettes per brand, or type;

3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection";

4. Determine particulate matter on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture content;

5. Determine and report the "tar" yield after subtracting moisture and alkaloids (as nicotine) from particulate matter;

6. Report "tar" yield to the nearest whole milligram and nicotine yield to the nearest 1/10 milligram.[9]

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[9] The Commission's 1980 announcement, 45 Fed. Reg. 46,483 (1980), adopted a new testing methodology to determine cigarettes' carbon monoxide (CO) yields, and modified the existing specifications for determining nicotine yields:

1. Determine CO concentration using a 20-port smoking machine described by H.C. Pillsbury and G. Merfeld at the 32nd Tobacco Chemists Research Conference, October 1978;

2. The concentration of CO will be reported as milligrams per cigarette;

3. The present method for "tar" and nicotine determination will be modified to use the method

TITL reported, and the FTC's contractor confirmed, that an independent company under contract to TITL obtained the tested cigarette samples. Under its contract, this company purchased two packages of every variety of cigarettes in 50 geographical locations throughout the United States. If not all varieties were available in every location, one or more additional packages of cigarettes were purchased in the areas where the respective varieties were available. Cigarettes used in the test represented cigarettes sold in the U.S. at the time of purchase in 1996.

"Tar" and carbon monoxide ratings are rounded to the nearest milligram (mg.); those with 0.5 mg. or greater are rounded up, while those with 0.4 mg. or less are rounded down. The nicotine figures are rounded to the nearest tenth of a milligram. Those with 0.05 mg. or greater are rounded up; those with 0.04 mg. or less are rounded down.

Cigarette varieties with assay results for "tar" or carbon monoxide below 0.5 mg. per cigarette and for nicotine below 0.05 mg. are recorded in the table as <0.5, and <0.05, respectively. The table does not differentiate, nor are actual ratings provided for these cigarettes, because the currently approved testing methodology is not sufficiently sensitive to report these components at lower levels.

[Footnote continued from previous page]

described in an article entitled, "Gas Chromatographic Determination of Nicotine Contained on Cambridge Filter Pads," by John R. Wagner, et al., as presented at the annual meeting of the Association of Official Analytical Chemists, October 1978.

Table 1 of this report displays the average "tar" and nicotine values, calculated on a sales-weighted basis, from 1968 through 1996.[10]

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[10] Several issues should be noted with regard to the collection and tabulation of the data in Table 1. First, the underlying "tar" and nicotine ratings were obtained using smoking machine parameters (puff frequency, puff volume, etc.) that have not changed since they were first adopted in 1967. Although this consistency allows for comparison of the data over time, it also means that the test has not been modified to reflect possible changes in the way people smoke. For example, research indicates that smokers of lower rated cigarettes may tend to smoke them more intensively than they smoke cigarettes with higher ratings. Thus, while Table 1 suggests a decline in average "tar" and nicotine yields of cigarettes, this might not correspond to a similar reduction in "tar" and nicotine ingestion by smokers.

Second, the source of the data in Table 1 has changed over time. From 1967 through 1985, the Commission's laboratory provided practically all of the "tar" and nicotine ratings reported by the Commission. As noted *supra*, the Commission decided in 1987 to close its cigarette testing laboratory. Since then, the Tobacco Institute Testing Laboratory has continued to test most branded cigarettes; the companies report the results to the Commission pursuant to compulsory process and the Commission publishes the results. The companies test their own generic and private label cigarettes — which today represent a significant part of the overall cigarette market — brands not widely available, and new brands. While the companies are required to follow the FTC method for testing their cigarettes, staff does not directly monitor the company tests (as it does the TITL tests).

Third, although the Commission did not publish "tar" and nicotine reports during some of the years covered by Table 1, reliable data for those years are still available. Beginning with cigarettes sold in calendar year 1985, the Commission required the major cigarette companies to report annually the "tar", nicotine, and carbon monoxide ratings of all cigarettes they sold

[Footnote continued from previous page]

in the United States. These data were incorporated as needed into the database that was used to compute the sales-weighted "tar" and nicotine figures in Table 1.

Finally, when the FTC created its computerized database for "tar" and nicotine figures in 1982, various problems resulted in missing observations for between four and eight percent of the data for the years 1982 through 1984. Although these missing observations do not appear to generate systemic biases in the data, they suggest that the data in Table 1 may be more useful for gauging long term trends than for evaluating changes over very short time spans.

* * *

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For RELEASE: IMMEDIATE, Friday, March 25, 1966

The Federal Trade Commission today announced that it has sent identical letters to each of the nation's major cigarette manufacturers and to Mr. Robert B. Meyner, Administrator of The Cigarette Advertising Code, Inc., in regard to factual statements of tar and nicotine content on labels and in advertising of cigarettes.

The text of the letter is as follows:

Gentlemen:

The Cigarette Advertising Guides promulgated by the Commission in September 1955 provided that no representation should be made that "any brand of cigarette or the smoke therefrom is low in nicotine or tars ** when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant." On the basis of the facts now available to it, the commission has determined that a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation of such Guides, or of any of the provisions of law administered by the Commission so long as

(1) no collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method, as described in an article entitled "Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C.L. Ogg, which appeared in the Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964. It is the Commission's position that it is in the public interest to promote the dissemination of truthful information concerning cigarettes which may be material and desired by the consuming public.

By direction of the Commission.

Joseph W. Shea,
Secretary.

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For RELEASE: A.M., Thursday, October 26, 1967

The Federal Trade Commission today released an exchange of correspondence with the National Association of Broadcasters, setting forth the current enforcement policy in regard to statements of, and representations to, tar and nicotine content of cigarettes.

FEDERAL TRADE COMMISSION

NEWS

WASHINGTON, D.C. 20580

For further information call:
David H. Buswell
Office of Public Information
(202) 962-7144

FOR RELEASE After 8:30 A.M., Thursday, October 1, 1970

FTC DIRECTS TOBACCO INDUSTRY TO SUBMIT SPECIFICS ON DISCLOSING TAR AND NICOTINE CONTENT

The Federal Trade Commission has given cigarette manufacturers 30 days in which to tell the Commission exactly how they voluntarily intend to disclose tar and nicotine content in cigarette advertising. The FTC also postponed the October 15 hearings on its proposed trade regulation rule to require such disclosure.

The Commission, after considering the tobacco industry's plan, will set a new hearing date if it still feels a trade regulation rule would be in the public interest.

FTC Chairman Miles W. Kirkpatrick said: "The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable,

voluntary plan by the industry could be put into effect immediately."

The written submissions by the industry will be placed on the public record for 30 days for public comment.

FTC NEWS

Federal Trade Commission
Washington, D.C. 20580
(202) 326-2180

FOR RELEASE: NOVEMBER 24, 1998

FTC STATEMENT IN RESPONSE TO SENATOR FRANK LAUTENBERG'S LETTER

Senator Frank Lautenberg (D-NJ) today by letter forwarded a series of tobacco industry documents concerning the current method of testing tar and nicotine in cigarettes and asked the Commission to respond to them. The letter raises issues currently under review at the Commission.

In September 1997, the Chairman proposed revisions to its test methods. The proposal was made in response to concerns that the existing system does not accurately reflect actual human smoking behavior, which varies widely among smokers. The National Cancer Institute and the U.S. Food and Drug Administration stated in comments that new data suggests that the limited health benefits, previously believed to be associated with lower tar and nicotine cigarettes, may not exist. The agencies urged the Commission not to make changes in its existing tar and nicotine testing methodology until a complete review of that data could be completed.

The Commission said it will carefully review the documents submitted by Senator Lautenberg, as part of its reevaluation of the system and development of specific recommendations on the future of the FTC's test method. The Commission has formally requested that the Department of Health and Human Services assist it in reviewing the entire system.

While its review is underway, the Commission will conduct a consumer education campaign to alert smokers to the limitations of the current test method. Most importantly, the Commission said, if consumers are concerned about the health effects of smoking they should stop smoking. The consumer education effort to disseminate this message will begin shortly. Simply put, there is no such thing as a safe mod.

* * *

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For Release: A.M., Tuesday, August 1, 1967

FTC TO BEGIN CIGARETTE TESTING

The Federal Trade Commission, having been advised by the staff that the cigarette testing laboratory has satisfactorily completed its trial tests, has now issued directions to commence the first formal test, under the following conditions:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,

2. Base results on a test of 100 cigarettes per brand, or type,

3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"

4. Determine particulate on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture content,

5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter.

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

The Commission directed that the test cover approximately 50 of the major brands and types (many brands are sold as regular, and king size, or filter, etc.) and all brands for which any tar or nicotine statement appears on the label or in the advertising. With respect to the latter, one purpose of the test will be to determine the accuracy of such statement. Cigarettes for testing will be purchased on the open market in 50 localities throughout the United States.

In determining the foregoing procedures, the Commission relied substantially upon a record including written presentation by interested persons and oral testimony offered at a public hearing on November 30, 1966, which was held "to assist the Commission in determining what action, if any, should be taken in the public interest with respect to modifying or amplifying the Cambridge Filer Method . . . and the form in which test results should be expressed." At the hearing the Commission received numerous submissions reflecting a variety of modifications of the Cambridge Filter Method that have been adopted by different groups engaged in testing cigarettes. No test can precisely duplicate conditions of actual human smoking and, within fairly wide limits, no one method can be said to be either "right" or "wrong." The Commission considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable. Although minor variations may not make one testing method "better"

than another, the public interest requires that all test results presented to the public be heard on a uniform method used by all laboratories. Use of more than one testing method would produce different results which would only serve to confuse or mislead the public.

In determining the test method, the Commission has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the "average" smoker will draw from any particular cigarette.

No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the tar and nicotine quantity in the smoke generated.

Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarettes down in an ashtray where they burn between puffs; other smokers constantly hold

cigarettes in their mouths; others hold them between their fingers.

The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.

Accordingly, the test method should not be considered defective because it does not rely on "averages." There are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an "average" smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly "average" smoker. It should be emphasized that the Cambridge Filter Method itself did no purport to duplicate an "average" smoker. Rather, it was an amalgam of many choices—some of them arbitrary. For example, the temperature and humidity specified in that Method were not determined by reference to the "average" temperature or the "average" humidity at which people smoke cigarettes. There is no human smoker who smokes, and no cigarette that is smoked, under conditions that precisely duplicate either the Cambridge Filter Method in its original form or as

modified by the Commission. Thus, to reiterate, the uniform method determined by the Commission has as its purpose measurement of the tar and nicotine generated by cigarettes when smoked according to that procedure.

There has been a wide variation among testing groups on the question of how many cigarettes of each brand to test. Recommendations were made to the Commission to test as few as 60 cigarettes per brand and as many as 200. After studying the record and its laboratory's preliminary test results, the Commission has determined that testing 100 cigarettes per brand will provide valid and reliable results. However, the Commission intends to continue evaluating its test results, and on that basis many determine in the future to change the number of cigarettes tested or any other testing procedures as may be found necessary.

Chairman Dixon dissents from that part of the majority's direction on testing procedures with respect to butt length and has filed a separate statement which is attached.

Commissioner MacIntyre did not participate in the Commission's vote on this matter for the reason that he did not consider that the Commission's cigarette testing laboratory has satisfactorily completed its trial test so as to sufficiently and adequately advise the Commission regarding what is required in this respect.

Attached is: Separate Statement of Chairman Dixon.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant To The
Federal Cigarette Labeling and Advertising Act

June 30, 1968

* * *

INTRODUCTORY NOTE

Pursuant to the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §1331, the Commission is required to submit to Congress annual reports on the effectiveness of cigarette labeling, current practices and methods of cigarette advertising and promotion, and recommendations for legislation. This Report is the second of three reports required by the above Act. We shall refer to the first required report as "The 1967 Cigarette Report".

Much of the statistical data utilized in this second Report was submitted to the Commission by the cigarette manufacturers in the form of Special Reports filed pursuant to Commission Orders dated March 17, 1967 and March 26, 1968. The Special Reports include information concerning cigarette sales volume, advertising expenditures, specimen advertising, and data regarding extent of television advertising.

In June of 1967 the Federal Communications Commission ruled that the Fairness Doctrine was applicable to cigarette advertisements. This decision requires broadcasters to allot a significant portion of

time (relative to the number of cigarette commercials they broadcast) to programs or announcements concerning the health hazards of smoking. The Commission has obtained information from the three major television networks (ABC, NBC, CBS) regarding the extent to which these networks have aired such programs and announcements. Also, through the help of the National Clearinghouse for Smoking and Health of the Public Health Service, representative announcements pertaining to the hazards of smoking shown on the networks were obtained.

Public opinion on issues relevant to the subject matter of the Report has been tapped by Opinion Research Corporation, which conducted a national survey for the American Cancer Society. This survey consists of interviews of a national sample of approximately 2,226 men and women, aged 18 or older, conducted during the period May 13 - June 3, 1968. The results of the entire survey are set forth in Appendix A.

A Public Health Service survey, referred to as the "Public Health Survey", was published in full as Appendix B of the 1967 Report. It is discussed in part in the instant Report. Those portions discussed herein are set forth in full in Appendix B of the instant Report.

During 1967, the Commission established a cigarette laboratory which tested the tar and nicotine yields of the numerous brands and types of cigarettes marketed in the United States. Reports and tables issued by the Commission and reflecting the results of these tests appear in Appendix C.

The Commission has also carried on continuous monitoring of cigarette advertising and promotional

practices and scrutinized trade and industry publications, public health journals and the general press. Close liaison has also been maintained with experts in the field of smoking and health, in such organizations as the Public Health Service, American Cancer Society, Roswell Park Memorial Institute and Sloan-Kettering Institute for Cancer Research.

A. *The Effectiveness of Cigarette Labeling.*

Section 4 of the Federal Cigarette Labeling and Advertising Act requires that each package of cigarettes manufactured, imported or packaged for sale or distribution within the United States bear the following statement:

> "Caution: Cigarette Smoking May Be Hazardous to Your Health."

This warning statement must be placed "in a conspicuous place on every cigarette package" and "appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package."

The Act became effective on January 1, 1966, and to the knowledge of the Commission, all cigarette manufacturers are in compliance with the labeling provisions.[1]

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[1] Section 7 of the Federal Cigarette Labeling and Advertising Act grants authority to the Department of Justice to enforce the Act in the U.S. District Courts. Section 6 of the statute further states that violators shall be guilty of a misdemeanor and on conviction shall be subject to a fine of not more than $10,000. The Commission is not aware of any prosecutions for violation of the Act. Century 100's, manufactured by Lorillard Corporation, initially were marketed with the health warning statement appearing only on a disposable cellophane wrapper.

To the extent that cigarette sales may be viewed as an indication of the effectiveness of the warning statement, it is noteworthy that the sales of cigarettes increased from a then all time high of 539 billion units in 1966 to a new high of 544.7 billion units in 1967. This trend of increased cigarette sales continues. Total cigarette sales for the first two months of 1968 amounted to 85.1 billion units, an increase of 2.8 billion units over the first two months of 1967.

Total sales figures (in terms of cigarettes sold) for each month of the period January 1963 - February 1968 were obtained from the cigarette manufacturers. These figures, submitted to the Commission under oath, are as follows:

TOTAL CIGARETTE VOLUME BY YEAR
(BILLIONS)

Total Cigarette Sales Volume	
1963	524.9
1964	514.2
1965	530.3
1966	539.0
1967	544.7
(2 mos.) 1968	85.1

Filters	
Non Menthol	
1963	222.0
1964	230.0

[Footnote continued from previous page]

Prior to any challenge by the Department of Justice, Lorillard voluntarily agreed to place the health warning statement directly on the package.

1965	248.0
1966	265.0
1967	284.0
(2 mos.) 1968	45.0

Menthol

1963	83.0
1964	84.0
1965	93.0
1966	102.0
1967	109.0
(2 mos.) 1968	17.0

[Totals]

1963	305.0 (58%)
1964	314.0 (61%)
1965	341.0 (64%)
1966	367.0 (68%)
1967	393.0 (72%)
(2 mos.) 1968	62.0 (73%)

Non Filters

1963	220.0 (42%)
1964	200.0 (39%)
1965	189.0 (36%)
1966	172.0 (32%)
1967	152.0 (28%)
(2 mos.) 1968	23.0 (27%)

N.B. - The Subtotal Figures have been rounded off to the nearest billion and thus do not add up to precisely the overall total listed at the top of the chart.

TOTAL CIGARETTE VOLUME BY MONTH (BILLIONS)

Month	
Jan.	
1963	40.8
1964	36.9
1965	38.0
1966	41.2
1967	42.3
1968	43.5
Feb.	
1963	38.4
1964	32.2
1965	39.0
1966	39.8
1967	40.0
1968	41.6
March	
1963	40.2
1964	41.4
1965	46.4
1966	48.1
1967	47.0
1968	
April	
1963	43.6
1964	41.4
1965	47.4
1966	40.1
1967	44.9
1968	

May	
1963	48.4
1964	41.5
1965	40.0
1966	46.4
1967	46.7
1968	
June	
1963	42.1
1964	48.5
1965	48.1
1966	49.0
1967	50.2
1968	
July	
1963	48.2
1964	46.8
1965	45.0
1966	44.4
1967	47.6
1968	
Aug.	
1963	46.6
1964	46.0
1965	46.6
1966	50.8
1967	49.4
1968	
Sept.	
1963	43.7

1964	45.5
1965	46.4
1966	46.3
1967	43.5
1968	

Oct.

1963	44.8
1964	42.4
1965	41.7
1966	43.2
1967	44.3
1968	

Nov.

1963	42.2
1964	43.9
1965	45.9
1966	45.7
1967	45.1
1968	

Dec.

1963	46.3
1964	47.8
1965	45.7
1966	44.3
1967	43.9
1968	

N.B. - The monthly figures have been rounded off to the nearest billion and thus do not necessarily add up precisely to the annual total.

An examination of monthly sales totals fails to disclose any correlation between the incidence of the warning statement and sales trends. It will be recalled that the warning statement went into effect on January 1, 1966. Nevertheless, in each of the first three months of 1966, sales surpassed those in the equivalent months of the year prior.

As concerns all of 1966, only in April, July, September, November and December were sales below those for the equivalent months in 1965 and downturns in these months (of 1966) were insufficient to offset an overall increase for the year of 8.7 billion units. Similarly in 1967, only in March, August, September, November and December were sales below those for the same months in 1966 and downturns in these months were insufficient to offset an overall increase for the year of 5.7 billion units. Finally, January and February 1968 sales exceeded January and February 1967 sales, and by greater margins than did January and February of 1967 sales exceed those of January and February of 1966.

Thus annual sales are on the increase but monthly sales (of one year compared to another) do not always increase. We know of no events which explain the seemingly random nature of these monthly upturns and downturns.

Statistics on the per capita consumption of cigarette for persons 18 years of age and over indicate that in 1967' consumption decreased somewhat for the first time since 1964. In 1963 the per capita consumption of cigarettes for persons 18 years of age and over amounted to 4345 units. Consumption declined in 1964 by 151 units to 4194 units, began to rise again in 1965 by 64 units to 4258 units, and rose again in 1966 by 29 units to 4287

units. Consumption in 1967 appears to have declined by 7 units to 4280 units.[2]

It is possible that this first decrease in recent years in the per capita consumption of cigarettes (other than the one occurring in 1964 occasioned by publication of the Surgeon General's Report[3]) is due to the presence of the warning statement. If so, it is difficult to explain why this same warning statement failed to accomplish a decline in 1966 per capita consumption. On the other hand, greater awareness of the dangers of cigarette smoking engendered by health education programs[3a], anti-cigarette commercials aired pursuant to the FCC Fairness Doctrine[4], and publication in mid-1967 of the

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[2] *Tobacco Situation*, U.S. Department of Agriculture, March 1963, page 7.

[3] On January 11, 1964, the Public Health Service issued *Smoking and Health - Report of the Advisory Committee to the Surgeon General of the Public Health Service*, U.S. Department of Health, Education, and Welfare, Public Health Service Publication No. 1103. As noted on page 6 of the Commisson's 1967 Cigarette Report, the decline in cigarette sales in 1964 was probably due to the publicity that accompanied the publication of the aforementioned Report on Smoking and Health.

[3a] In a speech entitled, Current Smoking among Teenagers, presented on March 26, 1968, Dr. Daniel Horn, Ph.D., Director, National Clearinghouse for Smoking and Health, stated that a national survey established that "there is an overwhelming awareness among youth at each year of age from 12 through 18 that cigarette smoking is a health hazard".

[4] The Federal Communications Commission ruled on June 2, 1967 that a broadcaster who carries advertising which promotes the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of the smoking and health issue.

"Second Surgeon General's Report"[5] may have served to make the meaning of the current warning statement more explicit[6] and hence more efficacious.

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[5] *The Health Consequences of Smoking - A Public Health Service Review: 1967*, U.S. Department of Health, Education, and Welfare, Public Health Service Publication No. 1696, August 1967.

[6] Certain health consequences of smoking have been described by the Public Health Service as follows:

1. One-third of all deaths among men, aged 35-60, would not have occurred as early as they did if cigarette smokers had the same death rate as non-smokers. The death rate per one hundred thousand for smokers is approximately twice that of non-smokers. *What We Know about Children and Smoking*, U.S. Department of Health, Education, and Welfare, Public Health Service Publication No. 1711, April 1968. *The Facts About Smoking and Health*, U.S. Department of Health, Education, and Welfare, Public Health Service Publication No. 1712, January 1968, page 4.
2. A substantial portion of earlier deaths would not have occurred if those affected had never smoked. See footnote 5, *Supra.*, page 3.
3. It has been estimated that more than 46,000 men and nearly 9,000 women will die of lung cancer. Studies have shown that the average smoker is 10 times more likely to develop lung cancer than a non-smoker, and a heavy smoker 20 times more likely. *Cancer of the Lung*, U.S. Department Health, Education, and Welfare, Public Health Service Publication No. 1173, 1968, pages 2-3.
4. Cigarette smoking is the most important cause of bronchopulmonary diseases and the risk of death from bronchitis and emphysema is six times greater for smokers than non-smokers. *What We Know about*

This explanation derives support from a comparison of results of two national surveys — the Public Health Service (PHS) Survey taken in 1966 and the Opinion Research Corporation American Cancer Society (ORC-ACS) Survey taken in 1968.[7] In 1966, 87% of those interviewed thought that the warning statement would not affect them in any way and 12% thought it would in some way.[8] The ORC-ACS Survey indicates that in 1968, 80% stated that the warning statement had not affected them in any way, but 17% indicated that it had.[9] This 17% stated they had been affected as follows: 2% quit; 8% cut

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[Footnote continued from previous page]

Children and Smoking; *The Facts about Smoking and Health*, page 6.

5. A 70% higher death rate exists for smokers from coronary heart disease than for non-smokers. *The Facts About Smoking and Health*, page 6.

6. Since smokers have a higher disability rate than non-smokers, it is estimated that 77 million work days are lost anually due to illnesses associated with smoking. See Footnote 5, *Supra.*, page 24.

[7] Results from both the 1966 Public Health Survey and the 1968 Opinion Research Corporation - American Cancer Society Survey will be frequently compared in this Report. Although the phrasing of some of the questions will differ slightly, the subject matter covered by many questions in both surveys are the same. All questions discussed herein are set forth in full in Appendices A and B, and when comparisons between the two surveys are made in the text, these Appendices should be, consulted for the exact phrasing of the question.

[8] Public Health Survey, Appendix B, page 2, question 3.

[9] Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 1, question 2.

down; 2% didn't start; and 5% were affected in some other way or had no opinion.[10]

It cannot be said that the current warning statement has thus far had a significant effect when cigarette sales are at an all time high, when upturns and downturns in monthly sales move in random fashion, and when 80% of those interviewed stated they have been unaffected in any way by it. However, the fact that per capita consumption has decreased slightly for the first time since publication of the Surgeon General's Report in 1964 and the possibility that 5% more persons in 1968 than in 1966 have been affected in some way by the warning indicates a latent potentiality for warning statements.

Comparing results of the PHS and ORC-ACS Surveys, it is noted that in 1968, 48% preferred a more strongly worded statement than the current warning, 29% preferred the current warning statement and 14% would dispense with any warning.[11] The more strongly worded statement preferred by the 48% was "Warning: Cigarette Smoking Is Dangerous To Health And May Cause Death From Cancer And Other Diseases." By contrast in 1966, 59% thought the current warning statement "just about right" and only 22% thought it "too weak".[12] There has thus been a radical shift

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10 Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 2, question 3.

11 Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 2, question 4.

12 Public Health Survey, Appendix B, page 1, question 1.

toward support of the more strongly worded statement.

In 1966, 1% believed the current warning statement might induce smokers to quit and 14% believed it might induce some of them to quit.[13] In 1968, 3% believed the aforementioned stronger warning statement might induce all or most smokers to quit and-25% thought it might induce some to quit.[14] There is thus appreciably more optimism for the efficacy of the more strongly worded statement. We think the stronger statement is also the more accurate description of the risks that are run.

In both 1966 and 1968 a near consensus supported requiring the warning statement in advertising as well as on packages — 69% were in favor in 1966 and 66% in 1968.[15] We believe that the conspicuous disclosure of the warning statement in connection with 300 million dollars worth of annual cigarette advertising could not help but increase its effect.

B. *Current Practices and Methods of Cigarette Advertising and Promotion.*

1. *Cigarette Advertising and Promotional Expenditures by Media.*

Cigarette advertising and promotional expenditures for all media reached a record 312

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13 Public Health Survey, Appendix B, page 1, question 2.

14 Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 2, question 5.

15 Public Health Service Survey, Appendix B, page 2, question 4; Opinion Research Corporation - American Cancer Society Survey, Appendix A, page 3, question 6.

million dollars in 1967. Television expenditures rose to 226.9 million (a 15% increase over 1966) and accounted for 73% of all moneys spent, thereby continuing the trend reported in the 1967 Report that television is way and away the principal recipient of the cigarette advertising dollar. Newspapers and magazines are the second most utilized media, followed by direct promotions. A most significant change from 1966 is the sharp decline (44%) in radio expenditures. Developed below is a chart based on data supplied to the Commission by the cigarette manufacturers.

Year	
1963	
TV	151.7
Newspaper Magazines	45.6
Radio	31.6
Direct	13.2
Other	7.4
Total	249.5

Year	
1964	
TV	170.2
Newspaper Magazines	45.2
Radio	25.5
Direct	14.6
Other	5.8
Total	261.3

Year	
1965	
TV	175.6
Newspaper Magazines	41.9
Radio	24.8

Direct	14.7
Other	6.0
Total	263.0

Year
1966

TV	198.0
Newspaper Magazines	43.4
Radio	31.3
Direct	17.9
Other	6.9
Total	297.5

Year
1967

TV	226.9
Newspaper Magazines	41.2
Radio	17.5
Direct	20.3
Other	6.0
Total	311.9

Year
1968 (Jan-Feb)

TV	38.4
Newspaper Magazines	7.2
Radio	1.5
Direct	3.4
Other	.7
Total	51.2

2. *Cigarette Advertising and Promotional Expenditures by Type and Size of Cigarette.*

Expenditures on advertising filter cigarettes increased from 75% (in 1966) to 95% (in 1967) of total cigarette advertising expenditures. Sales of filter cigarettes increased from 68% (in 1966) to 72% (in 1967) of all cigarette sales. This trend, whereby disproportionately more in relation to sales is spent to promote filter cigarettes, with the result that the market shares of filter cigarettes increases each year, has continued since at least 1963.

This same trend is beginning to appear in the case of 100 millimeter cigarettes. In 1967, 39% of total cigarette advertising outlays were spent in generating this product's 9% of total cigarette sales. In the first two months of 1968, 41% of the total cigarette advertising budget went for the promotion of 100 millimeter cigarettes at a time when they accounted for only 12% of the market. On occasion, the cigarette companies are thus willing to spend promotional moneys in an effort to alter market demand.

A more comprehensive statement of filter cigarette and 100 millimeter cigarette market share and advertising data follows:

Year	1963
Filter Cigarettes Market Share (%)	58
Filter Advertising - % Total Expenditures	75
100 mm Cigarettes Market Share (%)	—
100 mm Advertising - % Total Expenditures	—

Year	
1964	
Filter Cigarettes Market Share (%)	61
Filter Advertising - % Total Expenditures	78
100 mm Cigarettes Market Share (%)	—
100 mm Advertising - % Total Expenditures	—

Year	
1965	
Filter Cigarettes Market Share (%)	64
Filter Advertising - % Total Expenditures	77
100 mm Cigarettes Market Share (%)	—
100 mm Advertising - % Total Expenditures	—

Year	
1966	
Filter Cigarettes Market Share (%)	68
Filter Advertising - % Total Expenditures	75
100 mm Cigarettes Market Share (%)	—
100 mm Advertising - % Total Expenditures	—

Year	
1967	
Filter Cigarettes Market Share (%)	72
Filter Advertising - % Total Expenditures	95
100 mm Cigarettes Market Share (%)	09
100 mm Advertising - % Total Expenditures	39

Year	
1968 (Jan-Feb)	
Filter Cigarettes Market Share (%)	73
Filter Advertising - % Total Expenditures	95
100 mm Cigarettes Market Share (%)	12
100 mm Advertising - % Total Expenditures	41

Cigarette sales volume may be broken down to reflect sales by size as follows:

TOTAL CIGARETTE SALES VOLUME BY SIZE
(BILLIONS)

	1967	*1968* (2 mos.)
Regular (68-70mm)	76.0 (14%)	11.0 (13%)
King (80-85mm)	417.7 (77%)	63.9 (75%)
Long (95-101mm)	50.9 (9%)	10.2 (12%)

3. *Cigarette Advertising: The Size and Composition of Its Audience.*

In this section, discussion is limited largely to television advertising. As indicated previously, television advertising accounted for 73% of the money spent in 1967 to advertise and promote cigarettes.

For the months of January 1967 and January 1968, cigarette manufacturers provided the Commission with the names of programs sponsored in whole or in part by cigarette products; the number of cigarette commercials aired per program; and an estimate of the number of exposures, *i.e.* viewers for each program.

From this exposure data, the total number of exposures resulting from the airing of all cigarette commercials on each program was calculated. Thus,

if program X appeared four times in January of 1967, aired five cigarette commercials during the month, and had an estimated average audience of 10,000,000 (per program showing), then the total number of exposures resulting from the airing of cigarette commercials on that program during that month equals 5 times 10,000,000 or 50,000,000.

Also, the total number of programs having cigarette commercials which were aired during the months in question, the total number of cigarette commercials appearing on those programs, and the total number of exposures resulting from the airing of all of those commercials was calculated. This information and a breakdown of the exposure data according to age groups appears in Appendix D.

Finally, the cigarette companies provided data reflecting the total number of exposures, broken down according to age groups, which resulted from spot television cigarette commercials aired during January 1967 and January 1968. This information appears in Appendix E.

As can be seen from Appendix D, 73 programs were sponsored in January of 1968 which appeared 296 times during the month and contained a total of 501 cigarette commercials. Complete exposure data was obtained with respect to 69 of these programs (which appeared 290 times and contained 482 cigarette commercials). Seventy-six programs were sponsored in January of 1967 which appeared 261 times during the month and contained 450 cigarette commercials. Complete exposure data was obtained with respect to 66 of these programs (which appeared 243 times and contained 416 cigarette commercials).

Based upon complete exposure data as it appears in Appendices D and E, the following chart

has been prepared to indicate the total number of exposures and rate of exposure that resulted from the above noted television advertising.

All U.S. Inhabitants

Period --67	
Network (NW) or Network & Spot (NWS)	NW
Total Exposures (Billions)	9.1756
Population (Millions)[16]	196.920
Exposures Per Person	46.60
Period --68	
Network (NW) or Network & Spot (NWS)	NW
Total Exposures (Billions)	10.4799
Population (Millions)	199.118
Exposures Per Person	52.63
Period --67	
Network (NW) or Network & Spot (NWS)	NWS
Total Exposures (Billions)	11.7164
Population (Millions)	196.920
Exposures Per Person	59.50

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16 *Population Estimates* (Series P-25, No. 385), February 14, 1968, Bureau of Census, U.S. Department of Commerce, pages 11-12, and 14.

Period	
--68	
Network (NW) or Network & Spot (NWS)	NWS
Total Exposures (Billions)	13.2908
Population (Millions)	199.118
Exposures Per Person	66.75

Teens (12-17)

Period	
--67	
Network (NW) or Network & Spot (NWS)	NW
Total Exposures (Billions)	.9717
Population (Millions)	22.019
Exposures Per Person	44.13

Period	
--68	
Network (NW) or Network & Spot (NWS)	NW
Total Exposures (Billions)	1.0833
Population (Millions)	22.528
Exposures Per Person	48.08

Period	
--67	
Network (NW) or Network & Spot (NWS)	NWS
Total Exposures (Billions)	1.2228
Population (Millions)	22.019
Exposures Per Person	55.53

Period	
--68	
Network (NW) or Network & Spot (NWS)	NWS
Total Exposures (Billions)	1.37143
Population (Millions)	22.528
Exposures Per Person	60.88

Children (2-11)

Period	
--67	
Network (NW) or Network & Spot (NWS)	NW
Total Exposures (Billions)	1.4028
Population (Millions)	41.131
Exposures Per Person	34.10

Period	
--68	
Network (NW) or Network & Spot (NWS)	NW
Total Exposures (Billions)	1.5703
Population (Millions)	41.064
Exposures Per Person	38.24

Period	
--67	
Network (NW) or Network & Spot (NWS)	NWS
Total Exposures (Billions)	1.61508
Population (Millions)	41.131
Exposures Per Person	39.27

Period --67	
Network (NW) or Network & Spot (NWS)	NWS
Total Exposures (Billions)	1.82742
Population (Millions)	41.064
Exposures Per Person	44.50

The chart reveals that in one month, January of 1968, televised cigarette commercials resulted in an estimated 13.3 *billion* exposures. This means that on the average, each U.S. inhabitant viewed 66.75 televised cigarette commercials in one month.

The teenage exposure rate was reported as being somewhat higher than the inhabitant (without distinction of age) rate in the 1967 Cigarette Report.[17] Data obtained this year does not bear this out. During January 1968 there were 1.37 billion exposures among teenagers (12-17) and 1.83 billion exposures among children (2-11) for exposure rates of 60.88 per teenager and 44.5 per child, as opposed to 66.75 per inhabitant. It would seem that the teenage rate is not appreciably lower than the inhabitant rate and that the rate among children is low only

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[17] It was noted on page 13 of the Commission's 1967 Cigarette Report that during a one week period each U.S. inhabitant aged 13-17 viewed on the average 7.8 programs ailing cigarette advertising compared to 5.9 programs viewed by persons without distinction of age. Data used to determine television exposure rates for the 1968 Report was obtained for a one month period, the teenage classification was based on persons aged 12-17, and the source for this information was the cigarette manufacturers. The source of exposure data for the 1967 Report was *Network Television Target Audience*, published by American Research Bureau, Inc.

when compared to a very high adult rate. Certainly the exposure rate among children is not low in any absolute sense.

Indeed, the rate of exposure among children may be the most significant statistic of all in view of the findings of two recent surveys on smoking patterns of school aged children. Based upon a survey of school children in the Rockford-Winnebago County area of Illinois, it was found that 14% of seventh graders smoked three or more packs of cigarettes a week.[18] Based upon a survey of two school districts close to Portland, Oregon, the conclusion was reached that

> "For both boys and girls in both districts there is a generally steady parallel increase from kindergarten through ninth grade in the percentage of students reporting trying a cigarette. It is particularly interesting to note that from ninth grade through twelfth the slope flattens, indicating that by the time they enter high school almost all students who will try a cigarette by twelfth grade have already tried by the time they enter high school".[19]

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18 *A Replication of the Horn Study on Youth Smoking in 1967*, study presented before the Joint Session of the American School Health Association and the School Health Session, American Public Health Association, October 26, 1967, Miami Beach, Florida, page 8.

19 *Cigarette Smoking and School Children: The Beginning of a Longitudinal Study*, presented at the 1967 National Research Conference on Smoking and Health, May 1-3, 1967, Madison, Wisconsin, page 28.

These studies indicate that attempts to persuade youth to smoke can be effective, particularly so among pre-teens.

The following language appears in the 1967 Cigarette Report: "it would appear difficult to advertise on radio without reaching a substantial teenage audience."[20] The reduction of cigarette advertising expenditures on radio from $31.5 million in 1966 to $17.5 million in 1967 (a reduction of 44%) would, if standing alone, serve to reduce the overall teenage exposure rate. However, televised cigarette advertising has been going in the opposite direction; the teenage exposure rate increased from 55.53 in January 1967 to 60.88 in January 1968 (a 9.6% jump) and the rate among children increased from 39.27 in January 1967 to 44.5 in January 1968 (a 13.3% jump).

The superficiality of a standard that would bar programs having 45% or more of the audience aged 21 or under is that it does not take cognizance of the mass child and teenage audiences which exist irrespective of questions of proportionality. There were 24 programs in January 1967 and 25 programs in January 1968 each of which resulted in 25 million exposures to cigarette commercials among children during the month. As concerns teenagers, there were twelve such programs during each month.[21]

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20 *1967 Cigarette Report*, Federal Trade Commission, June 30, 1967, page 13.

21 *Programs with 25 million teenage exposures:*

1967 (in thousands)	*1968 (in thousands)*
Big Valley – 36,310	Tuesday Night Movie – 41,770

[Footnote continued from previous page]

Sunday Night Movie – 43,760 Wednesday Night Movie – 54,880

Wednesday Night Movie – 25,120 Saturday Night Movie – 39,250

Invaders – 50,400 Sunday Night Movie – 44,920

Rat Patrol – 26,560 The Virginian – 31,460

Friday Night Movie – 36,840 Cimarron Strip – 27,540

Thursday Night Movie – 28,220 It Takes a Thief – 33,210

Family Affair – 25,600 Family Affair – 38,400

Saturday Night Movie – 52,920 CBS News-Cronkite - 27,890

Dragnet – 26,080 Huntley & Brinkley – 27,780

The Virginian – 33,350 Smothers Brothers – 43,920

NFL – 39,300 Gunsmoke – 30,220

Programs with 25 million child exposures:

1967 (in thousands) *1968 (in thousands)*

Big Valley – 27,070 Rat Patrol – 35,270

Sunday Night Movie – 39,040 Tuesday Night Movie – 46,110

Wednesday Night Movie – 28,030 Wednesday Night Movie – 62,640

Invaders – 68,700 Friday Night Movie – 36,550

Love on a Rooftop – 37,200 Saturday Night Movie – 49,160

Rat Patrol – 36,620 Sunday Night Movie – 43,880

Felony Squad – 25,200 The Virginian – 61,740

That Girl – 26,640 Cimarron Strip – 51,460

Friday Night Movie 62,350 Petticoat Junction – 35,050

Gunsmoke – 29,090 It Takes a Thief – 32,040

Beverly Hillbillies – 52,910 Hogan's Heroes – 32,700

Evening News-Cronkite – 57,300 Family Affair – 55,500

During January 1967 and 1968, each of three programs resulted in monthly child and teenage exposures to cigarette commercials of well in excess of 100 million.[22] Yet apparently none of these programs violated the 45% ban.

It is noted that televised cigarette commercials appearing on sports programs resulted in 676,450,000 exposures during January 1967; this figure increased to 769,960,000 during January 1968.[23]

The public is apparently surfeit regarding the extent of cigarette advertising on radio and

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[Footnote continued from previous page]

Family Affair – 37,100	Jackie Gleason – 48,500
Hogan's Heroes – 36,300	Red Skelton – 53,700
Jackie Gleason – 42,000	He & She – 32,500
Mission Impossible – 29,800	CBS News-Cronkite – 62,480
Red Skelton – 56,600	ABC Evening News – 40,338
Saturday Night Movie – 76,080	Huntley & Brinkley – 43,200
Tuesday Night Movie – 36,200	Smothers Brothers – 52,450
Dragnet – 28,960	Avengers – 32,520
The Virginian – 39,300	Mannix – 27,450
Occasional Wife – 30,730	Gunsmoke – 61,740
Star Trek – 25,140	Wild Wild West – 29,450
NFL – 31,700	Guns of Will Sonnett – 29,850
	Ed Sullivan – 38,500

[22] The three programs are: Invaders (1967) 119,100,000; Saturday Night Movie (1967) 129,000,000; and Wednesday Night Movie (1968) 117,520,000.

[23] Apendix D, pages 4, 7.

television. The ORC-ACS Survey reveals that an absolute majority (51% v. 40%) favor placing controls on this advertising, with 22% favoring restrictions as to hours or certain programs and 29% favoring an outright ban.[24]

4. *Current Advertising and Promotional Themes.*

In 1964[25] and again in 1967[26], the Commission found that three principal themes dominate cigarette advertising. These are that (1) smoking and particularly the taste derived from it are satisfying; (2) smoking is associated with that which is desirable or even good; and (3) it is an activity relatively free of hazard.

A review of specimen 1967 and early 1968 advertising, obtained through the Commission's continuous monitoring program and also directly from cigarette advertisers, reveals that these three themes, the "Satisfaction" theme, the "Associative" theme, and the "Assuaging of Anxiety" (relative to the danger of cigarette smoking) theme continue to dominate.

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24 Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 5, question 10.

25 *Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule*, Federal Trade Commission, June 22, 1964 (hereinafter cited as the Trade Regulation Rule), pages 52-57.

26 *1967 Cigarette Report*, pages 14-22.

The Satisfaction Theme

Advertising in 1966 featured the phrase "mild taste" to describe the satisfactions obtained from smoking and also as a euphemism to cloak the dangers of cigarette smoking. The euphemistic effect derives from the possibility that the public assumes "mild" tasting cigarettes to be less strong, *i.e.* lower in tar and nicotine than many cigarettes, and hence less hazardous. The ORC-ACS Survey, testing opinion on whether "using a 'mild' — 'milder' — or 'mild-tasting' cigarette reduces the health risk in cigarette smoking", indicates that the vast majority interviewed does not believe in a connection between "mild" and "less hazardous", but that 6% strongly do and 15% mildly do.[27]

The frequency of the use of the adjective "mild" to describe cigarette taste declined markedly in 1967 and most brands using it (*e.g.* Domino, Parliament, Tareyton) are not among the highest in tar and nicotine content. However, "mild" was used to describe some cigarettes not even relatively low in tar and nicotine (*e.g.* Pall Mall, ranging between 22 - 28 mgs. of tar according to type and Colony, ranging between 26-28 mgs. of tar according to type[28]).

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[27] Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 4, question 8.

[28] As indicatred in Appendix C:

Brand	*Type*	*Tar*
Pall Mall	king size, non filter	27.1
Pall Mall	95 mm, filter (hard pack)	28.1
Pall Mall	100 mm, filter	23.1

As in 1966, cigarettes are still supposed to satisfy: "the most satisfying taste" (Kent) and "real taste, satisfies longer" (Camel). However, descriptions of cigarette taste have become less bland, more lively — "a remarkably good tasting cigarette" (Chesterfield), "a good round flavor" (L&M), "a full tobacco flavor" (Lark), "the real tobacco taste" (Raleigh), "a taste that challenges comparison" (Pall Mall), "generous in flavor" (Colony), "elegant taste" (Domino), "full, rich and country mellow" (Half and Half). It is possible that advertisers feel less defensive about their product.

Some taste descriptions are even sensuous — "the good feel of a built-in mouth piece" (True) and "soft tasting" (Lucky Strike). However, the tried and true has not passed from the scene — "best taste in filters" (L&M), "best taste in a filter cigarette" (Old Gold), "best taste in filter cigarettes" (Winston).

Many advertisers use the taste theme to lead into other matters. True, the contemporary cigarette, has "the right now flavor". L&M's "balanced blend" that gives "good taste from end to end" challenges the likelihood that the act of smoking unbalances cigarette taste. This likelihood is based upon the fact that a burning cigarette deposits tars in the unsmoked portion and when that

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[Footnote continued from previous page]

Pall Mall	95 mm, filter menthol (hard pack)	25.9
Pall Mall	100 mm, filter menthol	22.3
Colony	100 mm, filter	28.1
Colony	100 mm, filter menthol	26.3

portion is smoked, it emits its own tars plus the deposited tars.[29] Viceroy's "good taste never quits" because it is "right any time of the day" echos a theme implicit in much advertising of menthol cigarettes — that while the continuous passage of the product of burning leaves over the human tongue can heat and dull taste buds, the advertised product somehow circumvents this.

The 1967 Cigarette Report ascertained that "cool", "fresh" and "refreshing" were the constant adjectives used to describe menthol cigarette taste.[30] This continues to be the case. Newports, Chesterfields, Kools, Winstons and Salems all are said to be fresh; Kools, Lucky Strikes and Pall Malls

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29 This statement is based on the following studies:

A. "Some Practical Aspects of the Smoking-Cancer Problem", Ernest L. Wynder, and Dietrich Hoffman, *New England Journal of Medicine*, March 1960, pages 6, 11.

B. "Present Status of Laboratory Studies on Tobacco Carcinogenesis", Ernest L. Wynder and Dietrich Hoffman, *Acta Pathologica Et Microbiologica, Scandinavica*, 1961, page 120.

C. "The Role and Action of Environmental Agents in the Pathogenesis of Lung Cancer", Paul Kotin and Hans L. Falk, *Cancer*, March - April 1960, page 254.

D. "The Composition of Cigarette Smoke: Studies on Stubs and Tips", A. J. Lindsey, *British Journal of Cancer*, 1959, page 196.

E. "Variations in Amounts of Tobacco Tar Retrieved from Selected Models of Smoking Behavior Simulated by Smoking Machine", Saxon Graham, Shirley Crounch, Mortin L. Levin, and Fred G. Bock, *Cancer Research*, August 1963, page 1026.

30 *1967 Cigarette Report*, page 16.

are cool; and Newports and Salems refresh. Other adjectives include "smooth" ("smoother more refreshing" — Newport), "light" ("light touch, right touch" — Belair), and "bright" ("the brighter taste" — Chesterfield). "Soft" is becoming popular — "a soft, fresh taste" (Capri), "menthol soft taste" (Salem), and "the taste is so soft" (Lucky Strike).

As previously indicated, menthol cigarette advertising frequently features a taste with staying. power bordering on the therapeutic: "smooth and refreshing day after day" (Newport), "a full fresh taste every time" (Chesterfield), and "every Kool tastes first cigarette fresh".

The Associative Theme

We all wish we were something we are not or at least possessed more than we have. The trick for cigarette advertisers is to associate smoking with those myriad of desirable and good things which lie just beyond our reach. For if we can be persuaded that somehow the cornucopia of our desires is associated with smoking, how quickly those desires can be realized, since cigarettes are readily available.

Many appeals are made. Some go no further than basic sentiments. Thus, Viceroy advertisements relate to a man's world (men lay water mains, spin records, have massages). Tareyton ads also relate to this world, typically depicting a man with cigarette in hand and one eye blacked, engaged in masculine pastimes, *e.g.* playing poker.[31] Women are generally excluded unless they

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[31] Tareyton's most recent advertising features attempts to attach the Tareyton filter to other cigarettes.

go along with the gang, which means smoking Tareytans and wearing the black eye of the unswitchables.

Men who are men are not reticent about being liked by women. Pall Mall ads often close on the face of a pretty woman cooing some appropriate remark such as "smooooth" or "Mmm", as she indicates she is won over to Pall Malls and possibly to a man having the good sense to offer her one. Half and Half is very direct — "two reasons why men like Half and Half cigarettes. . . 1. made from America's mellowest pipe tobacco. 2. women like to be near its pipe tobacco aroma . . . the man's cigarette that gets to the girls". It is no wonder that the manufacturer predicts "you'll never be quite satisfied with any other cigarette again".

The athletic events so prevalent in 1966 were scarcely seen in 1967, although as previously noted, the number of exposures from cigarette commercials aired on sports programs increased. Social events continued to abound but with less frequency. There was square dancing (Kents), barbecuing (Chesterfield 101s), horse shows (Winston and Pall Mall), along with life at the marina and life at the bus stop (Pall Mall). In Winston ads, jolly people with propensities for continuous smoking and hedonism ("flavor your fun with Winston", "the good time for the good taste of Winston", "the flavor that goes with fun") predominate. In a typical ad, these good folk pop on and off a San Francisco cable car, smoking, singing and smiling, finally heading down hill toward the Golden Gate and the setting sun. Even in Marlboro Country, the solitary cowpokes close the day around the chuck wagon for a few words and some good hard pulls on the old cigarette.

The ads are not without their allusions to achievement –"me the chief engineer" (L&M). Not only are Kent 100s an achievement in themselves, "gilt edged investment in great taste", they are also the cigarette for the successful –"Announcing the rich guy's cigarette". "We call them Kent Expensives because they cost more. Our expensive Kent paper is filled with our expensive tobacco tipped with our expensive filter and imprinted with our expensive rich type letters . . . when you smoke Kent Expensives act wealthy. And always remember: Behind every Kent Expensive stands a rich guy getting his money's worth." Cigarettes can be used to cement if not achieve friendship — "start your day with a pack of True . . . you never know when you might meet a friend. Shouldn't his brand be True tool!" Furthermore, cigarettes can achieve a kind of time machine effect in that they can provide us with more time: "extra long, so you can spend a little more time in Marlboro Country" and "What you gonna do . . . with the extra time you get Smokin' new Super King Size Salem Cigarettes".

The 1967 Cigarette Report noted the possibility that cigarette advertisers play important roles as social arbiters.[32] Exposition if not outright espousal of values has become a prominent feature in current cigarette advertising. Thus,

> *Be up-to-date*: "You're a part of the right now . . . everything about True says right now". *Avoid Alienation*: "don't go out without your Lark pack. . . if you're ready to show your pack, the Lark truck will see

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32 *1967 Cigarette Report*, page 16.

you" and "you too, join the crowd that smokes the number one in 'good taste'. . . Winston". *Persevere*: "not long ago if you smoked a reduced tar and nicotine cigarette you were pretty much alone in the world . . . you're not alone anymore" (True).

Be aristocratic: with a connoisseur's eye, Sir Arthur Smith trades his Rolls Royce for a pack of Newports, "The smoothest (taste) that's ever been bred". Chesterfield filters are savored by a wine taster who pronounces their taste "suave, aristocratic, great finesse". *Be patriotic* (and egalitarian): "afterall, in this country, it's what you are, not who you are that counts" (Century 100s). *Be cosmopolitan:* "the first filter cigarette to combine rich American taste with handsome European styling" (Half and Half).

Presumably not all the values depicted represent those of the advertisers, *e.g.* "I bold, brawny, Bob Bevans am a flavor grabber" (L&M). In an L&M commercial taking place aboard ship, the object is to "see how many [L&M's] are grabbed in the next 50 seconds". In one commercial, the taste of Kents drives a man to larceny but in another delivers him from a career of gambling.

Certain commercials seek to associate their product with a mood. There is the "male whimsy" of Camel advertising, in which men with wondering souls travel from Kilimanjaro to Maine, a mile and yet a mile and a half onward, buying Camels and displaying holes in their soles.

As has been duly noted, cigarette advertising can lend itself to flights from reality.

Marlboro Country continues "traditional male heroic" and moored to the range — "you know when one's missin! Without countin, you know . . . this is Marlboro Country. Where a good colt is as important today as it was a hundred years ago".

There was a time when tribulations befell Salem Country. Replaced by appeals to urbanites ("you can take Salem out of the country . . .") and invaded by the hard sell ("that last cigarette was pretty tasteless — try Salem — taste now — talk later"),Salem Country when last sighted recommenced a definite bucolic upbeat, replete with jodhpur clad damsels with beaux and sorrels.

The Parliament Night People started the year characteristically ("let's find a new place for dinner, OK? . . . Meet the Night People . . . This is their style. They look for atmosphere"), but in the end gave way to sardonic Englishmen, given to having the last word over the mainstream of Parliament cigarettes.

Assuaging Anxiety

For good reason, there is concern that cigarettes are hazardous to health.[33] Consequently, it is important to advertisers of cigarettes that this concern be allayed. Attempts by cigarette advertisers to dispel worry or anxiety over the health

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33 See footnote 6, *supra*, for a description of certain health hazards associated with smoking.

consequences of smoking have met with considerable success.[34]

While recognizing that smoking any cigarette is hazardous, the Surgeon General of the United States has clearly indicated that some cigarettes may be less hazardous than others. Thus, he has stated that "in recent years, the harmful effects of tar and nicotine in cigarette smoke have been the subject of intensive scientific research here and abroad. There is evidence that 'tar' . . . is many times more potent in its cancer producing properties than any of the substances isolated from it."[35] A committee appointed by the Surgeon General has concluded that "the preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful are the effects."[36]

Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes.

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34 Public Health Service Survey, Appendix B, page 2, question 5: Opinion Research Corporation American Cancer Society Survey, Appendix A, page 4, question 8.

35 Statement of William H. Stewart, M.D., Surgeon General, U.S. Public Health Service, Department of Health, Education and Welfare, before the United States Senate Subcommittee on the Consumer, Committee on Commerce, August 25, 1967.

36 *Ibid.*

On May 15, 1967, Chairman Paul Rand Dixon announced the activation of a Commission cigarette testing laboratory. Testing procedures to be utilized by the laboratory were announced on August 1, 1967. On October 26, 1967, the Commission issued a policy statement which indicated that as a general rule the Commission would not challenge statements or representations of or relating to tar and nicotine content of cigarettes "where they are shown to be accurately and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission".

Shortly thereafter, on November 22, 1967, the Commission published test results on the tar and nicotine yields of 59 varieties of cigarettes — these included varieties having the greatest sales at the time and those whose labeling or advertising contained tar or nicotine yield statements. Only two varieties made yield claims lower than those published by the Commission and in both instances, the advertisers voluntarily corrected the situation. Unofficial information has been received that the November 22, 1967 test results were carried on the front pages of three out of four of all major daily newspapers in the United States. Many hundreds of thousands of copies were reproduced and distributed by the Public Health Service, the American Cancer Society and other health agencies.

As recently as mid-June of 1968 the Commission released test results of the tar and nicotine yields of virtually all brands marketed domestically, 127 in number. Advertisers now have available for use in their advertising, information concerning the tar and nicotine levels of their and

competitive brands. Their use of this information must be factual, fair and not misleading. The ORC-ACS Survey indicated that 62% of all interviewees think that the amount of tar and nicotine should appear both on the cigarette pack and in advertising; an additional 14% think that such information should appear on the pack only.[37] Since the establishment of the Commission's laboratory, cigarette manufacturers have changed thirty-eight[38] different varieties of cigarettes with respect to filters, filter overwraps, blends, etc., in an effort to lower tar and nicotine yields. We know of no attempts to produce cigarettes with higher yields.

An analysis of sales data provided by cigarette manufacturers indicates that sales of comparatively low yield cigarettes, e.g., for purposes of this report only, those having 15 milligrams (mg.) of tar or less, have not been extensive thus far. Three categories of cigarettes, classified according to tar yields, divided the market in 1967 as follows: 15 mg. and under - 2%; 16 - 21 mg. - 59%; 22 mg. and over - 39%.

In promoting the above-noted 2% of the market, cigarette advertisers spent 5.5% of their total 1967 advertising budget. During the first two months of 1968, cigarettes with tar content of 15 mg. and under accounted for 2.4% of the market and 7.8% of total advertising expenditures. Perhaps the trend noted in connection with filter and 100 millimeter cigarettes has commenced with respect to low yield cigarettes—manufacturers are spending

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37 Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 4, question 9.

38 Appendix C, pages 9-10.

disproportionately large amounts to promote them with the result that their market share increases each year.

There is every reason to believe that the promotion of low tar and nicotine yield cigarettes can be profitable. As indicated, the Commission released tar and nicotine figures for 59 varieties of cigarettes in late November 1967. These figures indicated that regular and king-sized filter Marvels were lowest in tar and nicotine of the 59: They also indicated that Cascade was lowest among menthol cigarettes. The sales of these three brands rose respectively 382%, 570% and 200% in December 1967, despite the fact that overall cigarette sales declined in December (from November) in 1967, 1966 and 1965. Furthermore, both True and Carlton cigarettes, two well advertised low yield cigarettes, each increased sales 20% that December following publication of Commission figures.

The only brands making tar or nicotine content disclosures in advertising or labeling at the time of the 1967 Cigarette Report were Carlton, True, Marvels, Cascade, King Sano, and Duke of Durham filters.[39] To these may now be added Domino menthols, Montclair, Silva Thins, and Tryon filters.

As noted in the 1967 Cigarette Report, rather than alert smokers to less hazardous low yield cigarettes, advertisers sought for the most part to allay smoker anxiety by proclaiming the wonders of their filters.[40] The PHS Survey revealed a plausible reason for this — the belief is widely held that filter

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39 *1967 Cigarette Report*, page 19.

40 *Id.*, pages 19-20.

cigarettes are less hazardous to health than nonfilter cigarettes.[41]

Now that the Commission has tested nearly every cigarette on the market, an evaluation of this belief is possible. Concerning the 127 varieties tested, the lowest 34 in tar content are all filter cigarettes and the highest six are all nonfilter cigarettes. However, the nonfilter cigarette ranking 35th lowest in tar is lower in tar than no fewer than 62 other filter cigarettes. Furthermore, it would appear that 95 millimeter, filter Pall Mall spews slightly more tar than king size, nonfilter Pall Mall and that regular size, non-filter Chesterfield spews slightly less tar than 101 millimeter, filter Chesterfields.[42] Obviously, the consumer cannot rely on the filter alone.

Nevertheless, the implied safety of a filter ("the mere addition of a filter to a cigarette is, in and of itself, some kind of claim or assurance relating to the health aspects of smoking"[43] and the miraculous way in which it delivers taste continue to be the advertisers' principal palliative against smoker misgivings. Examples include:

> "the flavor of the world's finest tobaccos through the Kent filter"; "the charcoal granules make the taste better" (Lark); "white filter flavor" (L&M); "a filter cigarette blended with natural flavor

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41 Public Health Survey, Appendix B, page 2, question 5.

42 See Appendix C, pages 4 and 6.

43 *Trade Regulation Rule*, page 60.

> fresheners" (Viceroy); "Kool's white filter . . . menthol through a filter."

Some filters are tasty enough to do without tobacco ("You don't even have to light it to like it" — Lucky Strike 100s).

The implication that "filter" equals "comparative safety" can be made more express through depictions of the complicated inner workings of the filter (True, Tempo, Lark, Lucky Strike 100s) or by euphemisms such as "mild", "soft", *e.g.* "flavor comes through filtered mild" and "charcoal to soften the taste" (Lucky Strike 100s), "the charcoal filter smoothes the taste" (Tareyton), "air cooled filter, a great light taste" (Carlton).

The Pall Mall advertisements, "Look! it's extra long at both ends. More fine tobacco at one end. And an extra long filter at the other. So it travels the smoke further for greater mildness" and "filter[s] further for a milder smoke", combine several approaches. The implicit assurance of the word "filter" is there, made more explicit by "an extra long filter" and through the euphemism "travels the smoke further for *greater mildness*" (emphasis added). The further thought is projected that such euphemistic mildness comes from the longer filter and more tobacco, *i.e.* "extra long at both ends . . . filter[s] further for greater mildness".

As has been indicated, however, the efficacy of a filter can best be judged from the results it produces, not from its physical dimensions nor even from its presence. Furthermore, tobacco as a filter has one serious disadvantage other filters do not have — it is likely to be consumed and, when that happens, the tar and nicotine it has filtered pass into the mainstream of the cigarette. All things being equal,

the less tobacco, the less tar and nicotine. As the manufacturer of Pall Malls has stated concerning its Fifty-Fifty brand, "a *shorter length of prime tobacco* [coupled with an extra long filter] gives you great flavor and mildness too. *You don't cut down your smoking . . . Fifty-Fifty does it for you*" (emphasis added).

A Carlton ad, which accurately discloses tar and nicotine content, contains the following language: "I thought my cigarette was lowest in 'tar'. It turned out not to be true. I compared it with Carlton's 7 milligrams and found Carlton had 45% less 'tar' than the brand I thought lowest. *Don't kid yourself. Your cigarette isn't lowest in 'tar' unless it's lower than Carlton*".

To smoke a cigarette 45% lower in tar than some of the higher yield cigarettes would not necessarily result in smoking a very low yield cigarette, *e.g.* a reduction of Herbert Tareyton's 33 mg. of tar by 45% would leave a cigarette with 18.15 mg. Nor is it entirely forthright to say in effect that one's cigarette is the one "they'll have to beat" to be lowest in tar. Obviously "they'll have to beat" each and every variety, Carlton included, to be lowest. As it happens, several have already turned the trick on Carlton.

Perhaps the most effective cigarette advertisements to counter anxiety in general were the humorous ads, particularly those put out by Benson & Hedges, *e.g.* "the number of extra puffs you get with Benson & Hedges depends on how you puff". Others pursued humor with varying degrees of success — Chesterfield 101 ("a silly millimeter longer"), L&M 100 ("the happening" involving the posturings of a cello player, a fakir, a scuba diver, *et*

al. around a fountain) and Pall Mall 100 ("smokes longer so you always finish last").

Miscellaneous Themes

While the satisfaction, associative and assuaging of anxiety themes continue to dominate cigarette advertising, other clearly identifiable themes are also present.

Cigarette coupons redeemable for gifts, cash or trading stamps are still in vogue (Old Gold, Spring, York, Alpine, Galaxy, Colony, Montclair, Domino and Yukon menthols). Extra puffs continue to be given away at no extra cost – "it's almost like getting five or six extra cigarettes in every pack" (Bull Durham) and "3 puffs, 4 puffs, maybe 5 puffs longer than king size" (Benson & Hedges).

There is a loyalty theme with its several motifs. These include straight forward appeals to loyalty — "don't try to sell a Kool smoker anything but the real thing — he knows the difference"; "Us Tareyton smokers will never change our stripes"; "When you change, you've changed for good" (Winston). Occasionally, disloyalty is counseled — "and you thought you were happy with your old cigarette" (Chesterfield). Then there are reconciliations — "I always come back to Lark".

Finally, while not a theme, there are moments of unusual forthrightness in cigarette advertising.

> "I've tried every smoke in the land. But . . . I can't find a smooth tasting brand" (Newport); "if you can't tell one filter cigarette from another . . . Try us" (True); "Somebody had to put true flavor in a filter cigarette." "Somebody had to put fresh taste in a menthol cigarette" (Chesterfield);

> "Most cigarettes I've tried taste about the same. Kind of dull. You know, flat. Sort of blah. If you've tried one — you've tried 'em all" (Kool).

To the extent that current cigarette advertising and promotional themes have changed at all, the aphorism "the more things change, the more they remain the same" would appear to be particularly appropriate.

5. *FCC Fairness Doctrine and Anti-Cigarette Advertising.*

To alleviate constant exposure to the one-sided blandishments of cigarette commercials and the health risks attendant thereto to the American public, the Federal Communications Commission ruled on June 2, 1967 that the Fairness Doctrine is applicable to cigarette advertising.[44] The Work Group on "Communication — The Media" of the World Conference On Smoking and Health (held September 11 - 13, 1967 in New York, New York) hailed this ruling as "pioneering and courageous" and termed it the "single, most significant recent development" in the regulation of cigarette advertising.[45] Under this ruling, stations which carry commercials promoting the use of a particular cigarette as attractive or enjoyable are required to provide a significant amount of time to the other side of this controversial issue.

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[44] FCC Docket No. 67-641.

[45] World Conference on Smoking and Health, New York, September 11-13, 1967, recommendations of Group 10, Communications—The Media, page 21.

Pursuant to this holding, the major networks have undertaken to produce a number of programs dealing with the smoking question. The Public Health Service, the Interagency Councils on Smoking and Health, the American Cancer Society, The American Heart Association, and The National Tuberculosis Association have produced series of anti-cigarette commercials. Information indicative of the extent to which these programs and advertisements were aired on network television during the month of January 1968 was furnished by American Broadcasting Company, Columbia Broadcasting System and the National Broadcasting Company. It is noted that 76% of the ORC-ACS Survey sample approved a government ruling "that TV and radio stations that advertise cigarettes must also give a reasonable amount of time to health warnings of the risks of cigarette smoking."[46]

During January of 1968, the networks aired 54 anti-cigarette commercials and five programs devoted in whole or in part to a discussion of the smoking problem, for a total of 59 programs and commercials which presented the opposite side to that of cigarette commercials. These resulted in a total of 625.4 million exposures, 222.1 million of which were among persons aged 2 - 17. By comparison, the networks aired 501 cigarette commercials during the same month which resulted in a minimum of 10.5 billion exposures, 2.7 billion of which were among persons aged 2 - 17. The ratios between program airings (59 v. 501), total exposures (625.4 million v. 10.5 billion), and exposures among 2

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[46] Opinion Research Corporation – American Cancer Society Survey, Appendix A, page 5, question 12.

- 17 year olds (222.1 million v. 2.7 billion) are respectively 1:8.5; 1:16.8; and 1:12.2.

The most frequently used theme in anti-cigarette commercials has to do with the danger that smoking entails, *e.g.* a man sitting at his desk coughs four times as the audio announces "here are four good reasons for quitting". Warning statements are used in a variation on this theme. In one, various warnings are depicted ("danger", "slow"); the audio then states "sometimes warnings can save our lives" which fades into an X-ray of a lung, the sound of a cough, and the cigarette warning statement. Advertisements stressing the danger of smoking often appeal to the public to look to scientific evidence rather than commercial allurements.

Well known sports figures are used to discuss the incompatibility of sports and smoking. The association between smoking and the parental example is well explored. Some of the themes deal with the pointlessness of smoking "if you laid all your cigarettes end to end you would never have time to smoke one — isn't that a good idea". Certain depictions of the repulsiveness of smoking are quite vivid, *e.g.* a young boy's efforts to "enjoy" his first cigarette; a young woman who realizes how slavish she has become when, being out of cigarettes, she retrieves a greasy, wet cigarette butt from an ash tray full of butts.

Ads having to do with social themes were particularly impressive. One humorously portrays the social agonies that a man who has quit smoking goes through at a party — everyone wants him to smoke. However, when he finally makes it to "the goal line", he is besieged by well wishers, many of whom had inveigled him to smoke earlier. One of

the most impressive ads, entitled "who are you kidding", is a cartoon depicting the foibles of man as they relate to smoking. One character, while holding a lit cigarette, lights a second one and says "I can quit whenever I want. I ought to know, I've been smoking for ten years".

The anti-cigarette ads are welcome fresh air to the cigarette scene.

6. *Influencing Public Opinion*

Attempts by cigarette advertisers to assuage smokers' fears concerning the health consequences of cigarette smoking were discussed under the topical heading "Current Advertising and Promotional Themes." To counteract these fears, some cigarette manufacturers have gone beyond product advertising.

Reportedly, there have been attempts by members of the cigarette industry to discourage the display of Commission tar and nicotine yield data in food and drug chain stores[47] and to halt a Public Health Service campaign to publicize the fact that large numbers of doctors have given up cigarettes.[48] A more significant attempt to affect public opinion will now be described fully.

An article entitled "To Smoke Or Not To Smoke – That Is Still The Question" and written by Stanley Frank, appeared in the January 15, 1968 issue of *True Magazine*. In the article, the author attempted to dismiss evidence supporting the proposition that

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[47] Twin City Sentinel, December 13, 1967, pages 12-13; Washington Post, January 22, 1968, page A3.

[48] *Advertising Age*, February 19, 1968, page 10

smoking and cancer are related as shown by his concluding statement, "at the moment, all we can say for sure is that there is absolutely no proof that smoking causes human cancer." Approximately two months later, on March 3, 1968, an article entitled "Cigarette Cancer Link Is Bunk," written by Charles Golden, appeared in the *National Enquirer*. As indicated by the article's title, the conclusions reached in the *National Enquirer* article were identical to those reached in the *True* article.

Shortly after these articles appeared, *The Wall Street Journal* charged that the articles were placed in the two publications by tobacco interests and that authors Stanley Frank and Charles Golden were the same person, an employee of Hill and Knowlton, Inc., the public relations firm retained by the Tobacco Institute.[49] The Tobacco Institute is a trade association consisting of many of the largest manufacturers of cigarettes.

The resulting controversy led Senator Warren G. Magnuson to request that the Public Health Service comment on the subject of the two articles. The PHS concluded that the articles generally contained half truths, distortions and statements misrepresenting existing scientific evidence establishing the cancer-cigarette relationship.[50] The PHS critique and one by the American Cancer Society are set out in full in Appendix F.

Since questions existed as to the promotion of and mailing of reprints of the *True* article and of the *National Enquirer* article, the Commission made

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[49] *Wall Street Journal*, March 21, 1968, page 1.

[50] See Appendix F.

inquiry into these matters—under the authority of Section 5 of the Federal Trade Commission Act and Section 5(d)(2) of the Federal Cigarette Labeling and Advertising Act. The inquiry revealed the following facts.

In March 1967, Mr. Douglas Kennedy, currently a free lance writer but then editor of *True Magazine*, and Mr. Joseph Field, a public relations executive retained by Brown and Williamson Tobacco Corporation, became mutually interested in an article demonstrating the tobacco industry's side of the smoking and health controversy. In an interview with an attorney for the Commission, Kennedy characterized himself as a heavy smoker who felt the smoker-cancer relationship was just propaganda and wanted to have an article on the subject in *True*. To the same interviewer, Joseph Field stated he had been on retainer by Brown and Williamson for about two years prior to the *True* article and that before and after the *True* article, he had sought out other national magazines to do an article on the tobacco industry's side of smoking.

Stanley Frank, a free lance writer, was approached by Kennedy and later by Field to draft an outline of an article written along the lines described above. Previously, Frank had written 29 articles for *True*, and all but two or three of them were in the sports field. Since at this point there was no formal commitment that the finished article would be published in *True*, Mr. Field reported to the Commission investigator that he paid Stanley Frank $500 to develop the article and that he (Field) received prior approval and reimbursement for the $500 payment to Frank from Brown and Williamson Tobacco Company.

The inquiry disclosed that Field introduced Frank to an attorney retained by another tobacco company who supplied Frank with the materials used in writing the *True* article. Field wrote this attorney, stating,"[m]any thanks for your help in development of this meaningful and impressive story for 'our side'."

A draft of an outline of the article was submitted to *True* and to Field on April 5, 1967. The following week Frank was given authority to write the article. The article was circulated among the four editors, with three giving favorable responses.

One of these three nevertheless commented, "Andy and Jack [the other two approving members of the board], smokers, are comforted and think this is great. I find it completely biased and if actually not hogwash, pretty damn misleading."

The fourth member of the editorial board, who is now the Editor of *True*, was against accepting the article. Part of his reasoning at the time was as follows:

> "If our old friend . . . had written this long, sob-sister plea for the tobacco industry I could at least understand his motives, but coming from Stanley Frank, a man who has spent many more years in baseball dugouts than in laboratories, I am at a loss. . . .Let's really face it: what's wrong here is that our writer didn't go out like a good reporter and do his legwork and his homework. The result is the purest trash — dated, biased and without present justification."

Frank received $500 from *True*. He later received additional payments of $1,250 for the article

and a $250 bonus due to the article's being featured on the cover of the January issue.

Once the article was accepted in *True*, extensive preparations were made to advertise it and to mail reprints of it. Such preparations commenced at least as early as October 1967. On December 14 and 15, 1967, advertisements of the article were run in some 63 newspapers throughout the country. These advertisements contained such excerpts from the article as "at the moment, all we can say for sure is . . . there is absolutely no proof that smoking causes human cancer." They did not disclose that a public relations man for a tobacco company compensated the author for the article. They did not disclose who paid for the ads.

The Commission's inquiry revealed that although the advertising was placed by Ted Barash and Co., Inc., the advertising firm for *True Magazine*, the format of the ad contained suggestions by Joe Field, and the $67,146.68 bill for the advertising was paid for by Tiderock Corporation, a public relations firm retained by the Tobacco Institute. Tiderock was reimbursed for the cost of the advertising by Brown and Williamson Tobacco Company, Philip Morris, Inc., and R. J. Reynolds Tobacco Company, all members of the Tobacco Institute.

Plans to distribute reprints of the *True* article were revealed in a letter from Joe Field to the Tiderock Corporation dated October 27, 1967. The Tobacco Institute's role in planning the reprint can be judged from a memorandum which it sent to the tobacco companies stating, "[w]e are preparing a proposal for reprint distribution." At the instigation of the Institute, Tiderock directed the art work, setting of type, printing and shipping operations for

607,934 reprints to be purchased from Fawcett Publications, the publisher of *True*. The Barash agency prepared the layout of the eight-page reprint, for which it received $1,599.75 from Tiderock. Tiderock also ordered and paid for 554,000 copies of a message to be used to transmit the reprints. This message stated, "As a leader in your profession and community, you will be interested in reading this story from the January issue of TRUE Magazine about one of today's controversial issues — THE EDITORS."

Kennedy told the Commission investigator that as Editor he had authority to grant permission for reprints of an article appearing in *True*. He indicated that he had no knowledge that the reprints would be mailed without identifying the sender. However, a letter was uncovered from the Barash agency dated December 26, 1967, notifying Kennedy of an intention to use the noted transmittal message in connection with the mailing of the reprints.

To what extent were the reprints disseminated? Tiderock retained R. L. Polk & Co., a Detroit, Michigan mailing house, to distribute 414,820 of the 607,934 reprints purchased. These were mailed with the transmittal message and the address of the mailing house on the envelope. Mailing lists were obtained to gain the widest distribution possible. Even in obtaining mailing lists from the American Medical Association, any connection with the tobacco industry was not disclosed. Although Tiderock was administering and guiding all phases of the reprint distribution, it had the Barash agency address a letter to the AMA seeking a mailing list ostensibly for the purpose of gaining greater circulation for *True*.

The following is a chart setting forth the distribution of individuals receiving the reprint.

Medical Field	184,647
Communications Field	7,295
Biological Scientists	41,055
Educators	18,819
Government Officials (including 50 Governors, 100 Senators, 432 Representatives	10,142
Security Analysts	10,173
Other Opinion Leaders (lawyers, Junior Chamber of Commerce)	123,779
	414,820

In addition to the mailing of the above reprints, bulk shipments without the transmittal message were sent to two tobacco trade groups, the National Association of Tobacco Distributors and the Tobacco Growers Information Committee. Four tobacco companies, Lorillard, R. J. Reynolds, Brown and Williamson, and Philip Morris obtained approximately 100,000 reprints from Tiderock to send to their stockholders, employees and sales forces. Reprints were also purchased directly from Fawcett Publications in the following amounts:

American Tobacco	200,000
Philip Morris	65,100
R.J. Reynolds	135,000

Altogether more than one million reprints were mailed out by tobacco interests. The cost of this project was as follows:

Ted Barash	Art Work and Layout	$ 1,599.75
Fawcett Publication	Printing of Article	19,450.70
R.L. Polk	Mailing	82,363.00
National Association of Tobacco Distributors	Mailing	320.52
Freight	Left over reprints mailed to Tiderock	69.80
Tobacco Growers Information Commission	Mailing	3,825.00
		$107,628.77

When the advertising costs are added to the above amount, the *True Magazine* article promotional campaign cost the Tobacco Institute and members at least $175,000.

The Commission inquiry into the article entitled "Cigarette Cancer Link Is Bunk" which appeared in the *National Enquirer* disclosed that the editor of the *Enquirer* read the *True* article and "wanted to present the other side of the cigarette cancer scare" in his newspaper. He attempted to secure a reprint from *True* but was turned down by Kennedy. Stanley Frank, who at this time was an employee of Hill and Knowlton, Inc., was contacted and persuaded to write an article for the *Enquirer*. The use of the name "Charles Golden" was the normal house by-line used by the *Enquirer* to keep the identity of the author confidential. Nat Chrazen, the *Enquirer* Editor, emphatically stated to a

Commission investigator that he received no compensation for having the article in the *Enquirer*.

Such are the facts concerning "the True Magazine" episode. They are included in this Report because they relate in a very material way to current practices and methods of cigarette advertising and promotion.

It would seem to be fair comment to say that the acts of retaining a free lance writer specializing in sports articles to write an article dealing with medical facts; promoting the acceptance of the article in *True Magazine* and then advertising excerpts therefrom favorable to the cigarette industry before a newspaper audience much greater than that which could be anticipated to read the article; failing to disclose in such advertising that tobacco interests, not *True Magazine*, planned and paid for the advertising; posing as *True Magazine* before the American Medical Association and posing as the editors of *True* before 414,820 persons in the medical and communications fields, biological scientists, educators, government officials and other opinion makers, are not the acts of an industry either confident of its facts nor solicitous of its reputation.

7. *Self Regulation of Cigarette Advertising.*

In this area there are no new developments of significance to report. There have been unsuccessful efforts by persons outside of the cigarette industry to reduce the amount of its advertising.

C. *Recommendations*

The Commission believes that legislation accomplishing the following objectives is necessary.

(1) Section 4 of the Federal Cigarette Labeling and Advertising Act should be amended by changing the required warning statement to read:

> "Warning: Cigarette Smoking is Dangerous to Health And May Cause Death From Cancer And Other Diseases."

(2) The warning statement should be required to appear in all advertisements as well as on all cigarette packages;

(3) A statement setting forth the tar and nicotine content of each cigarette should be required to appear on the package and in all cigarette advertising;[51]

(4) Cigarette advertising on television and radio should be banned entirely. Alternatively, cigarette advertising on television and radio should be limited as to the hours at which it may appear; the extent to which it may appear; and the types of programs on which it may appear.

(5) Increased appropriations should be made to the Department of Health, Education, and Welfare for education of the pubic (especially young people) as to the health hazards of smoking;

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[51] The Commission is of the belief that further scientific study may warrant extension of this requirement to include a statement listing the results of quantitative and qualitative analyses of hazardous components in a cigarette's smoke.

(6) Appropriations should be made for research under the direction of the National Institutes of Health on the development of less hazardous cigarettes.

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FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant To The
Public Health Cigarette Smoking Act

December 31, 1970

* * *

INTRODUCTION

With the enactment of the Public Health Cigarette Smoking Act in 1970, that year probably became one of the key dates in the history of cigarette promotion in the United States – the last year in which cigarette advertisements were broadcast over radio and television.

The cautionary phrase "probably became" is used in light of a legal action brought in the United States District Court for the District of Columbia on December 1, 1970, by six companies which own radio broadcasting stations to seeking to enjoin the Attorney General from enforcing those provisions of the Act which forbid cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communication Commission" after January 1, 1971. (*Capital Broadcasting Company v. Mitchell*, Civil Action No. 3495-70.) A three-judge court has been selected to hear the case in January, 1971.

Further cause for caution in predicting the disappearance of cigarette commercials from the television screen is given by reports of the development of electronic video recording and

playback devices for home use. Such devices would allow the recording of television programs, in a manner similar to pre-recorded audio tapes which are now available for tape recorders. The suggestion has been made that cigarette manufacturers might be able to place advertisements on such pre-recorded television programs if this new entertainment medium becomes available to a large enough number of households.

In its reports to Congress in the years 1967, 1968, and 1969, under provisions of the Federal Cigarette Labeling and Advertising Act, the Commission included statistical information concerning total cigarette sales by number and dollar volume, cigarette sales by type (*i.e.*, filter, non-filter, menthol, non-menthol), and size (*i.e.*, regular, king size, extra long), sales of products other than cigarettes by cigarette manufacturers, total cigarette advertising expenditures, cigarette advertising expenditures by type and size of cigarette, and advertising expenditures by medium for the years 1963 through 1968; and data concerning the size and age of certain television audiences exposed to cigarette advertisements during the years 1967 through 1969. Because the Commission believes that 1970 will be a landmark year in cigarette promotion and marketing, it desires to compile the most moderate data possible concerning cigarette sales and advertising expenditures for the year 1970 for purposes of evaluating the effects of the prohibition of broadcast cigarette advertising on cigarette sales and future use of other advertising media by cigarette manufacturers. For this reason, the Commission has directed the staff to obtain data relating to sales of cigarettes and other products and advertising expenditures from cigarette

manufacturers in the United States for the entire twelve months of calendar year 1970. These data, when received and tabulated by the staff, will be published and transmitted to Congress in a statistical supplement to this report.

EFFECTIVENESS OF CIGARETTE LABELING

By provision of Section 4 of the Public Health Cigarette Smoking Act, the statement required to be printed on cigarette packages was changed from "Caution: Cigarette Smoking May Be Hazardous to Your Health" to "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health", effective November 7, 1970. Failure to print the statement required by Section 4 on any package of cigarettes distributed within the United States is a misdemeanor punishable by fine. No instances of violation of this labeling requirement have been discovered by or reported to the Commission staff.

Although it is not possible at this time to measure the effect that the new labeling statement will have on cigarette sales, the Commission believes that by substituting the word "Warning" in place of the milder term "Caution", and the phrase "is dangerous" for the equivalent language "may be hazardous", the new statement gives a stronger and more effective warning and serves the public interest better than the statement previously required by the Federal Cigarette Labeling and Advertising Act.

However, the Commission also believes that the new statement is subject to an interpretation by some cigarette smokers and potential cigarette smokers that the determination that cigarette smoking is dangerous to human health is an opinion, which is held by a single government official, the

Surgeon General, rather than by an overwhelming majority of responsible medical practitioners and researchers. The language of the new labeling statement contains thirteen words and 81 characters; the old statement consisted of nine words and 50 characters. As a result of this increase in the number of words and characters and the continuing practice of cigarette manufacturers to print the statement on the side panel of the package, the type in which the new warning is printed is noticably smaller than that used for the previous labeling statement on all packages observed by the Commission staff. This may well detract from the impact of the message on smokers.

No requirement is contained in the Public Health Cigarette Smoking Act that the package contain a statement of tar and nicotine content, a recommendation which the Commission made in its three previous reports to Congress on cigarette advertising and labeling. During 1970, statements of tar and nicotine content appeared on the packages of the following brands: Carlton, Doral, King Sano, Marvels, Sane, True and Venture. However, more than, 50 other brands of domestic cigarettes were sold in the United States which did not list tar and nicotine information on the package.

CURRENT PRACTICES AND METHODS OF CIGARETTE ADVERTISING AND PROMOTION

In the three reports previously submitted to Congress under the provisions of the Federal Cigarette Labeling and Advertising Act, the Commission has noted the prevalence of these basic themes in most cigarette advertising:

1. Appeals to satisfying taste;

2. Association of smoking the advertised brand with desirable personality characteristics; and

3. Relieving anxieties about the health dangers of cigarette smoking.

In the last report, submitted in July of 1969, the observation is made that "Advertising themes have not changed markedly since 1964." They have not changed markedly since July of 1969. This sameness of advertising themes might be explained in part by the product itself, which has not undergone any drastic change since 1964. To be sure, an increasing number of the cigarettes sold and made with filters (which were not unknown in 1964), and 100 millimeter lengths (approximately 3 7/8 inches, compared to the 3 1/4 inches "king size") are a relatively recent development. But the basic product today — as in 1964 — made from a roll of tobacco wrapped in paper which is consumed by drawing the smoke produced by combustion of these materials through the mouth and into the lungs. No new uses have been developed for cigarettes and no evidence has been published which has caused any agency of the Federal Government to conclude that cigarette smoking is a lesser public health problem today than it was in 1964.[1]

Without exercising too much imagination, one can often see all three basic cigarette advertising themes present in a single advertisement. A good

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[1] For an overview of cigarette advertising and governmental regulation affecting cigarette promotion, *see* "Annals of Advertising — Cutting Down." *New Yorker*, December 19, 1970, p. 42.

example is a recent series of advertisements for Raleigh cigarettes, made by the Brown and Williamson Tobacco Corporation, featuring the slogan "Spend a milder moment with Raleigh". The advertisements extol the "smoother, milder taste" (making an appeal to satisfying taste); display fashionably dressed couples of indeterminate age spending their milder moments enjoying one another's company (associating Raleigh cigarettes with affluent, attractive and personable people); and are usually staged at twilight as the sun sets in a burst of gold behind patios, suspension bridges, or three-masted sailing ships in a tranquil and undisturbed place far removed from traffic congestion, smog, water pollution, noise, and other discomforting by-products of mid-twentieth century technology (thus helping to relieve anxiety about the health consequences of cigarette smoking by associating the practice with the beauty and tranquility of nature). Raleigh also offers coupons, a practice which is included in the discussion below of "Miscellaneous Promotional Techniques".

Although, three basic themes predominate most cigarette advertisements, the variations are almost infinite, as the following examples may indicate.

1. *Appeals to satisfying taste.* Even the most casual observer of advertising must know by now that "Winstons taste good like a cigarette should", and that if he wants to go to "where the flavor is" he must "come to Marlboro country". How do other brands describe their flavors? The following list is, if not all-inclusive, at least illustrative of the claims for taste which have been made during the past year.

"Air-Conditioned" - Mr. Menthol

"Air-cured burly taste"- Lucky Filters

"A little gentler"	-	Flair
"All of the taste all of the time"	-	Viceroy
"Better Tasting"	-	Taryton 100's
"Brisk, breezy flavor"	-	Kent Menthol 100's
"Cool menthol flavor"	-	Montclaire
"Cooler"	-	Pall Mall Menthol 100's
"Coolest"	-	Chesterfield Menthol filters
"Delicious mixture of rich tobacco flavors"	-	Old Gold Filters
"Easy taste"	-	Lark & Chesterfield filters
"Extra Coolness"	-	Kool 100's
"Fresh natural taste"	-	Maryland 100's
"Friendly to your taste"	-	Pall Mall
"Gentle taste"	-	L & M
Genuine tobacco flavor"	-	Old Gold Filters
"Good taste"	-	Kent
"Good clean taste"	-	Parliament
"Great taste"	-	Kent
"Light and rich"	-	Silva Thins
"Lighter"	-	Lucky Filters
"Menthol chill"	-	L & M Menthol
"Menthol chilled"	-	Newport
"Milder, smoother"	-	Pall Mall 100's
"Mildest"	-	Chesterfield 101's

"Pretty good"	-	Benson & Hedges 100's
"Quiet taste"	-	Raleigh
"Remarkably refreshing taste	-	Newport
"Rich new flavor	-	L & M
"Rich taste that keeps its cool"	-	L & M Menthol
"Richest"	-	Chesterfield filters
"Smart"	-	Silva Thins
"Smooth and Easy	-	Lark
"Smoother, milder"	-	Raleigh
"Soft, fresh"	-	Belair
"Tobaccoman's kind of flavor"	-	Multifilter
"Way up"	-	Marvels

If that is not enough, Embra gave "a taste to remember"; Virginia Slims offered "the taste for today's woman"; and Vantage claimed a taste "that doesn't cop out". "If you like the taste of gas, you'll hate the taste of Lark", but that is a subject which must be pursued more fully under the sub-topic of "Relieving Anxiety".

2. *Associative Themes.* For many years, cigarette advertisers have been attempting to associate their particular brands with beautiful people doing beautiful things. The statement that "Beauty is in the eye of the beholder" is certainly applicable when observing cigarette advertising. The models who appear in this year's cigarette advertisements do not all come from any one mold. Some appear to be urbane sophisticates, others

appear to be rough-hewn and blunt. Some are even bald and thoroughly middle-class in appearance. But all are imbued with one or more personality characteristics which the advertiser hopes will appeal to the audience of existing and potential cigarette smokers. Presumably, the audience exposed to advertisements based, on associative themes will get the message that by smoking the advertised brand, they can acquire some of the desirable characteristics displayed in the advertisements.

The classic example of this approach is the Marlboro cowboy — ruggedly masculine, self-sufficient, and able not only to withstand but even to enjoy, life on the Western plains and prairies.

The theme of masculine independence has been used by several other advertisers during 1970. The Old Gold filterman is an "independent guy" who does not "follow the crowd" or "care what's being done", to combine the language of several commercials. He can usually he found out-doors in clothing that ranges from casual to off-heat. Advertisements for Newport cigarettes feature men of the sea, usually dressed in denims and wool caps, occasionally with beards or mustaches, who also present a rugged masculine appearance. Another individualistic male is the Camel filtered cigarette won't go along with the latest fads "in this fancy, you-gotta-have-a-gimmick world" – of cigarette advertising. He insists on Camel filters and wants "no nonsense" and "no compromise."

During the past year, Philip Morris, Inc., the same corporation which added the Marlboro cowboy to the American culture, has been promoting Virginia Slims as a cigarette for "today's woman" by

making an appeal to the right tide of feminine independence. Stylishly clad, attractive female models review progress of their own sex during the last century, observing "you've come a long way baby", the theme of this campaign has been that women enjoy "better life today because today they can, among other things, wear bathing suits that display a considerable area of skin, forego whalebone corsets and potato peeling, vote and smoke Virginia Slims, a cigarette made especially for woman. This logic may be dubious, but the intent is clear to mandate Virginia Slims with femininity.

Another group of fashionably dressed young women who attract calm, decisive, intelligent, strong, well-mannered and generally masculine men have been touting Flair Cigarettes, a product which Brown and Williamson Tobacco Corporation has been test-marketing in the Mid-West and Southwest.

Another entrant into the feminine cigarette world is Liggett and Myers' Eve, which utilizes an illustration of a young lady, amid a field of flowers on the package. The advertising copy proclaims "Women have been feminine since Eve. Now cigarettes are feminine. Since Eve." series of advertisements for this brand displays an Eve cigarette (which has a floral decoration printed on the filter end) resting on an apple. A package is standing upright beside the apple. To insure that readers get the message that "feminine" equals "beautiful", the headline reads: "Farewell to the Ugly Cigarette". Brown and Williamson mandates pitch to the feminine audience with a series of Kool 100's using the slogan "lady be cool". These advertisements use stylish young female models in

such glamorous settings as a castle, a sail boat, and a Mercedes roadster.

Many brands continue to suggest that they are associated with beautiful people of both sexes. One series of advertisements for L & M cigarettes proclaimed "There is a cigarette for the two of you, L & M". Each of these advertisements was illustrated with an intense young couple who stared straight ahead, with a somewhat brooding look on their intelligent, stylish faces. Another series for L & M rhapsodizes about the L & M moment, "When there's a moment just for the two of you". One such occasion is after a party; another is at the conclusion of a hectic morning in suburbia attending to such chores as a car wash, the family laundry, and grocery shopping. On these and other "L & M moments", attractive young couples snuggle up to one another and light an L & M. Another set of attractive couples frolicked about on the television screen constantly finding a "good time for the taste of Kent".

Somewhat like the uncompromising stance of the Camel Filters man is the attitude displayed by several couples featured in advertisements for Viceroy. Those people seen to have very definite ideas about what they want. They are depicted in gourmet food stores, unfinished furniture shops, and at home in their own flower garden, displaying their sophisticated good taste, their togetherness and their Viceroys. Wherever they are, "they won't settle for less",

The Silva Thins people — that enigimatic, sinister fellow in the wrap-around shades and the women who pursued and idolized him — were blatantly sensual, stylish and opulent. Throughout

1970, they delivered the message that "Cigarettes are like women. The best ones are thin and rich. Silva Thins are thin and rich." Presumably, this advertising is not aimed at the "Women's Liberation" market.

In marked contrast are the people who, upon, being told about Lark cigarettes, do something nice in return for the information. This series of advertisements features such work-a-day folk as barbers, tailors, housewives, photographers, secretaries, week-end golfers, and poker players. The settings are definitely middle-class, and usually not glamorous. However these people are beautiful because they do "nice" things — and they smoke Lark.

In the series of Lark advertisements discussed above, some of the models have balding heads and other indications that they may be approaching or well into middle age. This phenomenon is an exception to the general practice of using persons who appear to be in their mid-twenties in most cigarette advertising. This general proposition that beautiful people are young people is further enhanced by the use of contemporary language — the jargon of the young. A recent campaign for Kent menthol 100's used the slogan, "Kent's got it all together", whatever that means. Another series for Vantage featured people who wouldn't "cop-out". Neither does the taste of Vantage, it is claimed, as has already been noted.

3. *Relieving Anxiety.* In one sense, all cigarette advertising relieves anxiety about the health consequences of cigarette smoking to a certain extent simply by its presence. The existence of cigarette advertising reassures some people — both

smokers non-smokers — who believe that if the product were really dangerous to health, the Government would not allow it to be sold, let alone advertised. All cigarette advertising observed to date presents the advertised brand in a favorable light, and no cigarette advertisement has yet been observed which in any way suggests that cigarette smoking might be harmful to health.

In addition to this general tendency of all cigarette advertising to allay fears about the danger to health, many specific advertisements and campaigns help relieve anxieties by the scenes they depict. When people are displayed, what ever their age, occupation or activities, they are happy, and apparently healthy people. The Marlboro cowboy is seen galloping through the rain or sitting around a campfire, not occupying a bed, in an emphysema ward, or even a lonely bunkhouse. An "L & M moment" never takes place on the steps of a church immediately after a funeral, or anywhere near a hospital.

Many cigarette advertisements go even further in their attempts to dispel any concern that the public may have about cigarette smoking and human health. One technique to accomplish this end is the use of humor. During 1970, Benson and Hedges continued its campaign based on the supposed disadvantages caused by the length of Benson and Hedges 100's. These advertisements featured a variety of presumably amusing predicaments in which the Benson and Hedges smoker finds that, his extra-long cigarette works to his disadvantage. An artist with a cigarette in his mouth jams it against the canvass which he is painting; a brick layer mortars his cigarette into a wall he is building; a

shoe shine man burns a hole in a customer's trousers. The theme of these and many more advertisements is that "Benson and Hedges 100's must taste pretty good. Look what people put up with to smoke them". Although, an appeal is made to satisfying taste, the underlying message is that cigarette smoking is one of those amusing and irrational things that people do, and anything that is amusing is not really dangerous.

For more than a decade, the Winston slogan has been offensive to grammatical purists, because the word "like" is used as a conjunction in the slogan "Winston tastes good like a cigarette should". During the past year, Winston has attempted to inject an element of humor into its advertising by suggesting that people who worry about problems of English grammar are troublemakers who have no place in the pseudo-sophisticated world of cigarette promotion. In one series of television commercials, grammatical fuss budgets smugly point out the error, and are then physically over-powered by Madison Avenue's equivalent of the Greek chorus — a crowd of "sensible" individuals who find the question. "What do you want, good grammar or good taste" to be only a rhetorical one. As in the Benson and Hedges series, at the surface level these advertisements may be an appeal to satisfying taste, but the principal thrust of the message is that cigarette smoking is an amusing aspect of life, and that people who worry about grammar (and presumably such other picayune things as the effect of cigarette smoking on human health) must be brought to see the pleasurable aspects of cigarette smoking (*i.e.*, good taste), through physical coercion in some cases.

Another technique for dispelling concern about the health consequences of cigarette smoking is to associate the product with those aspects of undisturbed nature which are aesthetically pleasing and suggest the existence of life as a pervasive and continuing phenomenon. The classic example of this approach is the advertising for Salem cigarettes, which for many years has utilized scenes of rural beauty. In 1970, Salem continued this theme, using such slogans as "You can take Salem out of the country but you can't take the country out of Salem" and "Springtime it happens every Salem". One typical Salem advertisement in 1970 was the television commercial in which a demure post-adolescent country maid in an old-fashioned long dress is interrupted on a walk through the forest, in the manner of little Red Riding Hood. "Where are you going?", asks an off-camera voice. "To visit a relative" she replies. "And what's in the basket?" asks her interrogator. "Oh, a dozen country fresh eggs, wild berries, freshly baked bread, fresh spring flowers, and, oh yes, a carton of country-fresh Salem cigarettes with springtime in every puff", she coos. But a question about the tune she is humming provoke an abrupt change of character, and she suddenly assumes the pose and voice quality of a burlesque hall queen and belts out the lyrics, "You can take Salem out of the country but. . ." If the association of Salem cigarettes with all of those wholesome delights of rural living was not sufficient to dispel all cares about smoking and health, the attempt at a humorous ending should chase away any lingering doubts.

Another brand which made a strong bid in the past year to associate itself with those aspects of nature which are pleasing to the eye and comforting

to the psyche was Kool. A series of advertisements for that brand showed packages nestled in boughs of pine, and displayed against forests, mountains, clear streams, icy-blue bays, and luxurient green grass.

Still another effort to associate cigarettes with nature was the change in packaging made by Liggett and Myers, Inc., for its L & M and Chesterfield filter varieties. Chesterfield menthol filters appeared in a new package which reproduces a photograph of a couple sitting beside a forest stream. The new package of Chesterfield filters utilizes a photograph of a couple on horseback at twilight, and the new Chesterfield 101 package depicts a sailboat on an ocean of gold. L & M's new package uses the same photographic technique to depict a couple strolling through an autumn woods. Maryland 100's, a menthol filter produced by American Brands, Inc., also uses an illustrated package which shows three men on horseback attired, in red hunting jackets and surrounded by hounds, against a background of rolling green hills and a bright blue sky. Advertisements for this variety emphasize that the tobacco is "100 per cent fresh air cured", and one television commercial depicts a pack expanding with sound effects which suggest the inhalation of a deep breath.

A third category of cigarette advertising directed specifically to reduction, of anxiety about the health hazards of cigarette smoking is that which involves claims about the effectiveness of the filter of the advertised brand. This type of advertising presents a double-edged problem for a regulatory agency charged with promoting truth in advertising.

Since 1964, a growing number of medical experts have been stating that all cigarette smoking

is dangerous to human health. However, many of these experts also believe that some cigarettes are more dangerous than others. On August 25, 1967, William H. Stewart, M.D., then Surgeon General of the Public Health Service reported in testimony before the Consumer Subcommittee of the Committee on Commerce of the United States Senate, that an *ad hoc* advisory committee had concluded that "the preponderance of scientific evidence strongly suggests the lower the 'tar' and nicotine content of cigarette smoke the less harmful are the effects." That same year the Commission adopted its methodology for testing cigarettes for tar and nicotine content, and since that year has conducted six tests of all those varieties of domestic cigarettes available at retail outlets throughout the United States for tar and nicotine content. The most recently published results are those from a test of 120 varieties completed on October 21, 1970. In that test, tar content ranged from 2 to 31 milligrams per cigarette, and nicotine content varied from 0.1 to 2.2 milligrams per cigarette. Of the varieties tasted, 94 had filters, 26 did not. Of the varieties which occupied the first 30 positions when ranked in increasing order of tar values, only one was a non-filter. Of the 30 varieties which were lowest in nicotine content, only five were non-filter varieties. Of the 30 varieties highest in tar content, 20 did not have filters. Of the 30 varieties ranking highest in nicotine content, 14 were non-filters.

Thus the regulatory problem presented by these figures is that responsible medical opinion indicates that the reduction of tar and nicotine content in cigarette smoke decreases the hazard to the health of that element of the population which persists in smoking cigarettes, and the bulk of those varieties

which are at the low end of the tar and nicotine scale are filter varieties. To promote the public interest, advertisers should not be discouraged from promoting those varieties which rank low in tar and nicotine. However, much of the advertising designed to allay fears of the health consequences of cigarette smoking during the past year by emphasizing the essence of a filter was directed toward claims other than a forthright disclosure of tar and nicotine content of the advertised brand in relation to the range of all available variances. (The Commission hopes that the proposal to disclose tar and nicotine content in cigarette advertising made by eight manufacturers (Appendix C) when implemented will lead those, smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette, and resultant competition among the cigarette companies to meet that interest.)

One example of advertising for the effectiveness of a cigarette filter not directed toward competition on the basis of lower tar and nicotine content is that which deals with the "gas phase" of cigarette smoke. Throughout 1970, Lark hammered away at the ability of its filter to reduce "certain harsh gases" through the use of charcoal granules in the filter. The benefit to be derived from the reduction of these gases is always stated in terms of taste. "If you like the taste of gas, you'll hate the taste of Lark," one advertisement proclaims. Another asks "just what does gas in cigarette smoke taste like" with mug-shots of people grimacing. Still others attempt to describe the taste of these gases as "smogging" and to make a porous connection between Lark and current interest in air pollution. Liggett and Myers, Inc., the manufacturer of Lark is one of the eight companies which have indicated their intention to

disclose tar and nicotine content in cigarette advertising.

Advertisements for Tareyton and Tareyton 100's also emphasize that the filter contains charcoal granules, and like Lark, the appeal at the surface level is worded in terms of taste: "If you could put Tareyton's charcoal filter on your cigarette, you would have a better tasting cigarette." One series of advertisements based on this slogan tries for humor; it depicts an individual making several unsuccessful attempts to join a filter and a cigarette, while the slogan is repeated, with stress on a different word each time. Many of these advertisements close with a statement that Tareyton's taste is "why us Tareyton smokers would rather fight than switch", and a picture of a man with a black eye, the last vestige of a campaign from yesteryear. American Brands, Inc., the manufacturer of Tareyton, is the one member of the industry which, at the date of this writing, has not indicated its willingness: to disclose tar and nicotine content in cigarette: advertising.

Other brands which have made clams about the effectiveness of filters while avoiding tar and nicotine content were Kent and Parliament. While amiable couples were busy discovering yet another "good time for a Kent," an off-camera announcer was plugging "Kent's exclusive Micronite which "smooths the taste" of the tobacco. Parliament emphasized that its filter is recessed, and wrapped in an outer shell. "It works just like a cigarette holder works." Again, another appeal at the surface level to taste: "You never taste the filter, only the flavor."

Only a relatively small portion of all cigarette advertising during the past year urged cigarette smokers to select the advertised brand on the basis

of tar and nicotine content. In addition to advertising for Pall Mall Gold 100's, American Brands, Inc. made comparative tar claims in advertisements for Pall Mall Menthol 100's — "lower in tar than the best selling menthol king"; Silva Thins — "less tar than other 100's"; Carlton — "Four packs of Carlton have less 'tar' than one pack of the largest selling filter king"; and Montclair — "Montclair gives you low 'tar', menthol and Bonus Gift Coupons." R.J. Reynolds Industries, Inc. listed tar and nicotine content in advertisements for Doral and Vantage. One series of advertisements for True disclosed True's tar and nicotine and gave the range for tar and nicotine content of cigarettes tested by the Commission.

Multifilter also utilized advertisements which disclosed Multifilter's tar content and the highest and lowest tar content reported by the Commission's testing laboratory.

4. *Miscellaneous Promotional Techniques.* In 1970, seven brands of cigarettes offered purchasers the added enticement of coupons. Those brands and their manufacturers were: Belair and Raleigh, made by Brown and Williamson Tobacco Corporation; Chesterfield, made by Liggett and Myers, Inc.; Old Gold and Spring, made by Lorillard Corporation; and Alpine and Gallaxy, manufactured by Philip Morris, Inc.

At one time American Brands offered a variety of merchandise ranging from poker chips to footballs in return for the end seals from Lucky Filters and another promotion included a phonograph record in Lucky Filters cartons. American Brands, Inc. also sold Lucky Filters and Montclair with Bonus Gifts coupons, redeemable for trading stamps: or money.

Other brands offered merchandise at special prices when accompanied by proof of purchase of the advertised brand. Among the goods available to cigarette smokers were wallets and wrist watches from Silva Thins, an Oleg Cassini scarf from Lark, a butane cigarette lighter from L & M, and a beach towel from Marlboro. Sweepstakes were advertised by Virginia Slims, Winston and Benson & Hedges.

At various times during 1970, American Brands, Inc. has mailed free sample packages of Silva Thins and Maryland 100's cigarettes to addresses in California, Connecticut, New York, Washington and Wisconsin. Although the Commission has received many letters from the public protesting this promotional technique — several of them referred by members of Congress – the Commission is not aware of any statute or regulation which would prohibit this practice. Because of the interest of the public and Congress in this topic, the Commission has directed the staff to include data concerning the total number of all free sample cigarettes of all varieties distributed by all cigarette manufacturers during 1960 and 1970 in the forthcoming statistical supplement to this report.

5. *Regulatory- Activity.* In its 1969 Report on Cigarette Labeling and Advertising, the Commission included a copy of its proposed Complaint against the American Tobacco Company (a division of American Brands, Inc.) which alleged that American Tobacco Company engaged in false and misleading advertising of Pall Mall Gold 100's and other brands of cigarettes manufactured by that company, by representing that these brands were "low" or "lower" in tar without disclosing the tar content of the highest and lowest yield cigarettes, the tar content of

the advertised brand, and the tar content of any specific cigarette to which the tar content of the advertised brand was compared. This complaint was issued later in 1969, and counsel for the Commission presented evidence in this case before a hearing examiner in 1970. However, the case is still in adjudication, and for that reason, no further comment about the complaint by the Commission would be appropriate at this time.

On July 1 and 2, 1969 the Commission held public hearings on a proposed. Trade Regulation Rule to require disclosure in all cigarette advertising that "cigarette smoking is dangerous to health, and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema and other diseases". (A copy of the Notice of public hearing containing a statement of the proposed rule in full was included as Appendix E of the Commission's 1969 Report.) Later that month, Paul Rand Dixon, then Chairman of the Commission, testified before the Consumer Subcommittee of the Committee on Commerce of the United States Senate during hearings on H.R. 6543, which was eventually enacted into law as the Public Health Cigarette Smoking Act. In his testimony, Chairman Dixon stated that the Commission would be walling to suspend its proceedings with regard to the proposed Trade Regulation Rule on cigarette advertising until July 1, 1971, if all cigarette advertising were removed from radio and television. Section 7(a) of the Public Health Cigarette Smoking Act prohibits the Commission from taking further action with respect to the proposed Trade Regulation Rule to require a strong health warning in all cigarette advertising before July 1, 1971. In conformity with

that provision, the Federal Trade Commission took no action with regard to that matter during 1970.

On August 8, 1970, the Commission announced the text of another proposed Trade Regulation Rule pertaining to cigarette advertising which would require that all cigarette advertising disclose clearly and prominently "the tar and nicotine content of the advertised variety or varieties," based on the most recently published results of the Commission's cigarette testing laboratory. A copy of the public notice of this proceeding which contains a statement of the rule in full is attached as Appendix A. Public hearings originally scheduled to begin October 15, 1970, were postponed on October 1, 1970, and cigarette manufacturers were given a period of 30 days in which to present details of an industry proposal to disclose tar and nicotine content in cigarette advertising on a voluntary basis. A copy of the news release announcing this action is attached as Appendix B. On October 23, 1970, Brown and Williamson Tobacco Corporation, Larus and Brother Company, Inc., Liggett and Myers, Inc., the Lorillard Corporation, Philip Morris, Inc., R.J. Reynolds Industries, Inc., Stephano Brothers, and United States Tobacco Company submitted a written plan to disclose tar and nicotine content in cigarette advertising. This plan was placed on the public record until December 2, 1970, for comments from all interested parties. On December 18, 1970, these manufacturers submitted a modification of the original proposal which made the plan more favorable to the public interest, and on December 22, 1970, the Commission took action to suspend indefinitely the Trade Regulation Rule proceeding to afford the eight manufacturers an opportunity to implement their plan to disclose tar and nicotine

content in cigarette advertising on a voluntary basis. A copy of the final version of the plan proposed by the participating manufacturers is attached as Appendix C. American Brand's, Inc. is the only major domestic cigarette manufacturer which has not agreed to this proposal. Advertisements bearing tar and nicotine data in accordance with this plan are expected to make their first appearance before the public in February, 1971.

In its announcement of the action taken on December 22, 1970, the Commission stated:

> It appears to be in the public-interest to afford the tobacco industry an opportunity to implement the letter and spirit of the amended plan which it has proposed. In taking this action, the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this subject at any time it deems such action to be necessary or desirable in the public interest.
>
> The Commission believes that if the amended plan operates satisfactorily, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing with the serious problems relating to cigarette advertising.

A copy of the Commission news release announcing the action taken with respect to the industry plan is attached as Appendix D.

The Commission completed tests for tar and nicotine content from market samples of domestic cigarettes on May 18 and October 21, 1970. Copies of the test reports are attached as Appendix E.

In 1968, the United States Court of Appeals for the District of Columbia upheld an order by the Federal Communications Commission to the effect that the "Fairness Doctrine" is applicable to cigarette advertising and required those radio and television stations which broadcast advertising messages to promote the sale of cigarettes were obligated to make a significant amount of time available to persons who desire to present messages which point out the health hazards which may result from cigarette smoking. (*Banzhaf v. FCC*, 405 F2d 1082). On October 15, 1970, the Federal Communications Commission requested comments about the public interest obligations of broadcast licensees after January 1, 1971, when cigarette advertising by broadcast media would be illegal. In the Report and Order adopted December 15, 1970, the FCC held that after January 1, 1971, broadcast licensees could present messages to discourage cigarette smoking without an obligation to present views that cigarette smoking may not be hazardous to health. (Three cigarette manufacturers immediately announced their intention to appeal this portion of the Order to the Court of Appeals for the Fourth Circuit in Richmond, Virginia.) The Commission also rejected a petition from Action on Smoking and Health to rule that a residual obligation exists under the "Fairness Doctrine" which would require broadcast licensees to continue to devote a significant amount of time to the dangers to health associated with cigarette smoking after January 1, 1971, because cigarette commercials have been broadcast for several decades, while

messages to alert the public to the health hazards of cigarette smoking have been broadcast for only three years. The FCC added that the question of whether a broadcast licensee who avoids all discussion of cigarette smoking and health after January 1, 1971 would fail to meet the obligation to operate in the public interest "is one which can be definitively assessed only at renewal time when the licensee's *overall* public service performance effort can be evaluated". A copy of the ECC Report and Order is attached as Appendix F.

6. *Voluntary Regulation.* In a petition to the Commission dated November 12, 1970, Warren Braren, now associated with the National Citizens Committee for Broadcasting and formerly manager of the New York Office of the Code Authority of the National Association of Broadcasters, made the statement: "Today there is no administered self-regulation of cigarette advertising. The Cigarette Advertising Code (CAC) fumbled and finally closed its door on August 1, of this year. It now exists only on paper." Additional details of the decline and fall of the Cigarette Advertising Code are given in an article entitled "Cigarette Code on Ads Dropped," which appeared on page 17 of the November 13, 1970 edition of the New York Times and is attached as Appendix G. Responding to an inquiry from the Commission staff, Robert B. Meyner, Administrator of the code, said in a letter dated December 1, 1970, "As a bare bones recital, the Times' account which you enclosed is substantially accurate."

The Code Authority of the National Association of Broadcasters adopted as its policy a position similar to the order which the Commission believed to be appropriate in issuing its complaint against the

American Tobacco Company, and during 1970 required that if a broadcast cigarette advertisement used comparative language such as "low" or "lower" to describe the tar and nicotine content of the advertised cigarette, the advertisement must also disclose:

1. The tar and nicotine content in milligrams of the advertised cigarette;
2. The tar and nicotine content in milligrams of the lowest and highest yield domestic cigarettes; and
3. If the tar and nicotine content of the advertised cigarette is compared to any other specific cigarette, the brand name and tar and nicotine content in milligrams of the smoke produced by such other cigarettes.

One result of this decision was the withdrawl of several cigarette commercials which contained comparative tar and nicotine claims after January 1, 1970. Only two brands made comparative tar and nicotine claims in broadcast advertisements during 1970 — Multifilter and True.

RECOMMENDATIONS

The Commission believes that legislation to accomplish the following objectives is necessary:

1. Amendment of the Public Health Cigarette Smoking Act to require:
   a. The following statement to be printed clearly and conspicuously on the front panel of all cigarette packages and included, clearly and conspicuously in all cigarette advertising:

"Warning: Cigarette Smoking Is Dangerous To Health and May Cause Death From Cancer, Coronary Heart Disease, Chronic Bronchitis, Pulmonary Emphysema and Other Diseases."

b. A statement setting forth the tar and nicotine content of each cigarette, as reported by the most recently published Federal Trade Commission test, *or the package* and in all cigarette advertising.*

2. a Increasing appropriations to the Department of Health, Education and Welfare for education of the public (especially young people) as to the health hazards of cigarette smoking.

b. Enactment of measures to encourage the widest possible dissemination through all media of mass communication of messages to alert the general public to the health hazards of cigarette smoking.

3. Appropriating funds for research under the direction of the National Institutes of Health seeking the development of cigarette not hazardous to health.

Additional legislative recommendations may be forthcoming with the publication of the statistical

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* The Commission believes that further scientific study may warrant extension of this requirement to include a statement listing the results of quantitative and qualitative analyses of hazardous components in cigarette smoke.

supplement to this report after the staff has had an opportunity to evaluate cigarette sales and advertising data for 1970. The Commission staff will continue its surveillance of the cigarette industry, and the Commission will continue to assert its jurisdiction in those instances where unfair methods of competition or unfair or deceptive acts or practices in commerce are used in the promotion of cigarettes when the practices fall within areas where Commission action has not been preempted.

* * *

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant to the
Federal Cigarette Labeling and Advertising Act

For the Year 1979

INTRODUCTION

This report is the most recent in a series of reports on cigarette advertising that the Federal Trade Commission has submitted annually to Congress since 1967 pursuant to the Federal Cigarette Labeling and Advertising Act[1] which, in pertinent part, states:

> The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.[2]

The 1965 Federal Cigarette Labeling and Advertising Act also required all cigarette packages sold in the United States to include the warning: "Caution: Cigarette Smoking May Be Hazardous to

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1 15 U.S.C. §§ 1331 *et. seq.* (1965).

2 *Id.*

Your Health".[3] In 1970, Congress amended the Federal Cigarette Labeling and Advertising Act to strengthen the cigarette package health warning to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health."[4] At the same time, Congress barred cigarette advertising from radio and television after January 1, 1971. Congress has not required cigarette *advertisements* to include a health warning, nor as Congress required that cigarette packages or advertisements contain a disclosure of the brand's "tar" and nicotine content.

Jurisdiction over the need for the inclusion of a health warning in cigarette advertisements and the need for a disclosure of a brand's "tar" and nicotine content in cigarette advertisements has remained with the Federal Trade Commission. Thus, following the initiation of a rulemaking proceeding by the F.T.C., domestic advertisers in early 1971 agreed to implement a voluntary plan to disclose the "tar" and nicotine content of their brands in all cigarette

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[3] *Id.*, This requirement covers only "domestic cigarette sales," defined as:

(a) all sales within the 50 states, of the District of Columbia and U.S. territorial possessions,

(b) all sales to members or units of the Armed Forces of the United States located outside the 50 states, the District of Columbia and U.S. territorial possessions, and

(c) all sales for delivery to a vessel or aircraft of the Armed Forces of the United States, as supplied, for consumption beyond the jurisdiction of the internal revenue laws of the United States.

[4] P.L. 91-222, Approved April 1, 1970.

advertisements. Cigarette manufacturers have never been required to disclose "tar" and nicotine content on cigarette packages, and most packages do not reveal the brand's "tar" and nicotine levels.

In 1971, the Federal Trade Commission also announced its intention to file complaints against the cigarette manufacturers for failing to include a health warning in their advertisements. One year later, on March 30, 1972, the Commission obtained consent orders from the six domestic cigarette manufacturers requiring them to include in all of their advertisements the same health warning Congress already required on all cigarette packages. Since 1972, the same health warning has appeared on all cigarette packages and advertisements.

This report updates with 1979 data the previous annual reports issued by the Commission pursuant to the Federal Cigarette Labeling and Advertising Act. However, it should also be noted that on May 21, 1981 the Commission approved for publication and transmitted to Congress a lengthy Staff Report on a Cigarette Advertising Investigation which had been authorized by the Commission in 1976. The May 21, 1981 Staff Report discusses in detail the available evidence on the following five major issues: (1) In light of the substantial growth of medical information in recent years, what are the known consequences of smoking? (2) What health information does cigarette advertising contain about the nature, probability and severity of the dangers of smoking? (3) Does the public already know these facts, or does a substantial portion of the population lack knowledge of or hold false beliefs about the dangers of smoking? (4) Is the current warning effective in alerting the public to the health hazards

of smoking? (5) Is remedial action necessary? If so, what remedial measures, if any, are likely to result in the public being provided with sufficient health information to avoid any deception in cigarette advertising.

Thus, the Report recently transmitted to Congress contains a discussion of recent cigarette advertising practices, the effectiveness of the current health warning and the state of consumer knowledge of the health hazards of smoking. The Staff Report also contains a discussion of a number of possible remedial options for consideration by Congress, the Commission and all other appropriate organizations. These include increasing consumer education efforts, such as public service announcements, encouraging industry self—regulation, changing the size and the shape of the current warning, replacing the current warning with a more specific one, instituting a system of rotational warnings for cigarette advertisements and packages, permitting only "tombstone" advertising and requiring the disclosure of carbon monoxide levels in each brand of cigarettes.

The Commission wishes to emphasize that the remedial options suggested in the Staff Report are not limited to action by the agency; they may well be appropriate for consideration by other entities, including private organizations, government agencies such as the Department of Health and Human Services, and especially Congress. The Commission's 1978 Report to Congress on Cigarette Advertising has already suggested that Congress consider strengthening the language of the current warning and adopting a system of rotational disclosures. The Commission currently believes that because of the nature of the issues posed by such a

system, rotational warning proposals are particularly appropriate for Congressional consideration. The staff report's analysis of how such a proposal might work will hopefully facilitate this discussion.

Because the May 1981 Staff Report addresses at length current cigarette advertising practices and discusses a variety of remedial alternatives available to Congress and the Commission, this Annual Report does not contain a discussion of these matters.

DOMESTIC CIGARETTE SALES AND ADVERTISING FOR 1979

The data concerning domestic sales of cigarettes and expenditures for domestic cigarette advertising for 1979 were compiled by the Commission staff from Special Reports filed by the six major domestic cigarette manufacturers.[5]

The first five tables provide information on the sales and consumption of domestic cigarettes. These tables include data on overall sales, per capita consumption, and the market share of various types of cigarettes. Tables 6 through 11 present information on the advertising expenditures of domestic cigarettes. These tables reveal the total advertising expenditures in different media as well the percentage of the total advertising budget that was spent to promote various types of cigarettes, including low "tar" cigarettes. Table 12 provides data on the average "tar" and nicotine levels of

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[5] The companies are American Brands, Inc.; Brown & Williamson Tobacco Corp.; Ligget Group, Inc.; Lorillard, a Division of Loew's Theatres, Inc., Philip Morris, Inc.; annd R.J. Reynolds Industries, Inc.

domestic cigarettes from 1968 through 1979. The tables are discussed in more detail in the following section.

Sales and Market Share Trends

Table 1 presents total domestic cigarette sales[6] for each year from 1963 to 1979. As the Table indicates, 621.8 billion cigarettes were sold domestically in 1979, an all-time high and an increase of five and one-half billion over the number sold in 1978. Since 1963, total domestic cigarette consumption has increased by more than 100 billion cigarettes.

However, as indicated in Table 2, in 1979 per capita cigarette consumption actually declined slightly for the seventh straight year. Per capita cigarette consumption is determined by dividing the total number of cigarettes sold by the total adult population of the United States and overseas American military personnel, including nonsmokers as well as smokers. In 1979, each United States resident and overseas military person age 18 or over smoked an average of 3,935 cigarettes. Because per capita consumption figures are derived by dividing the total number of cigarettes sold by the *total* population of the United States, including both smokers and nonsmokers, these figures significantly underestimate the average number of cigarettes consumed by smokers each year. According to the 1979 Surgeon General's Report there are approximately 54 million smokers in the United

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6 For a definition of what is included by the phrase "domestic cigarette sales", *see* Footnote 3, *supra*.

States.[7] Using this figure for 1979, the average smoker consumed more than 11,500 cigarettes during 1979, or about 960 cigarettes every month.

Table 3 shows the domestic market share of filter and non-filter cigarettes in the United States from 1963 through 1979. Over the past 17 years, filter cigarettes have come to dominate the cigarette market. In 1979, filter cigarettes accounted for 91% of total sales, one percent more than in 1978 and 33% more than in 1963.

Menthol cigarette sales have also increased since 1963, when they accounted for 16% of total sales. Table 4, which presents the domestic market share of menthol and non-menthol cigarettes during 1963 through 1979, shows that in 1979 menthols held 29% of the cigarette market, up one percent from 1978.

Longer cigarettes have become more popular since 1967. Table 5 reveals that the market share of 95-101 mm cigarettes continued to increase in 1979, as it has each year since this data was first collected by the Commission in 1967. In 1979 regular size cigarettes accounted for 4% of total sales, king size cigarettes maintained the 1978 rate of 65% of total sales and 95-101 mm cigarettes increased their market share to 30%, a gain of 3% over 1978. The market share for sales of 110-121 mm cigarettes remained at 2%, the same as it has been for the last three years.

Table 11 shows the steady increase in the market share of low "tar" cigarettes over the past 13

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[7] 1979 Surgeon General's Report, at vii.

years. In 1967 only 2.0% of the cigarettes sold domestically had "tar" levels of 15.0 mg. or less. By 1979, the market share held by these cigarettes had risen to 40.9%. Still, almost 60% of all the cigarettes sold in 1979 emitted more than 15.0 mg. of "tar". For 1979, for the first time, Table 11 also reports the market share (and advertising expenditures, which are discussed in the following section) for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The Table reveals that almost 90% of all cigarettes sold in the United States in 1979 had "tar" levels of more than 9.0 mg.

Advertising and Market Share Trends

Table 6 provides a detailed breakdown of cigarette advertising budgets in 1970 and from 1975 through 1979. This table shows the amount spent to advertise cigarettes in various media, such as newspapers, magazines, outdoor signs and several other categories. In 1979 cigarette advertising expenditures in all media exceeded one billion dollars for the first time. The increase over 1978 expenditures is dramatic. Cigarette manufacturers spent 209 million dollars more in 1979 than they spent in 1978, an increase of approximately 20%.

Several comparisons between 1970 and 1979 are illuminating. In 1970, before the ban on radio and T.V. cigarette advertisements, total newspaper ad expenditures were about 14 million dollars. By 1979, the figure had risen to more than 240 million dollars. In 1970, cigarette manufacturers spent only approximately 7 million dollars on outdoor (billboard) advertisements. By 1979, that total had risen to close to 163 million dollars. Cigarette manufacturers spent 50 million dollars for cigarette advertisements in magazines during 1970. By 1979

cigarette advertising expenditures in magazines totaled almost 260 million dollars.

The data reported in Table 6 were not collected in their present form until 1975. Therefore, Tables 7 and 8, which report cigarette advertising expenditures for the years 1963-1974 and 1970-1974 respectively, have been retained in this report for comparative purposes.

Table 9 reveals the percentage of the total cigarette advertising expenditures that was used to promote filter cigarette sales. This percentage has increased from 75% in 1963 to 99% in 1979. As noted above, sales of filter cigarettes also have increased steadily during this time. For ease of comparison, the sales information regarding filter cigarettes that is presented in Table 3 is presented adjacent to advertising expenditure information in Table 9.

Table 10 shows the percentage of total cigarette advertising expenditures used to promote longer (95-121 mm) cigarettes from 1967 through 1979. Advertising expenditures for these cigarettes remained at the 1978 percentage level, 34%, but the sales data from Table 4, which are repeated in Table 10, reveal that longer cigarettes increased their market share slightly to 32%.

Table 11, which has been discussed in the previous section, presents the percentage of total cigarette advertising expenditures used to promote cigarettes with FTC "tar" levels of 15 mg. or less, as well as the sales figures for these cigarettes. Since 1976, cigarette manufacturers have greatly increased the aggregate percentage of their advertising expenditures used to promote these cigarettes. The market share of these brands has also increased

steadily since 1976. In 1979, cigarette manufacturers spent 66.9% of their advertising budgets to promote cigarettes with 15.0 mg. or less "tar". This represents an 18% increase over the 1978 level. Sales of these cigarettes also increased substantially, from 27.5% of total sales in 1978 to 40.9% in 1979.

For 1979, Table 11 also reports the market share and advertising expenditures for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The percentage of total advertising expenditures devoted to these cigarettes greatly exceeded their market share. In 1979, cigarette manufacturers spent an average of 30.9% of their advertising budgets to promote the sale of cigarettes with 9.0 mg. or less "tar", but these cigarettes accounted for only 10.6% of total sales. Cigarettes falling in what advertisers sometimes call the "ultra low 'tar'" range of 3.0 mg.[8] accounted for less than 3% of total sales and 9.6% of the cigarette advertising expenditures.

Table 12 reports the weighted average "tar" and nicotine emissions of all cigarettes sold domestically, and enables the reader to assign the decline in those values which has taken place since 1968 to one of three factors:

(1) Brand switches among the varieties that had been on the market throughout 1968-1979;

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[8] The FTC has not defined "ultra-low tar", or any term related to "tar" level except for "low tar", which the FTC defines as 15.0 mg. or less tar. As a result advertisers use a variety of terms to distinguish among "tar" levels.

(2) The lowering of the "tar" content of the varieties that had been on the market throughout 1968-1979; and

(3) Brand switches to varieties that were introduced after 1968.

The "A" columns show the weighted average "tar" and nicotine figures for all cigarettes sold in the U.S. from 1968 through 1979. These weighted averages are obtained by multiplying the total yearly sales figure for a given brand by that brand's respective "tar" and nicotine level. The resulting figures for each brand are then added together and divided by the total number of cigarettes sold domestically during the year in question. The "B" columns show these weighted averages only for those cigarette varieties which have been on the market from the year 1968 until the year indicated. Thus, these columns do not reflect the impact of new brands introduced after 1968. Finally, the "C" columns report on the same cigarettes considered in the "B" columns, but assume that the "tar" and nicotine values of these cigarettes had remained constant since 1968. Thus, figures in column "C" provide an indication of what the weighted average would have been if the "tar" and nicotine figures of individual cigarette varieties had not changed since 1968 and if no new varieties had been introduced after 1968.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant to the
Federal Cigarette Labeling and Advertising Act

For the Year 1980

DATED: November 15, 1982

Federal Trade Commission
NOV 18 1982

I. *INTRODUCTION*

This report is the most recent in a series of reports on cigarette advertising that the Federal Trade Commission has submitted to Congress annually since 1967 pursuant to the Federal Cigarette Labeling and Advertising Act[1] which, in pertinent part, states:

> The Federal Trade Commission shall transmit a report to the Congress not later than January 1, 1971, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.[2]

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1 15 U.S.C. §§ 1331 *et. seq.* (1965).

2 *Id.*

The 1965 Federal Cigarette Labeling and Advertising Act also required all cigarette packages sold in the United States to include the warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health". In 1970, Congress amended the Federal Cigarette Labeling and Advertising Act to strengthen the cigarette package health warning to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health."[3] At the same time, Congress barred cigarette advertising from radio and television after January 1, 1971. Congress has not required cigarette manufacturers to include a disclosure of "tar" and nicotine content on cigarette packages.

Jurisdiction over cigarette advertisements has remained with the Federal Trade Commission. Following the initiation of a rulemaking proceeding by the Commission, domestic advertisers in early 1971 agreed to implement a voluntary plan to disclose the "tar" and nicotine content of their brands in all cigarette advertisements. In 1971, the Federal Trade Commission also announced its intention to file complaints against the cigarette manufacturers for failure to include a health warning in their advertisements. On March 30, 1972, the Commission obtained consent orders from the six domestic cigarette manufacturers requiring them to include in all of their advertisements the same health warning Congress already required on all cigarette packages. Since 1972, the same health warning has appeared on all cigarette packages and advertisements.

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[3] P.L. 91-222, Approved April 1, 1970.

This report updates with 1980 data the previous annual reports issued by the Commission pursuant to the Federal Cigarette Labeling and Advertising Act. However, it should also be noted that on May 21, 1981, the Commission published for comment and transmitted to Congress a lengthy report entitled *Staff Report on the Cigarette Advertising Investigation*. In releasing the *Staff Report* the Commission indicated that it took no position at that time on the Report's recommendations or conclusions. The Commission stated that its purpose in publishing the May *Staff Report* was to stimulate an open dialogue about the need for additional government or private action with regard to cigarette advertising, and the appropriate body to take such action if it is deemed necessary. The May 1981 report on the Cigarette Advertising Investigation by the Commission staff was the culmination of an investigation which had been authorized by the Commission in 1976. The *Staff Report* discusses in detail the available evidence on the following five major issues: (1) In light of the substantial growth of medical information in recent years, what are the known consequences of smoking? (2) What health information does cigarette advertising contain about the nature, probability and severity of the dangers of smoking? (3) Does the public already know these facts, or does a substantial portion of the population lack knowledge of or hold false beliefs about the dangers of smoking? (4) Is the current warning effective in alerting the public to the health hazards of smoking? (5) Is remedial action necessary? If so, what remedial measures, if any, are likely to result in the public being provided with sufficient health

information to avoid any deception in cigarette advertising.

The *Staff Report* recently transmitted to Congress contains an extended discussion by the Commission staff of the effectiveness of the current health warning and the state of consumer knowledge of the health hazards of smoking. Therefore, these issues will not be addressed in this report. Moreover, the *Staff Report* contains a discussion of a number of possible remedial options appropriate for consideration by Congress, the Commission, and other agencies or organizations. This discussion also will not be repeated in this report.

There are two recent and important occurrences which the Commission wishes to bring to the attention of Congress. First, in March 1981, the Commission, for the first time, reported the levels of carbon monoxide, in addition to the levels of "tar" and nicotine, contained in all domestic brands of cigarettes. The December 1981 report is appended as Attachment I. A discussion of the potential health hazards associated with the carbon monoxide component of cigarette smoke is found in the May 1981 *Staff Report*.

Second, in July 1981, the Commission obtained in federal court consent judgments against five cigarette companies to settle charges that they did not clearly and conspicuously disclose the Surgeon General's health warning in all cigarette advertisements. The companies were charged by the Commission with violation of the 1972 consent orders by (1) failure to display the health warning on vending machines; (2) failure to display the health warning at all in some other advertising; (3) printing the warning in letters smaller than required on

billboards; (4) failure to translate, or inaccurately translating, the warning in foreign language advertisements; and (5) improper placement of the warning in some advertisements.

Under the settlement, the cigarette manufacturers must display the warning in all advertising appearing in the U.S. and all American territories; use larger lettering in billboard advertisements and print the warning in a single line across the bottom of the billboard rather than in a box; place the warning on vending machines; and, in foreign-language advertisements, disclose the message in the same language as the advertisements themselves. Under the consent judgments, Philip Morris, Inc., Lorillard, a Division of Loew's Theatres, Inc., American Brands, Inc., Liggett & Myers Tobacco Co., a subsidiary of the Liggett Group, and Brown and Williamson Tobacco Co. each also will pay civil penalties. The suit against a sixth company, R.J. Reynolds Tobacco Co., Inc., remains in litigation.

II. *THEMES OF CIGARETTE ADVERTISING*[4]

A. *Low "Tar" Cigarettes*

The percentage of cigarette company advertising budgets devoted to the promotion of low yield cigarettes (that is cigarettes with "tar" levels of 15 mg. or less) has greatly increased in recent years, as has the market share of these cigarettes. Various advertising techniques have been employed in the

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[4] The May 1981 *Staff Report on the Cigarette Advertising Investigation* contains a detailed summary of the Commission staff's findings as to recent trends in cigarette advertising.

promotion of these low yield cigarettes, including some comparative advertising.

Advertising for brands at the lowest levels of "tar" and nicotine content focus on the numbers. For example, Carlton cigarettes, Cambridge cigarettes and Now cigarettes all claim to be the lowest in "tar" and nicotine content. Carlton ads refer to U.S. government reports in support of the proposition that "Carlton is lowest." Advertisements for Now, on the other hand, use comparative charts to demonstrate that with some package varieties Now is the same as Carlton and that with others it is actually lower in "tar" than Carlton. Cambridge ads claim that "no other cigarette is lower in tar."

Advertisements for other brands stress the achievement of good taste in a low yield cigarette. Kent, for example, claims to be "the low tar that won't leave you hungry for taste." Ads for Kent III cigarettes feature headlines such as "Houston gushes over taste of Kent III 100s." Each states that taste has made Kent III "one of America's most popular low, low tars." Barclay ads state, "The Pleasure is Back" and add Barclay is "99% Tar Free."

Some low "tar" brands associate the cigarette with a rugged, masculine image. Raleigh Lights ads, for example, feature a truck driver urging the reader to "take the road to flavor in a low tar cigarette." Camel Lights advertisements use the caption "where a man belongs." Featured are a race car driver beside his car; a man with camping equipment next to a sea plane; a man climbing rocks with a rope ladder.

Other cigarette manufacturers advertise the results of survey research which purport to demonstrate that their particular brand is the best

tasting low "tar" cigarette. For example, advertisements for Golden Lights claim that "with 75 low tar products to choose from, over 1 million smokers switched to Golden Lights . . . often after just one pack." Merit asserts that "among 95% of smokers stating a preference, the MERIT low tar/good taste combination was favored 3 to 1 over high tar leaders when tar levels were revealed!" Triumph claims to be the "national taste test winner," preferred over other brands such as Winston Lights, Marlboro Lights, and Salem Lights, when "tar" levels were revealed.

B. *Outdoor and Athletic Activity*

As discussed in the May 1981 *Staff Report*, a major theme in cigarette advertising continues to be that of associating cigarette smoking with various forms of outdoor and athletic activity. These ads portray smokers engaged in vigorous activity in a clean, refreshing outdoor environment. Newport ads, for example, feature a couple on a beach with the woman riding on the back of the man; a group of youthful people playing volleyball on a beach; a couple splashing in the surf; and a couple frolicking in the snow. Benson & Hedges advertisements feature scenes of boating, hiking through woods or fields, bicycling, and a woman with a horse.

Marlboro has continued its highly successful ad campaign featuring the cowboy on horseback in "Marlboro Country" galloping across the range. Winston ads picture various kinds of outdoor workers, such as construction workers building a house overlooking a lake.

Other advertisements stress independence. One notable example is the Virginia Slims ad campaign, featuring the slogan "you've come a long

way, baby," which associates cigarette smoking with women's independence. One such series of advertisements features historical vignettes showing women being chastised in various ways for daring to smoke.

Thus, a major theme of cigarette advertising continues to be that smoking is associated with youthful vigor, athletic activity, and independence. In addition, an increasing amount of cigarette advertising is devoted to low "tar" cigarettes.

II. *DOMESTIC CIGARETTE SALES AND ADVERTISING FOP 1980*

The data concerning domestic sales of cigarettes and expenditures for domestic cigarette advertising in 1980 were compiled by the Commission staff from Special Reports filed by the six major domestic cigarette manufacturers.[5] The first five tables provide information on the sales and consumption of domestic cigarettes. These tables include data on overall sales, per capita consumption, and the market share of various types of cigarettes. Tables 6 through 11 present information on advertising expenditures for domestic cigarettes. These tables reveal the total advertising expenditures in different media as well as the percentage of the total advertising budget that was spent to promote various types of cigarettes, including low "tar" cigarettes. Table 12 provides data on the average "tar" and nicotine levels of domestic cigarettes from

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[5] The companies are American Brands, Inc.; Brown & Williamson Tobacco Corp.; Liggett Group, Inc.; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris, Inc.; and R.J. Reynolds Industries, Inc.

1968 through 1980. The tables are discussed in more detail in the following section.

A. *Sales and Market Share Trends*

Table 1 presents total U.S. cigarette sales for each year from 1963 to 1980. As the Table indicates, 628.2 billion cigarettes were sold domestically in 1980, an all-time high and an increase of 6.4 billion, or 1%, over the number sold in 1979. Since 1963, total domestic consumption has increased by more than 100 billion cigarettes.

However, as indicated in Table 2, in 1980 per capita cigarette consumption declined by 2%. Per capita cigarette consumption is determined by dividing the total number of cigarettes sold by the total adult population of the United States and overseas American military personnel, including nonsmokers as well as smokers. In 1980, each United States resident and overseas military person age 18 or over smoked an average of 3,848 cigarettes. Because the base for per capita consumption figures includes both smokers and nonsmokers, these figures significantly underestimate the average number of cigarettes consumed by smokers each year. According to the most recent Surgeon General's Report there are approximately 54 million smokers in the United States.[6] Using this figure for 1980, the average smoker consumed more than 11,633 cigarettes last year, or about 969 cigarettes every month.

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[6] *The Changing Cigarette: a Report of the Surgeon General*, January 1981, p. viii.

Table 3 shows the domestic market share of filter and non-filter cigarettes in the United States from 1963 through 1980. Over the past 18 years, filter cigarettes have come to dominate the cigarette market. In 1980, filter cigarettes accounted for 92% of total sales, one percent more than in 1979 and 34% more than in 1963.

Menthol cigarette sales also have increased since 1963, when they accounted for 16% of total sales. Table 4, which presents the domestic market share of menthol and non-menthol cigarettes during 1963 through 1980, shows that in 1980 menthols held 28% of the cigarette market, down 1% from 1979.

Longer cigarettes have become more popular since 1967. Table 5 reveals that the market share of 94-101 mm cigarettes continued to increase in 1980, as it has nearly each year since this data was first collected by the Commission in 1967. In 1980 regular size cigarettes accounted for only 3% of total sales; king size cigarettes dropped slightly to 63% of total sales; and 94-101 mm cigarettes increased their market share to 32%, a gain of 2% over 1979. The market share for sales of 110-121 mm cigarettes remained at 2%, the same as it has been for the last four years.

Table 11 shows the steady increase in the market share of low "tar" cigarettes over the past 14 years. In 1967 only 2% of the cigarettes sold domestically had "tar" levels of 15 mg. or less. By 1980, the market share held by these cigarettes had risen to 44.8%. Still, over 55% of all the cigarettes sold in 1980 emitted more than 15 mg. of "tar". Table 11 also reports the 1979 and 1980 market shares (as well as advertising expenditures, which

are discussed in the following section) for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The market share for each of these categories of low "tar" cigarettes increased from 1979 to 1980. However, the Table reveals that over 83% of all cigarettes sold in the United States in 1980 had "tar" levels of more than 9 mg. although the only category that exhibits any growth is the 9 mg. or less segment. Further, the category of 9 to 15 mg. "tar" cigarettes actually declined in market share.

Table 12 reports the weighted average "tar" and nicotine emissions of all cigarettes sold domestically. The table enables the reader to attribute the decline in those values which has taken place since 1968 to one of three factors:

(1) Brand switches among the varieties that had been on the market throughout 1968-1980;

(2) The lowering of the "tar" content of the varieties that had been on the market throughout 1968-1980; and

(3) Brand switches to varieties that were introduced after 1968.

The "A" columns show the weighted average "tar" and nicotine figures for all cigarettes sold in the U.S. from 1968 through 1980. These weighted averages are obtained by multiplying the total yearly sales figure for a given brand by that brand's respective "tar" and nicotine level. The resulting figures for each brand are then added together and divided by the total number of cigarettes sold domestically during the year in question. The "B" columns show these weighted averages only for those cigarette varieties which have been on the market

from the year 1968 until the year indicated. Thus, these columns do not reflect the impact of new brands introduced after 1968.

Finally, the "C" columns report on the same cigarettes considered in the "B" columns, but assume that the "tar" and nicotine values of these cigarettes had remained constant since 1968. Thus, figures in column "C" provide an indication of what the weighted average would have been if the "tar" and nicotine figures of individual cigarette varieties had not changed since 1968 and if no new varieties had been introduced after 1968.

For the first time, the average cigarette contains less than 15 mg. tar. Several forces have led to the decrease in tar for the average cigarette from approximately 22 mg. "tar" in 1968 to 14 mg. tar in 1980. Cigarettes on the market in 1968 have lowered their tar content. Further, the introduction of new brands since 1968, which have tended to be low tar ones, has had the aggregate effect of further reducing the "tar" delivery of the average cigarette to 14 mg. "tar."

B. *Advertising and Market Share Trends*

Table 6 provides a detailed breakdown of cigarette advertising budgets in 1970 and from 1975 through 1980. This table shows the amount spent to advertise cigarettes in various media, such as newspapers, magazines, outdoor signs and several other categories. In 1980 cigarette advertising expenditures in all media exceeded one billion dollars for the second year in a row. In 1980 cigarette advertising expenditures exceeded one billion two-hundred-forty-two million dollars, an increase of approximately 13% over 1979.

Table 6 permits comparisons between 1970 and 1980 advertising expenditures. In 1970, before the ban on radio and television cigarette advertising, total newspaper advertising expenditures were about 14 million dollars. By 1980, that figure had risen to more than 300 million dollars. Of course, this does not represent an absolute increase since the figures have not been adjusted for inflation.[7] In 1970, cigarette manufacturers spent only approximately 7 million dollars on outdoor (billboard) advertisements. By 1980, that total had risen to over 193 million dollars. Cigarette manufacturers spent 50 million dollars for cigarette advertisements in magazines during 1970. By 1980, cigarette advertising expenditures in magazines totaled more than 266 million dollars.

Thus, by 1980 the cigarette manufacturers played a major role in newspaper, magazine and outdoor advertising. In fact, R.J. Reynolds Industries, Inc., Philip Morris, Inc., B.A.T. Industries, Inc., the parent of Brown and Williamson Tobacco Corporation and Loew's Theatres, Inc., of which Lorillard is a division, represent the top four outdoor advertisers in the U.S. in terms of expenditures. American Brands, Inc. is sixth. Three of these companies are also among the top five advertisers nationally in terms of both newspapers and magazines.[8]

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[7] The 1981 *Staff Report* notes that the real increase in ad expenditures from 1967-1979, controlling for inflation, exceeded 50%. 1981 *Staff Report*, Chapter 2, p. 4.

[8] *Advertising Age*, September 10, 1981 at 36, 40, 66. These rankings also include advertising expenditures by these companies for products other than cigarettes.

One form of cigarette promotion which has become increasingly prevalent since the ban on cigarette advertising in the broadcasting media is cigarette company sponsorship of special events, such as musical and sporting events. Two notable examples of this phenomenon are the Virginia Slims Tennis Tournament and the Kool Newport Jazz Festival in New York. In 1970, cigarette company expenditures for such events were only $544,000. In 1980, cigarette manufacturers spent nearly 17 million dollars (1.4% of total advertising and promotional expenditures) on the sponsorship of special events.

The data reported in Table 6 were not collected in their present form until 1975. Therefore, Tables 7 and 8, which report cigarette advertising expenditures for the years 1963-1974 and 1970-1974 respectively, have been retained in this report for comparative purposes.

Several other events illustrate the magnitude of advertising by cigarette manufacturers in 1980. In September 1980, Brown and Williamson introduced Barclay cigarettes and backed its introduction by a 150 million dollar advertising and promotional campaign, the largest advertising campaign ever mounted in support of a single cigarette brand.[9] While the size of the Barclay campaign far exceeded that of any other advertising campaign, numerous brands were supported by very large advertising budgets. For example, R.J. Reynolds Industries

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[9] The data on the Barclay advertising expenditures were obtained from a trade publication and have not been independently verified by the Commission. *Advertising Age*, September 10, 1981 at 32.

spent 37 million dollars in support of Winston, 37 million dollars in support of Salem and 32 million dollars in support of Vantage. Philip Morris spent 32 million dollars advertising Marlboro. In all, cigarette manufacturers spent over 20 million advertising dollars in support of each of approximately 10 different brands.[10]

Table 9 reveals the percentage of total cigarette advertising expenditures used to promote sales of filter cigarettes. This percentage increased from 75% in 1963 to 99% in 1979, then dropped back to 96% in 1980. As noted above, sales of filter cigarettes have increased steadily during this time. For ease of comparison, the sales information regarding filter cigarettes that is presented in Table 3 is also presented adjacent to advertising expenditure information in Table 9.

Table 10 shows the percentage of total cigarette advertising expenditures used to promote longer (94-121 mm) cigarettes from 1967 through 1980. Advertising expenditures for these cigarettes rose from 34% in 1979 to 36% in 1980.

Table 11, which has been discussed in the previous section, presents the percentage of total cigarette advertising expenditures used to promote cigarettes with "tar" levels of 15 mg. or less, as well as the sales figures for these cigarettes. Since 1967 the percentage of cigarette advertising expenditures devoted to promoting sales of low "tar" cigarettes has increased dramatically from 5.5% to 65.1%. (The 65.1% figure for 1980 represents a slight decline from the 66.9% spent in 1979.) The market share of

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10 *Id.* at 6, 32, 106, 112, 114, 136.

these low "tar" brands has increased steadily from 2% in 1967 to 44.8% in 1980. Between 1979 and 1980 there was an increase of nearly 4% in market share.

Table 11 also reports the market share and advertising expenditures for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The percentage of advertising expenditures for cigarettes in each of these categories increased from 1979 to 1980. However, the percentage of advertising expenditures devoted to these cigarettes greatly exceeded their market shares. In 1980, cigarette manufacturers spent an average of 39.7% of their advertising budgets to promote the sale of cigarettes with 9 mg. or less "tar", but these cigarettes accounted for only 16.8% of total sales. Cigarettes in what advertisers sometimes call the "ultra low 'tar'" category of 3 mg. or less[11] accounted for only 3.3% of total sales, but over 15% of cigarette advertising expenditures.

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[11] The FTC has not defined "ultra-low 'tar'", or any term related to "tar" level except for "low 'tar'", which the FTC defines as 15.0 mg. or less "tar." As a result advertisers use a variety of terms to distinguish among "tar" levels.

OFFICIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE

FEDERAL TRADE COMMISSION

DOCKET NO. _____

In the Matter of:

METHODS TO BE EMPLOYED
IN DETERMINING TAR AND NICOTINE
CONTENT OF CIGARETTES

Place Washington, D.C.

Date November 30, 1966

Pages 1 – 134

WARD & PAUL, Inc.
OFFICIAL REPORTERS
917 G STREET, N.W.
WASHINGTON, D.C. 20001

AREA CODE 202-628-4266

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STATEMENT OF CLYDE L. OGG, PH.D.,
HEAD, SPECIAL PLANT INVESTIGATIONS
EASTERN UTILIZATION RESEARCH AND
DEVELOPMENT DIVISION, UNITED
STATES

DEPARTMENT OF AGRICULTURE,

PHILADELPHIA, PENNSYLVANIA

DR. OGG: Mr. Chairman, Members of the Commission. You have before you a written statement — I hope you have it. If not, I have extra copies in my briefcase. I would like to not read the full statement but emphasize some of the points that have been made in my comments.

First, I should like to point out that although the method that is under discussion is published under my name, I am not solely the author of this method. It was as a result of the committee work — the committee being the Analytical Methods Committee of the Tobacco Chemistry Research Conference. I acted as Chairman of that Committee and also acted as referee on tobacco for the Association of Official Analytical Chemists and it is in that role that I am speaking today.

The Committee members at the time this work was started were five in number, a representative of the American Tobacco Company, Phillip Morris, Liggett & Myers Tobacco Company, Consolidated Cigar Corporation and myself. This work was undertaken initially at the suggestion of Mr. Fred Irish, Chief of the Division of Scientific Opinions of the Federal Trade Commission, who contacted me as an associate referee for the AOAC and suggested that through the cooperation of the Tobacco Chemists Research Conference the committee undertake a study of a method for determining the particulate matter and nicotine in cigarette smoke.

We undertook this work and conducted a collaborative study, to get some information, some indication as to what procedures should be studied

more thoroughly. This resulted in the committee adopting the Cambridge Filter Method which is described in the publication referred to before and make a study of this method, setting parameters for the different variables — puff volume, duration and frequency and butt-length. The puff duration was 2 plus or minus 0.2 seconds was agreed to unanimously by the Committee members. The puff frequency, puff volume and butt-length was not agreed to unanimously by the Committee members. There was a strong and honest difference of opinion among the members which could only be resolved by Committee vote. In fact, the vote, on approval of the method was finally evolved was 4 in favor to 1 opposed.

Each one participating used a slightly different procedure. They probably still do unless they have adopted the AOAC procedure referred to. The objective of the Committee in developing the procedure were to try to simulate the "average smoker." And to try to get a method that was as precise as possible, that is, that would give the same values in different laboratories by different analysts.

The smoking procedure is of necessity empirical for it depends on the particular conditions selected. There are no true values for particulate matter and nicotine in cigarette smoke. Precision or repeatability of both within and between laboratories is a primary criterion used in developing the method.

Since smokers vary so greatly in their smoking habits, the proposed AOAC method will not tell a smoker how much tar and nicotine he will get from any given cigarette. It will indicate, however, whether he will get more from one than from another cigarette if there is a significant difference between

the two and if he smokes the two in the same manner.

Now, as to the comments on the four questions raised, the first one that deals with the butt-length, whether it should be 23 millimeters per non-filter cigarettes and the length of the filter and overwrap plus 3 millimeters for filter cigarettes with such combined length is more than 23 millimeters.

The procedure that was studied collaboratively used a 30 millimeter butt-length. Unpublished data available to members of the Committee indicated the average butt-length in this country at that time was approximately 30 millimeters. In a small study that I conducted this past summer n my own laboratory — only a 300 sample — the averages came out for non-filter cigarettes was 30.2 millimeters and for filter cigarettes was 33.2.

It is my opinion that smoking to the butt-lengths noted in he question would bias the data in favor of filter cigarettes and would probably decrease the precision of the method. There is a small but unavoidable variation in butt-length because the burning zone may reach the 30 millimeter mark during a puff, therefore, the analyst is directed to try to balance "overs" and "unders". In other words, those cigarettes which have a butt-length slightly larger than specified and less than that specified.

When the method was developed — the other point on this goes, as Dr. Hammond noted, as you smoke to a shorter butt-length, each puff has succeedingly larger amounts of nicotine delivered. So that if you have a variation in butt-length or a variation in the number of puffs it becomes more critical, the shorter the butt-length.

When the method was developed, all cigarettes on the market could be smoked to a 30 millimeter butt-length, but this is no longer true. Since that time some cigarettes cannot be smoked to 30 millimeter butt-lengths because the filter plus overwrap is of the order of 30 millimeters and it has apparently become standard practice or generally standard practice to smoke to the filter tip plus overwrap plus 3 millimeters, which is about as close as can be reasonably smoked to the filter tip and it is recommended that this procedure be followed for filter cigarettes.

It was noted earlier, the Method has little value as a quantitative measure of the amount of tar and nicotine an individual smoker will get from a cigarette. Its value as a means of comparing the tar and nicotine delivery of one cigarette with another, and to do this both must be smoked in a similar manner and to the same butt-length, if possible.

As to the second question, whether it should be smoked on a wet or dry basis, in the first collaborative study conducted by the Committee, moisture was determined by the Karl Fisher titration procedure. This did not seem to be a satisfactory procedure and was not used in the second study. The gas chromatographic procedures mentioned in the notice of the hearing were not available at the time the second study was done. Had they been available it is very probable that these methods would have been reported on a moisture-free basis.

It is my understanding from talking with some of the people who are using the gas chromatograhic procedure for moisture that it is a satisfactory method. It could not become part of the AOAC

procedure without a collaborative study involving its use.

As to Question No. 3, whether test results should be reported in terms of whole numbers or whole numbers and fractions of milligrams, or a range, or a figure accompanied by the standard deviation with an explanation, the Committee has not discussed the way in which particulate matter and nicotine values should be reported. However, in our report we gave the particulate matter and nicotine values to three significant figures and also reported the standard deviations. Variation in the results occurs in the second significant figure, that is in the milligrams of particulate matter and tenths of a milligram of nicotine.

In technical reporting it seems reasonable to me to report three significant figures and the standard of deviation. The general public would have to have an understanding and meaning and significance of the standard deviation would be then required.

As to Question No. 4 regarding the sampling, the Committee did not study the problem of gross sampling and we have no information on this subject.

That concludes my remarks.

CHAIRMAN DIXON: Commissioner Elman?

Mr. Sweeny?

MR. SWEENY: Doctor, we would like to ask one question which we think is important to the subject matter at this hearing today and that is this: How important do you consider the procedure of weight selection of cigarettes in the testing procedures described in your published method?

DR. OGG: The weight selection was to try to get what would be termed an average cigarette. We chose the weight rather than the pressure drop or rather than a combination of weight plus pressure drop as some people apparently do, because the Committee felt that this was a sufficient measure of what the average cigarette would be. The weight of the different cigarettes obtained by the different laboratories had a coefficient variation of about one per cent, indicating that there was quite good control and good uniformity in the cigarettes.

MR. SWEENY: With respect to the butt-length discussion that you had here a few minutes ago, would you tell the Commission, as we understand this, it came to an average of butt-lengths of about 30 millimeters in your study – is that right?

DR. OGG: In this small study I had, I had 30.2 for non-filter and 33.2 for filter cigarettes.

MR. SWEENY: Do you have any figures on how many or what percentage were between 25 and 30 millimeters or between 20 and 25?

DR. OGG: No, I do not. The range was, I think, 16 to 55 millimeters.

MR. SWEENY: Thank you.

CHAIRMAN DIXON: Mr. Elman?

COMMISSIONER ELMAN: Dr. Ogg, you say in your written statement that it is my opinion — your opinion — that smoking to the butt-lengths measured in the questions would bias the data in favor of filter cigarettes and would probably decrease the precision of the method. Could you spell that out? Why would it bias the data in favor of filter cigarettes if the 23 millimeters is non-filter and as to

filter cigarettes, the filter and overwrap plus three millimeters?

DR. OGG: The principle adopted in developing the method was to try to simulate what the average smoker did. The average smoker smokes to a 30 millimeter butt-length so smoking to a 23 millimeter butt-length on the non-filter cigarettes would give you more tar and nicotine than those filter cigarettes

COMMISSIONER ELMAN: The premise is, that the average smoker smokes to 30 and not 23.

DR. OGG: Yes, the puff volume, puff frequency could be varied to increase or decrease the same as the butt-length.

COMMISSIONER REILLY: I don't know whether you are aware of this. There has been one recommendation made that the test be the butt-length — overwrap plus 3 or 25. Would that be any better as far as you are concerned?

DR. OGG: 25 is not what our indication is to be on the average. This is what we show.

COMMISSIONER REILLY: Would the bias be less on your tests as it approached 33?

DR. OGG: Slightly less — 2/7 less.

COMMISSIONER ELMAN: This depends on whether 30 is in fact the average in the studies that have been made from the descriptions that we have heard have hardly exhausted it scientifically.

You said the study you made was based on 300 samples in the laboratory building where you work.

DR. OGG: That's right. It was a very small sample. I think Dr. Hammond before commented

that his study was 30 and mine was more than exhaustive. I satisfied my own curiosity.

COMMISSIONER ELMAN: The suggestion of 25 that Commissioner Reilly referred to is based on this P. Lorillard — plus three millimeters or 25 millimeters, whichever is the greater.

Do you have any reaction to that?

DR. OGG: There are a great many differences of opinion on this.

COMMISSIONER ELMAN: But it is important that they be uniform.

DR. OGG: The method we used specified 30 millimeters. I would like to see this followed.

COMMISSIONER REILLY: In your statement when you said the test would be biased, you didn't mean the results would be any less correct — the amount of tar and nicotine — the result of your test would not be any less correct. It would be more biased toward filter cigarettes, is that what you are saying, because the results would be less?

DR. OGG: The comparison of the results from the filter and non-filter cigarette would not be as valid as if they were both smoked to the same length. The average smoker does not decide when to quit smoking by deciding how much he has smoked, but how much butt-length he has left.

COMMISSIONER JONES: The use of the word "bias" tends to suggest that the test results are distorted in and of themselves. You are using the term "bias" in terms of the reaction on the smoker, isn't that right? You are not going to produce distorted results. You are not going to have erroneous results.

DR. OGG: The results of the method are useful in comparing the amount of particulate matter and nicotine that you will get from two cigarettes. If you smoked one of them to a lot shorter butt-length than the other one then you are favoring the one which you cannot smoke down to the shortest butt-length.

COMMISSIONER JONES: Wouldn't that argue that the test should be, as I understand Dr. Hammond to suggest, to get as close to an approximation of the contents of the cigarette and omit any consideration where individual smokers smoke that cigarette?

DR. OGG: What is the contents of the cigarette? You an smoke 35 millimeters.

COMMISSIONER JONES: That conceivably could be smoked?

DR. OGG: The contents of the particulate matter and nicotine is not necessarily determined by the butt-length, but it is also determined by how frequently a person takes a puff and the volume of the puff. The frequency with which cigarette smokers puff, that is for maybe one puff per two or five minutes, to the last report I heard was 13 puffs per minute.

COMMISSIONER JONES: Are you saying that a cigarette that is 50 millimeters long and the tar and nicotine content of that 50 millimeters has been measured, that if one smoker smokes it by 30 puffs and one smokes it by 15, the same length of cigarette, are they getting a different amount?

DR. OGG: Yes. You would have twice the volume. If you use twice the number of puffs of equal volume you would get twice the volume of smoke consumed or inhaled.

COMMISSIONER JONES: You are saying then that some people leave it lying in the ashtray and then pick it up and smoke it intermittently?

DR. OGG: That is why it is extremely difficult to put any quantitative figure as to the amount of matter that any one smoker will get.

COMMISSIONER JONES: You say there is no way of approximating it?

DR. OGG: It varies greatly.

COMMISSIONER REILLY: Would we eliminate — could the problem be eliminated between the filter and non-filter if you measured by the amount of cigarette smoked rather than the amount of cigarette remaining? If you smoke the same amount of filter cigarette, the test ram talking about, as a non-filter cigarette, wouldn't the measurement be as accurate as between the two?

DR. OGG: Does the average smoker do this? This is the question. The data seemed to indicate that the average smoker does not. He smokes to a particular butt-length.

COMMISSIONER REILLY: If we have a problem on 23 on filter cigarettes you are down beyond the filter, is that right?

DR. OGG: Yes.

COMMISSIONER REILLY: What if we set 20 but measured it from the front of the cigarette rather than the rear and smoked 20 milligrams on each cigarette whether it be filter or non-filter?

DR. OGG: The longer the cigarette, whether it had a filter in it, would deliver less tar and nicotine. But the average smoker tends to smoke it down

beyond that to the 30 millimeter length. The whole concept of this is to try to find the parameters of the method as nearly as possible to those of what the average smoker does according to the information the Committee had.

COMMISSIONER ELMAN: Dr. Ogg, have you had an opportunity to look at these?

DR. OGG: No, I have not.

COMMISSIONER ELMAN: Do you think that the recommendations that have been made, that you have heard, that reports be made on a per puff basis, do you think that recommendation is supported by the studies that you have made?

DR. OGG: We determined the number of puffs in the first study and calculated the average particulate matter in nicotine per puff. This has no advantage over giving the total because it is again, just an average and as Dr. Hammond pointed out, the matter of particulate matter and nicotine varies with the length of cigarettes or the number of puffs that you have taken.

COMMISSIONER ELMAN: The average puff tested according to your method, according to the method that you have reported, isn't necessarily the same as the average puff of the average smoker because there is no such thing?

DR. OGG: There is no such thing.

COMMISSIONER DIXON: Mr. McIntyre.

COMMISSIONER MCINTYRE: I have one question, Doctor.

At page 2 of your statement, in commenting on butt-lengths, you said unpublished data available to

the individual members of the committee indicated that the average butt-length in this country at that time, 1961-62 was about 30 millimeters. I would like to ask you this. You have heard Dr. Hammond's testimony. Was some of this unpublished data by him?

DR. OGG: No, Dr. Hammond was not a member of the Committee.

COMMISSIONER MCINTYRE: This wasn't limited to just was written by the Committee, was it, the unpublished data available to the Committee, the way you stated it?

DR. OGG: It may have included Dr. Hammond. I am not sure.

COMMISSION MCINTYRE: You heard him testify this morning that his experience in surveys had show the average butt-length to be 30, did you?

DR. OGG: This was probably taken into consideration but I do not remember that.

COMMISSIONER MCINTYRE: So this statement of yours would have included some data that he had colletected?

DR. OGG: I would suspect so.

CHAIRMAN DIXON: Any questions?

COMMISSIONER JONES: Dr. Ogg, if I understand your testimony correctly, you said under your method — that your method will not reflect the amount of tar and nicotine a person will get from a given cigarette. Could you explain that a little bit? It seems to me what we are getting at is to test what the tar and nicotine in the cigarette is.

DR. OGG: Tar and nicotine content that you are measuring depends upon the arbitrary parameters you set on puff volume, puff frequency, and puff length, and you have these three variables plus such other conditions as the moisture in the cigarettes and temperature and humidity, et cetera, and there are a great many variables here that are unknown.

COMMISSIONER JONES: What you are really saying is, it cannot be precise as an absolute reflection of quantity.

DR. OGG: Precision or repeatability is what we have to judge the method on, because there is no true or absolute value as there would be if you had the pure known compound. You have the mixture and the amount that you get of particulate matter and that depends upon what conditions you arbitrarily set for your smoking process.

CHAIRMAN DIXON: As long as those conditions are applied equally and identically to all brands of cigarettes you are smoking you should get a fair result, should you not, a fair comparison?

DR. OGG: As long as you are comparing one cigarette with another, providing they are smoked under these conditions.

CHAIRMAN DIXON: The frequency and puff you used was more than one puff per 60 seconds.

DR. OGG: Yes.

CHAIRMAN DIXON: That's the Ogg method of testing?

DR. OGG: I don't like the Ogg method being called that.

CHAIRMAN DIXON: This is the way this was tested.

DR. OGG: Yes.

CHAIRMAN DIXON: There might be some smoking machine that would eat one up and they would be getting a lot more than if you took one every 60 seconds?

DR. OGG: Yes.

CHAIRMAN DIXON: But if you measured ten brands of cigarettes identically, you would get a comparative basis, would you not?

DR. OGG: Yes.

CHAIRMAN DIXON: We are going to take a five-minute recess.

(A short recess was taken.)

CHAIRMAN DIXON: The next witness is Dr. Marcus Edwin Hobbs, who is Professor of Chemistry at Duke University, Durham, North Carolina.

Dr. Hobbs, will you come forward? Very happy to have you here sir.

* * *

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the Commission in June. I will be happy to supply you with additional information concerning my "Digital Air Control" cigarette.

CHAIRMAN DIXON: Mr. Sweeny?

MR. SWEENY: No questions

CHAIRMAN DIXON: Thank you, Doctor, for coming. Next, James K. Sorenson, President,

Continental Tobacco Company of South Carolina, Inc., Columbia, South Carolina.

STATEMENT OF JAMES K. SORENSON, PRESIDENT, CONTINENTAL TOBACCO COMPANY OF SOUTH CAROLINA, INC., COLUMBIA, SOUTH CAROLINA

MR. SORENSON: Mr. Chairman, members of the Commission, in listening to the testimony today I think we have all come to the conclusion that we are interested in what is best for the public welfare. In our opinion, Mr. Chairman, the printing of nicotine and tar content on the label of various brands of cigarettes on the face of the label of cigarettes is misleading and we further believe that the Federal Trade Commission in setting up a laboratory to cooperate or to check on nicotine and tar content would contribute to misleading the public. I would like to read this — I can substantially substantiate what we have.

It is the opinion of Continental Tobacco Company of South Carolina, Inc., that the printing of nicotine and tar content on the label of various brands of cigarettes manufactured in the United States would tend to mislead, confuse and deceive the general smoking public in that showing low nicotine and tar content would infer a safer cigarette. To substantiate the foregoing statement, the following references are submitted to the Commission for your consideration:

Quote taken from Smoking & Health — Report of the Advisory Committee to the Surgeon General of the Public Health Service — U.S. Department of Health, Education and Welfare – Public Health Service; page 74: "There is no acceptable evidence that prolonged exposure to nicotine creates either

dangerous functional change of an objective nature or degenerative disease."

Quote taken from Smoking & Health – Report of the Advisory Committee to the Surgeon General of the Public Health Service – U.S. Department of Health, Education and Welfare – Public Health Service; page 75: "The results from chronic study on animals, and the low morality ratios of pipe and cigar smokers when compared with non-smokers indicate that the chronic toxicity of nicotine in quantities absorbed from smoking and other methods of tobacco use is very low and presumably does not represent a significant health problem."

Quote taken from Smoking & Health – Report of the Advisory Committee to the Surgeon General of the Public Health Service – U.S. Department of Health, Education and Welfare Public Health Service; page 71: "Nicotine is actively and rapidly metabolized (broken-down) by man and other animals, — the metabolites being in large measure excreted in the urine. If any tissue storage occurs, it is in such small quantity as to elude current analytical technics. —No evidence has been presented that the other known metabolites of nicotine carry any significant systemic toxicity."

Quote taken from Smoking & Health — Report of the Advisory Committee to the Surgeon General of the Public Health Service – U.S. Department of Health, Education and Welfare Public Health Service; page 74: "In view of the mortality ratios of pipe and cigar smokers, it follows logically that the apparent increase in morbidity and mortality among cigarette smokers relates to exposure to substances in smoke other than nicotine."

Further, in the summary on page 74 of the Smoking and Health Report, the average dosage level of nicotine is from one to two milligrams per inhaled cigarette.

Quote taken from Smoking and Health — Report of the Advisory Committee to the Surgeon General of the Public Health Service – U.S. Department of Health, Education and Welfare Service; page 71: "Dogs receiving 150 milligrams per one kilogram of body weight per day orally for 108 days exhibited no weight loss or other objective signs. Man has ingested 500 milligrams orally at 8-hour intervals for 6 days without untoward effects.

It is a further opinion of Continental Tobacco Company of S.C., Inc., that by lowering the nicotine content, the smoker may increase his consumption of cigarettes in search for nicotine satisfaction. To suppose this opinion, we submit information published by the New York Academy of Sciences - Vol. 6, No. 1, June, 1966: "It is generally conceded that nicotine plays a key role in the initiation and development of the smoking habit in man. In man, hypodermic injections of nicotine are said to give a pleasant sensation to smokers but not to non-smokers. One experimenter said that he derived more pleasure from injections of nicotine than from smoking.

Monkeys can be taught to give themselves injections of nicotine for no other reward than the pleasure they derive Drs. G.A. Deneau and Reizo Inoki University of Michigan, Ann Arbor) told the conference that, after receiving injections of nicotine into the bloodstream automatically every hour, all seven of the monkeys they tested later began the self-administration of nicotine. This they did by

pressing a lever which released a measured amount of nicotine into the bloodstream through an indwelling catherer.

Although the amount of nicotine self-administered at each injection remained the same, the number of injections each monkey gave himself varied from day to day. All the monkeys gave themselves more injections every other day, and, fewer injections on the alternate days.

Gradually, these researchers increased the dose of nicotine in each injection. The monkeys gave themselves fewer injections each day, but the total amount of nicotine taken daily increased. When very large amounts of nicotine were received at each injection, most of the monkeys simply stopped self-administration."

Mr. Chairman, in the "Western Tobacco Journal" —

"There seems to be two opinions in the U.S. as to whether being allowed to publish "nicotine and tar" information about a cigarette is a good idea. On one hand there is point expressed by P. Lorillard recently when it withdrew from the advertising code organization. Lorillard officials and many others believe that not being able to use "tar and Nicotine" information discourages manufacturers from trying to develop "safer" cigarettes. On the other hand some believe cigarette manufacturers are really whistling in the dark about what should be removed from a cigarette to make it "safer." It is conceivable that if some "dangerous" as yet unknown, ingredient unrelated to "tar and Nicotine" is in cigarettes, reducing "tar and nicotine" could actually be dangerous. Smokers might tend to smoke more

cigarettes to get the same smoking satisfaction, therefore getting more of that unknown ingredient."

CHAIRMAN DIXON: I have been listening patiently to what you said. This is not the right forum to come here and argue this, sir. What we were sitting here today to hear was suggestions as to the Cambridge Filter method.

MR. SORENSON: I believe our conversation said we thought you shouldn't do it at all.

CHAIRMAN DIXON: I see your narrow thread, sir, but think maybe your argument ought to be over to the Surgeon General rather than to us. How much longer do you have?

MR SORENSON: I had the nine minutes. I wanted to wind it up by saying that it is our opinion that if ingredient analysis be printed on the various brands of cigarettes, the contents of known deleterious substances should be printed, not nicotine and tar. It is our contention that the Public is mislead now, Mr. Chairman.

If you walked down the halls of your own building here and asked the employees in here what they thought the deleterious substances in this cigarette was, I would venture to say 12 out of 12 would say nicotine. If the Federal government goes ahead and sets up the laboratory and spend money to check this, it is going to further confuse the public into believing, well, the government wouldn't go ahead and check on nicotine and tar unless they believed it was deleterious as substance and it wouldn't have an effect of reducing, as your own words were, it would start a derby of lowering the nicotine people smoke and people would smoke more to get the same satisfaction. It could be deleterious,

this setting up of a laboratory and checking it. What's my reason for coming.

CHAIRMAN DIXON: Do you have any questions, Mr. Sweeny?

MR. SWEENY: No, sir

CHAIRMAN DIXON: Anyone have any questions?

(No response.)

CHAIRMAN DIXON: Thank you very much, sir.

Are there any more witnesses here?

(No response.)

CHAIRMAN DIXON: Hearing none, the Commission wishes to again express its appreciation to all of those who have contributed to the public record in this matter, either by submitting written data and view or taking the time to appear here today.

It may be that upon consideration of the record to date, some interested parties may desire to file further statements. Accordingly, the public record will remain open for 30 days from this date to receive such submissions. The Commission will thereafter consider the entire record and take such action thereon as may appear to be in the public interest.

The hearing is adjourned.

(Whereupon, at 3:10 o'clock, the hearing in the above-entitled matter was adjourned.)

NOMINATION-1970

HEARING

BEFORE THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

NOMINATION OF

MILES W. KIRKPATRICK, TO BE CHAIRMAN
OF THE FEDERAL TRADE COMMISSION

AUGUST 20, 1970

Serial No. 91-88

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* * *

Mr. Kirkpatrick, I welcome you before the committee. As I indicated in our conversation in my office, I think that you bring to this office, that you have been nominated for by the President, the unique qualifications that certainly should enable you to function very successfully there.

I have a few questions I did want to ask. I was pleased to see the Commission institute a

rulemaking proceeding to require the listing of tar and nicotine in all cigarette advertisements. This is a logical next step, following the congressionally imposed ban on broadcasting advertising of cigarettes, and one which Chairman Magnuson and I have long sought.

Although the Commission has been criticized in many areas, it can be proud of its forthright stand on cigarette advertising. As you know on January 1 of next year cigarette advertising will disappear from the electronic media. This committee is particularly concerned that there may then ensue a flood of cigarette advertising in the printed media. I very much hope you will have the staff of the Commission closely monitor the practices of the cigarette companies.

At the end of June of 1971, under the terms of this cigarette labeling law, you will then be free to proceed with your trade regulation rules to require warnings on printed advertising.

Would you be prepared to require a warning in all cigarette advertising if the behavior of the cigarette companies warrants that action?

Mr. KIRKPATRICK. If the behavior of the cigarette companies warrants that action, of course, sir.

Senator Moss. And by behavior, I am really predicating that on this flood into printed advertising when electronic advertising ceases.

Mr. KIRKPATRICK. If you speak, sir, merely of the amount of advertising involved, I don't think I could comment on that very knowledgeably at this time. It would involve a great deal, I think, of

background in the cigarette rulemaking that I simply don't have and have not had access to.

But I want to very much consult with my future colleagues and with the staff on that matter. It certainly is a matter we would be very much alert to.

Senator Moss. The rationale behind the cigarette advertising bill was that, one, the product was found by the Surgeon General to cause serious disease, impairment of public health, and the electronic media was being used to induce more people to take up the habit and continue the habit, and therefore because of the peculiar control that we have over electronic media, we, the Congress, decided that it should cease.

But now if the tobacco companies simply divert those funds and with ingenuity and the type of advertising, all of the rest, to still attempt to achieve the same results through printed media advertising, it seems to me the basic reason for banning the electronic advertising would then appear over on the printed side of the media.

And one of the things that must be done is a warning in the advertising itself to people of what it is going to do to their health if they take up or continue the habit of cigarette smoking.

Mr. KIRKPATRICK. I don't quarrel with what you say, Senator Moss, at all. I think one of the factors that I am unaware of is what weight to attribute to the peculiar and compelling nature of television advertising on cigarette sales. That may be something that would distinguish and compel the action to be taken by the Congress on television advertising that would not be a factor in magazines or newspapers.

I am simply, I think, unable to deal with the question in terms of, in the categorical terms you would like me to deal, because I am simply not qualified to do so at this point.

Senator Moss. We already had some counterweight in the electronic advertising by the requirement of carrying the anti-ads, the little spots that are prepared by the voluntary agencies, to tell the effects of cigarette smoking. And they have been very effective.

What I am talking about is whether we might require some sort of similar thinking by putting in the ad itself what the health effects will be of continued use.

Mr. KIRKPATRICK. It is certainly a matter in my judgment that the Commission should carefully consider.

Senator Moss. On the 29th of June, Chairman Weinberger informed me that the Commission was undertaking a study of the relationship between advertising and drug abuse in response to a proposal now pending before this committee which I introduced. I hope that you would give this strong support and resources to this study.

Many experts in the drug field are convinced that certain kinds and types of advertisements, particularly those for over-the-counter medicines, are contributing to the drug abuse problem in this country. At the very least by promising the relief from anxiety and tension which they cannot offer, many of these ads deceive the American public into believing that problems can be solved simply by popping a pill.

Will you pursue this study vigorously?

Mr. KIRKPATRICK. This study will be pursued, Senator. I believe it is already in the competent and vigorous hands of the Commission.

Senator Moss. The recent hearings I held on the nutritional value of dry breakfast cereals and advertising of these cereals caused some concern. Will you vigorously pursue your announced study of the cereal industry ?

Mr. KIRKPATRICK. It is my intention, and as I understand it the intention of the Commission.

Senator Moss. Will this focus on the advertising practices of the cereal industry ?

Mr. KIRKPATRICK. I could not speak with personal knowledge of the precise focus. I believe it would be a general study, covering market structure, as well as performance, which would undoubtedly involve advertising practices as well.

I do not, myself, know whether that is the central focus of it or not, sir.

Senator Moss. One of the other problems is the structure of the industry, concentrated very largely in four producers of cereals that dominate the market. The structure of the industry should also be scrutinized might also be of interest.

Mr. KIRKPATRICK. I understand that is very much a part of the subject matter of the study, sir.

Senator Moss. On the 10th of June Chairman Weinberger recommended to this committee that we establish a vigorous enforcement procedure for the Federal Trade Commission in dealing with the Flammable Fabrics Act. Those recommendations have now been embodied in S. 3765.

Do you subscribe to the certification procedure and the penalty provisions which Chairman Weinberger recommended?

Mr. KIRKPATRICK. I think if I might, Senator, Chairman Weinberger proposed a pretest procedure rather than certification procedure. I certainly subscribe, very definitely and emphatically, to the objectives of that legislation. I do understand there have been subsequent hearings which raised technical questions. But the objectives of that legislation are beyond question in my mind.

Senator Moss. That is correct.

The CHAIRMAN. It is a strong ball and will give you plenty of authority down there to get at it.

Senator Moss. The pretesting—by saying certification I perhaps neglected to say this was pretesting, and therefore certifying that the fabric had passed the test. Rather than the system that we have now of having goods all distributed and out and then making a discovery there is a flammable fabric and you probably can't recall all of the goods.

Mr. KIRKPATRICK. I am wholeheartedly in favor of this legislation, sir.

Senator Moss: Mr. Kirkpatrick, you are familiar with the automobile warranty report of the Federal Trade Commission?

Mr. KIRKPATRICK. I know that it exists. I have not studied it in detail, sir. I have not had an opportunity to do so. It is a rather voluminous report. I think I know in substance what its recommendations are.

Senator Moss. I would hope that you would support the recommendations of that report,

particularly as they relate to prohibiting the disclaimer of implied warranties.

Our committee saw no reason why a written warranty should be used to limit the rights of the consumer, rights that he would have but for the written warranty. Do you agree with that?

Mr. KIRKPATRICK. I agree with that.

Senator Moss. Do you believe that all warranties should clearly and conspicuously disclose their terms to the consumer?

Mr. KIRKPATRICK. I do.

Senator Moss. Do you believe that there should be some direct and simple means for consumers to identify warranties that are full and complete and that offer total protection against malfunction from those warranties for parts, but not for labor, or otherwise have only partial coverage?

Mr. KIRKPATRICK. I think that would be highly desirable. Senator Moss.

Senator Moss. The committee received a statement from Howard Frazier of the Consumer Federation of America. You are acquainted with that organization, I assume ?

Mr. KIRKPATRICK. I had not been acquainted with it, sir. But Mr. Frazier was kind enough to send me a copy of that communication so that I have read that which you refer to.

Senator Moss. As I read it, the main point of the statement seemed to be that the consumers must be given a voice in the day-to-day operations of consumer protection agencies.

Mr. Posner claims there are no incentives to the agencies to be faithful to the consumer interests.

Commissioner Elman says the problem is due to the fact that there is no accountability to an identifiable constituency. There have been proposals that an independent consumer council be established within the Commission. I assume this means a council with power of intervention, such as was done in New York by the State Utilities Commission.

What do you think of that as a possible solution to this problem posed by Mr. Frazier?

Mr. KIRKPATRICK. I look upon the Commission as just such an agency, sir. We are committed to the protection of the consumer, and to have somebody in our midst who is just like we are would be, I would be a little nonplussed, I wouldn't know what to do with him I think.

Senator Moss. He is in effect the devil's advocate down there. Because of the allegation that the Commission was not fully oriented to protect the consumer, he is in there for just that purpose, to be a consumer man. You don't think that is a necessary addition ?

Mr. KIRKPATRICK. I would like to give that—I really have not considered that, Senator Moss. I would like to give it consideration. My instant reaction is that I don't like it, sir, because the Commission is indeed committed and its purpose is the protection of the consumer. To have somebody whose avowed purpose is that of looking over our shoulder, being part of us, I say, I am confused as to what he would do. Because we are there to advocate and prosecute the interests of the consumers.

Senator Moss. What do you think of the suggestion that the Commission be shorn of its adjudicative responsibilities, it simply be an action, advocate agency?

Mr. KIRKPATRICK. Senator Moss, I am not critical of the Commission's functions, or the Federal Trade Commission and others. Criticism has been leveled at this for many years. It does pose difficulties, and my own conviction is, and I think it has been demonstrated under former Chairman Weinberger and I hope I and my colleagues and staff can continue to demonstrate that we can deal with that and be more effective because we do have both of those functions. I very much believe in the commission process. Indeed I don't think I would be here sitting before you today if I did not so believe.

Senator Moss. Those two sort of tie in, the Commission being required to sit in adjudication cannot carry out as fully its function as an advocate of the consumer, because of the necessity of sitting in judgment.

Isn't there a conflict there?

Mr. KIRKPATRICK. I think that we have—I have not gone into this in the detail, I -would expect to—I think there have been procedures devised at the Commission such that such separation as should in fact take place is assured. And that the process is a smoothly working one and that the criticism really is, I would hope it could be demonstrated, more an intellectual exercise than a realistic one in these circumstances.

Senator Moss. Do you think consumers should have a voice in selecting their advocates in government ?

Mr. KIRKPATRICK. Well, I am unable to identify, really—well, the answer is "Yes." But I am unable to identify who the consumer is, because we are all consumers.

Senator Moss. You are aware of course that consumers are showing an increased interest and in fact demanding their rights to participate in the regulatory process by which we are supposed to protect the environment and the quality of the marketplace and the old rules appear to no longer be in effect. We are concerned that the FTC as the major agency of consumer protection at the Federal level be fully responsive to the burgeoning insistence that the marketplace be improved. In that connection do you believe the FTC rules of practice should be amended to assure interested parties the right to participate in FTC proceedings?

Mr. KIRKPATRICK. I assume without knowing the answer that we already have procedures which permit intervention of interested parties. And I assume also the procedures would permit the appearance, the filing of briefs and the like. This is a complicated question with which the Commission has dealt in some detail in recent cases. I am not familiar with the detail of the matters and really cannot comment further than that at this time.

Senator Moss. The designation of the Bureau of Deceptive Practices has been changed to the Bureau of Consumer Protection. Other than the establishment of a Consumer Advisory Board and consumer protection committees in the field and the creation of a Consumer Education Office, what new steps have been taken in consumer protection?

Mr. KIRKPATRICK. We have, as I understand it, a few groups of consumer representatives, I don't

know that that is the exact title, that have been coming from the field offices, who have been taking training, if you like, and then going back to the field offices. That has been done, sir.

I think these consumer advisory and consumer protection committees are a great step forward. I think they will be the eyes and ears of the Commission in the matter of consumer protection, to develop what must be developed in this field.

May I say there is a great deal of talk and I am aware of that, about consumer protection. But there is to the best of my knowledge very little solid economic learning in this field. I would hope that these consumer protection agencies in the field and the consumer advisory groups, would develop a body of learning.

May I give you a further example?

I understand that the computerized program that the Commission established in Chicago has developed this interesting fact, that the most frequent complaint that has come to that consumer protection group is the failure to deliver goods upon an order of a consumer. That is a surprising fact. I would not have expected that. But that is the kind of thing I hope we develop, the kind of information, which is very important in this field.

Senator Moss. Do you intend to make increased use of public hearings and trade regulation rules?

Mr. KIRKPATRICK. We intend to—it would certainly be my intention to do so.

Senator Moss. We covered that part earlier.

Senator Moss. Thank you very much, Mr. Kirkpatrick. I appreciate your answers.

As you can see, we have many things about which we have great concern, and on which we must turn to the Trade Commission for effective enforcement. We are anxious that you vigorously pursue these consumer areas that we have been talking about in this series of questions.

Thank you very much.

Mr. KIRKPATRICK. Thank you, sir.

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. KIRKPATRICK, I have just one other question that was brought up on the cigarette bill. There is a new proposed rule of the Trade Commission to require tar and nicotine listing in the advertising of cigarettes. As you know, we have been working with the tobacco industry for a long time, and I must say there has been good cooperation with the industry, seeking a voluntary agreement by them to do just what the Trade Commission is suggesting in the proposed rulemaking.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. I wanted to ask you if this can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?

Mr. KIRKPATRICK. In my judgment; yes, sir.

The CHAIRMAN. I hope that that can be pursued, because I must say they have been very cooperative and I think we might work out something along that line. We did that a long time ago in advertising with the hard liquor people. And for years it has been just an agreement between us and them that they don't go on television. And it has worked. And we have a sort of a loose agreement

with the beer people that they don't drink beer on television.

Now if you stopped a man on the street and said, "Do you know that people don't drink beer on television?" He would say, "What do you mean? I just saw them drinking beer last night."

Mr. KIRKPATRICK. That is my impression.

The CHAIRMAN. Because the advertising gets right up to it. But it seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.

Mr. KIRKPATRICK. It would be a highly desirable arrangement, sir; indeed, yes.

The CHAIRMAN. All right.

Senator Hart?

Senator HART. I will yield to the Senator from Kentucky.

Senator COOK. May I say to the Senator and the chairman, after Senator Moss and the chairman get through with tobacco and whisky, there is not much left of the Commonwealth of Kentucky.

The CHAIRMAN. Well, there are a few things left, but we won't mention them today.

Senator COOK. For Senator Magnuson's benefit, we are getting a group of people to be anti-SST in the Commonwealth of Kentucky.

Mr. Kirkpatrick, to be serious, I would hope from the start of questioning that your nomination wouldn't depend on your overall enthusiasm of S. 3201. As you well know I have strong objections to

this bill and purely and simply because I believe that the Congress is about to extend to the Federal Trade Commission authority that it has to and should reserve to itself.

Let me ask you this: I was delighted to hear you say if the adjudicatory authority of the Commission were not in existence, probably you would not be sitting here. I think this is fine. But you do agree there is a limit beyond which the adjudicatory authority of an agency should go before the Federal court system assumes its responsibility ; do you not?

Mr. KIRKPATRICK. Well, there must be some limit, sir, yes. Exactly what you have in mind, of course I don't know. I don't mean to fence with you, but, yes.

Senator COOK. What I have in mind is at least my own legal interpretation of rule 23 of the Rules of Civil Procedure, in relation to S. 3201 and the authority that is to be vested in the Federal Trade Commission by this bill. And I merely had this in mind. I hope I will be able to expound on it at a later time.

The CHAIRMAN. Would the Senator yield a moment there? I must be excused, and I think Senator Cotton has to leave too.

Senator COTTON. Before leaving, I will say I didn't go into these matters, because I knew Senator Cook was going into them. However, I am very much interested in the questions I anticipate he will ask.

Senator COOK. I wonder whether you have read to any great extent section 201, subsection 1(p) of the present proposed act?

Mr. KIRKPATRICK. I have not studied it, I am aware of it.

Senator COOK. As a matter of fact, in light of the criticisms that have been leveled against the FTC and as a matter of fact some of which are contained in your report, don't you think Congress should retain the power to define those unfair acts which may become a legal cause of action in a Federal district court? Or do you think that broad, all-expansive power should be delegated to the Federal Trade Commission?

Mr. KIRKPATRICK. I think in fairness, Senator, I have not come to grips with that in any way that permits me to give you an answer which is categorical. I do, however, appreciate the force of that which you are saying, and the force of your statement in the report and, indeed, it disturbs me.

On the other hand, I have not had the benefit of any thinking on the matter, any conferring with my colleagues or others. I would prefer to simply leave it that I recognize very much of the force of your remarks but I have not myself made up fully my mind.

Senator COOK. There is another question I have to ask you and I am sure your answer will be satisfactory in the record, but I hope that in this business of cigarette advertising, that you would not have any preconceived ideas or that you would not have any strong objectivity in regard to the attitude of some of the members of this committee.

Let me tell you why. During our discussions relative to the act that was passed in the spring, we had a hearing with the radio and television people and it was their desire, and I am sure this is public

knowledge, it was their desire that they wished to be phased out in 3 years. It was the of this Senator that the advertising go off last September. It was their des ire that they be phased out in 3 years because this represented 12 1/2 to 14 percent of their entire income and they could not sustain such a loss.

I might even say to you part of the argument that made up the decision to go until after the bowl games of January 1 of next year, for their benefit, by many of the people on the committee who were opposed to cigarette advertising, was summed up by the head of the broadcasters at that time he said they needed the opportunity to supplement this income, but he wanted the committee to know if they could stay on the air that much longer, with the antismoking advertising, that they would convince more people not to smoke. And this seemed like a strange thing to this Senator, that they were saying to the tobacco industry we appreciate your over $400 million a year in advertising dollars, but, we want to stay on longer, so we can have antismoking advertisements, so we can convince more people not to smoke.

In other words, if you stay with us and pay your bill, we will dig you right into the ground. That seemed like a strange analysis to me from a major industry.

Would you not agree to that?

Mr. KIRKPATRICK. As you state it, sir, it does surprise me.

Senator COOK. I might say when you answered Senator Cotton's question about the political invasion of positions down at the Federal Trade Commission, I might say for the junior Senator from

Kentucky, if this were to occur, it would be a great change. And I might say in regard to Mr. Frazier's comments, I am delighted with your nomination. I am delighted that the President has exercised his own choice to name you, because I am having a great running battle with the Department of Justice because I feel that they have forsaken their authority to recommend members of the Federal judiciary to the President and have given that authority completely, and absolutely, with almost a power of veto to the American Bar Association which I have serious objection to.

So I am delighted the Executive has exercised the prerogative to nominate you and I will be delighted to vote for you.

Mr. KIRKPATRICK. Thank you, sir.

Senator HART (presiding). Mr. Kirkpatrick, I join with the others who have expressed delight that one with your background and established excellence would come into Government.

Senator COOK. Senator Hart, may I ask one more question?

Senator HART. Sure.

Senator COOK. Or at least a suggestion. That is relative to Senator Moss' question about the cereal business, I would hope when this is looked into, it might be done on a combined basis, with the Federal Communications Commission and the Federal Trade Commission. Because a great deal of publicity has been given lately on television relative to what is and what is not in cereals. But yet when you turn the television set on, those advertisements are still there in full bloom, they are still there every Saturday and every morning, and I might suggest that if you are

really going to tackle the problem, that one does not just look to the industry itself and as a matter of fact what the advertising media may recommend to the industry, but it looks at both of them, because you can't blame the industry for advertising when there is no objection by the advertiser; namely, the media, that they continue to take and continue to utilize it, while they are being critical of it by the way, by reason of their news and editorial comments.

So I would hope if you go into this, and obviously you should, but I hope if you do it you do it in coordination with the Federal Communications Commission and our own Commission.

* * *

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Jan 10 1967

Dear Senator Magnuson:

In response to your letter of November 9, 1966, I am pleased to forward to you a copy of a technical report by the Public Health Service reviewing the significance of the "tar" and nicotine content of cigarette smoke. This report was in the process of preparation at the time of my last letter to you in July and I regret this long delay in putting it in your hands. The report reflects the general considerations which went into the thinking of the committee whose recommendations to the Surgeon General were transmitted to you earlier.

In our opinion, requiring the identification of "tar" and nicotine levels on packages and in advertising, as you have proposed, would be an important step and would result in the progressive reductions of "tar" and nicotine levels because of public demand.

On the basis of available evidence regarding the effects of individual constituents of cigarette smoke, their relationship to the overall hazards of cigarette smoking, and the relative precision regarding measurement techniques, the identification of "tar" and nicotine levels can provide valuable information on overall dosage. In considering any labeling requirement, it would be important that such requirement allow for the addition of other components of cigarette smoke as they are identified as a hazard and when agreement is reached on appropriate measurements to be used.

I strongly support your view that these steps relating to the measurement and labeling of "tar" and nicotine in cigarette smoke are only part of our overall approach to this problem. As you have pointed out, until hazardous substances can be removed from cigarette smoke, the only effective means available to eliminate the health hazards associated with smoking is an educational program designed to inform people of the hazard and encourage people to stop or not to start smoking.

I hope that this letter and the attached technical report will prove helpful.

Sincerely,

/s/

Secretary

Honorable Warren G. Magnuson
United States Senate
Washington, D.C. 20510

1/11/67
Enclosure with letter from HEW Secretary John Gardner to Senator Magnuson endorsing "tar" and nicotine listing on packages and in advertising.

PUBLIC HEALTH SERVICE

Technical Report on "Tar" and Nicotine

It is clear that the overall risk associated with cigarette smoking increases as the average number of cigarettes consumed per day increases (1). In the studies which have reported other measures of exposure such as pack-years, degree of inhalation, and maximum level of cigarette consumption, the same type of relationship holds.

Hammond(2) has shown that users of high "tar" and nicotine cigarettes report significantly more of the symptoms that are characteristic of cigarette smokers in general. Graham et al (3) have shown that appreciable variations in "tar" yield of cigarettes may be achieved by changing the pattern of smoking, with maxim yield being obtained when puffing is concentrated toward the end of the cigarette. The effect of tobacco smoke condensate on the mouse skin has been shown by numerous investigators to be dependent on the dose of tar applied to the skin.

These findings support the existence of a dose-response relationship between exposure to cigarette smoke and the risks most clearly associated with cigarette smoking — lung cancer, chronic obstructive pulmonary diseases; and cardiovascular diseases. Among the factors which may enter into the total exposure are numbers of cigarettes consumed, pattern of smoking (relative concentration of puffing at beginning, middle, or end of cigarette), frequency and depth of inhalation, and concentration of tobacco smoke which enters the smoker's mouth. The concentration of a particulate matter in the mainstream of smoke is reflected in the measurement of the so-called "tars" and tobacco smoke.

The epidemiologic evidence on the effect of cigarette smoking on health is based largely on numbers of cigarettes consumed daily as the measure of exposure. That the degree of risk correlates as high as it does with numbers of cigarettes probably reflect the fact that the various measures of exposure noted above tend to be positively inter-correlated. Those individuals who smoke many cigarettes, and also, who inhale frequently and deeply, take more puffs,

use higher "tar" and nicotine content cigarettes, and so on.

Wynder and Hoffman (4) have shown that the tumorigenicity of cigarette smoke can be reduced by alteration in the cigarette which reduces the "tar" and nicotine content. They use the term "indicator" for "tar" and nicotine content or other measures which reflect this type of gross relationship lacking the identification of specific agents which are responsible for the effect. Bock, Moore, and Clark (5) have independently shown a similar variation in carcinogenic activity of tobacco "tar" obtained from different types of cigarettes.

The ad-hoc group of scientists which reviewed and discussed these data recently at the invitation of the Surgeon General concluded that:

> 1. The preponderance of scientific evidence strongly suggests that the lower the "tar" and nicotine content of cigarette smoke, the less harmful would be the effect.
>
> 2. We recommend to the Surgeon General that action be encouraged which will result in the progressive reduction of the "tar" and nicotine content of cigarette smoke.

This judgment was arrived at with full recognition of the following.

> 1. It is possible for a cigarette to be altered in such a way that its "tar" and nicotine content is reduced but certain other harmful effects, for example, the effect of the gaseous phase may be increased. Although this is a theoretical

possibility, there is no evidence that this has occurred to any serious degree.

2. The potential benefit to the individual consumer who might shift to a lower tar and nicotine cigarette would be negated if this shift were accompanied by an increase in the number of cigarettes consumed, or in the length of each cigarette used. There is evidence that, by-and-large, this does not occur; that the shift to low "tar" and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption (6,7).

3. Promotion of a low "tar" and nicotine cigarette might lull the consumer into believing that he could smoke this kind of cigarette without *any* accompanying risk. The presence of the warning label on the package, control over the advertising statements which are permitted, and the continuing educational efforts of public health agencies on this subject should minimize this likelihood.

* * *

SMOKING AND TOBACCO CONTROL

Monograph 7

The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes

Report of the NCI Expert Committee

NATIONAL INSTITUTES OF HEALTH
National Cancer Institute

Chapter 1

Cigarette Testing and the Federal Trade Commission: A Historical Overview[1]

C. Lee Peeler

Cigarette manufacturers began advertising their products' tar and nicotine content before there was a standardized procedure for testing cigarette output. In 1955, after a series of cases challenging a variety of claims made for cigarettes (including tar and nicotine claims),[2] the Federal Trade Commission

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[1] These remarks are the views of the staff of the Bureau of Consumer Protection. They do not necessarily represent the view of the Commission or any individual commissioner.

[2] *See, e.g., R.J. Reynolds Tobacco Co. v. FTC*, 192 F.2d 535 7th Cir. (1951) (claims that Camel does not impair the physical condition of athletes and aids digestion); *American Tobacco Co.*, 47 F.T.C. 1393 (1951) (Lucky Strike cigarettes advertised as less irritating to the throat than competing brands and containing less tar than four other leading brands); *P. Lorillard*

(Commission or FTC) published cigarette advertising guides. Among other things, the guides prohibited claims that a particular brand of cigarettes was low in tar and nicotine or lower than other brands "when it has not been established by competent scientific proof . . . that the claim is true, and if true, that such difference or differences are significant" (Federal Trade Commission, 1988a).

However, cigarette manufacturers continued to advertise tar numbers. In the absence of a standardized testing methodology, their claims resulted in what is often referred to as the "tar derby"—a multitude of inconsistent, noncomparable claims that did not give consumers a meaningful opportunity to assess the relative tar delivery of competing brands. The tar derby ended in 1960, when discussions with the Commission culminated in an agreement by the industry to refrain from tar and nicotine advertising (Federal Trade Commission, 1988b).

In 1964 the first Surgeon General's report on the health risks of smoking concluded that cigarette smoking was a cause of lung cancer in men (U.S. Department of Health and Human Services, 1964). In 1966 the Public Health Service stated that "The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content

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Co., 46 F.T.C. 735 (1950)' (Old Gold cigarettes advertised as lowest of seven leading brands in nicotine and throat irritating tars, and Beech-Nut cigarettes as providing "definite defense against throat irritation"). *See also, e.g., Leighton Tobacco Co.*, 46 F.T.C. 1230 (1950) (Phantom cigarettes represented as causing no irritation of any kind).

of cigarette smoke, the less harmful would be the effect" (U.S. Department of Health and Human Services, 1981, p. v).

It was in this environment that the Commission initiated two major steps in 1966 to encourage cigarette manufacturers to provide consumers with comparative information about their products' tar and nicotine yields. First, it ended the ban on tar and nicotine advertising by announcing that factual statements of the tar and nicotine content of mainstream cigarette smoke could be made if they were supported by tests conducted in accordance with the so-called "Cambridge Filter method" and if they were not accompanied by claims about reduced health hazards (Federal Trade Commission, 1988a). Second, it authorized establishment of a laboratory to analyze cigarette smoke and invited public comment on what modifications, if any, should be made to the Cambridge Filter method for purposes of the laboratory's procedures and how the test results should be expressed (*Federal Register*, 1966). The modified Cambridge Filter method ultimately adopted by the Commission is often referred to as the "FTC method."

By mid-1967 the laboratory was ready to begin testing cigarettes (*Federal Register*, 1967).[3] The Commission agreed, pursuant to Senator Warren Magnuson's request,[4] to report the test results to

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[3] For the first dozen years of its existence, the laboratory tested only for tar and nicotine. In 1980 the protocol was modified to add testing for carbon monoxide.

[4] Expressing the opinion held at that time by many people in the Federal Government, Senator Magnuson stated that "By encouraging smokers to switch to low tar/nicotine cigarettes, we

Congress periodically, a process that continues today.

From the outset, the testing was intended to obtain uniform, standardized data about the tar and nicotine yield of mainstream cigarette smoke, *not* to replicate actual human smoking. The Commission recognized that individual smoking behavior was just that—too individual to gauge what a hypothetical "average" smoker would get from any particular cigarette: "No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion" (Federal Trade Commission, 1967). The purpose of the testing was "not to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" (Federal Trade Commission, 1967). Indeed, the Cambridge Filter method did not attempt to duplicate an "average" smoker but was "an amalgam of many choices" (Federal Trade Commission, 1967). Because no test could accurately duplicate human smoking, the Commission believed that the most important thing

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can contribute meaningfully to the physical health of our nation. Publication of the Commission's testing results is one important facet

The Commission expressed its views concerning dissemination of tar and nicotine figures in an October 1967 letter to the National Association of Broadcasters. "The Commission favors giving smokers as much information about the risks involved in smoking as is possible and to that end favors mandatory disclosure of tar and nicotine content, as measured by a standard test."

was to make certain the results presented to the public were based on a reasonable, standardized method and could be presented to consumers in an understandable manner.

The Commission next attempted to increase consumer awareness of the ratings produced by its laboratory. In 1970 it proposed a trade regulation rule that would have required disclosure of tar and nicotine ratings in all cigarette advertising (*Federal Register*, 1970). The rulemaking was suspended indefinitely a short time later, when five of the major cigarette manufacturers and three small companies agreed voluntarily among themselves to include the ratings produced by the Commission's protocol in their advertisements. That agreement, modified to reflect the discontinuance of the Commission's laboratory, remains in effect today.[5]

There are a number of ways to lower a cigarette's tar and nicotine rating, including adding filters that literally trap some of the constituents of the tobacco smoke before they reach the machine, wrapping the tobacco plug in paper that burns relatively quickly, and placing ventilation holes around the circumference of the filter so that when a smoker or smoking machine puffs on the cigarette, air is drawn into the filter and the resulting diluted mixture of air and smoke yields lower tar and nicotine ratings than an undiluted puff of smoke

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[5] The American Tobacco Company did not sign the voluntary agreement, but similar disclosures have been contained in its advertisements, pursuant to a 1971 consent agreement with the Commission. [*In re American Brands, Inc.*, 79 F.T.C. 255 (1971).]

would yield. The last technique is often referred to as "aeration."

These types of changes in cigarette technology have focused the Commission's attention on its protocol on two separate occasions since 1970. In both cases, the Commission solicited public comments on certain aspects of the FTC method. However, in neither instance did the information received by the Commission form a sufficient basis for changing the protocol, even though the limitations on the predictiveness of the FTC method caused by compensatory smoking were clearly recognized by the mid-1980's. ("Compensatory behavior" is the tendency of consumers to offset the benefits of a positive change in their behavior by making a second, negative change. For example, a smoker who switches to a brand with lower tar and nicotine ratings might smoke more cigarettes each day or smoke each one more intensively, that is, inhale more deeply and/or take more puffs per cigarette.) Following is a review of the two events referred to above.

Aeration first became an issue for the Commission in 1977, when Lorillard, Inc., suggested that the depth to which cigarettes were inserted in the Commission's smoking machine be decreased when the standard depth would block some of a cigarette's ventilation holes, thereby impairing its filtration system and resulting in higher ratings than if the holes were open. The Commission solicited public comments on this question and also on whether the insertion depth should be decreased beyond the point where consumers cover the cigarette with their fingers or lips (*Federal Register*, 1977).

Of the seven cigarette companies that commented, only Lorillard supported varying the standard insertion depth. However, none of the responders addressed the question of whether the new insertion depth would be more consistent with actual smoking practices. After reviewing the comments, the Commission noted that the development of cigarettes with ventilation holes near the tip had complicated the comparability of its tar and nicotine ratings,[6] but "that a change in the insertion depth would cause a lack of continuity with previous test results" (*Federal Register*, 1978, pp. 11856, 11857). The Commission decided not to modify the protocol "in the absence of information indicating that a new insertion depth would be more consistent with the manner in which smokers insert

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[6] Quoting its 1967 statement that the purpose of testing was not to determine the amount of constituents inhaled by a human smoker but to determine the amount generated when a cigarette was smoked by a machine in accordance with a prescribed protocol (see above), the Commission noted that:

> The point of this statement was that the FTC's "tar" and nicotine values represented valid standards for making comparisons among different cigarettes. Thus, if the consumer smoked each different cigarette the same way, he would inhale "tar" and nicotine in amounts proportional to the relative values of the FTC figures. A person who smoked a 10 mg "tar" cigarette would ingest half the "tar" he would by smoking a 20 mg "tar" cigarette providing he smoked the same way. The development of cigarettes with ventilation areas within 11 mm of the tip has complicated this simple relationship. (*Federal Register*, 1978, p. 11856)

cigarettes in actual use" (*Federal Register*, 1978, p. 11857).

Another controversy concerning the test method arose in the early 1980's and involved the Brown & Williamson Tobacco Corporation's (B&W) Barclay cigarette, which was designed with a channel ventilation system rather than air holes.[7] Competitors claimed that Barclay, which had received an official FTC rating of 1 mg tar in 1981, did not test accurately on the FTC smoking machine because the channels remained open during testing but were rendered inoperable in practice. After careful consideration, the Commission determined that its present test method did not accurately measure Barclay's tar, nicotine, and carbon monoxide. It revoked the 1-mg rating, estimating that Barclay should be rated between 3 and 7 mg of tar (based on testing by independent consultants) and invited comments on a number of issues relating to possible modification of its testing method, including using new cigarette holders on the smoking machine that would simulate the reduction in ventilation that occurred when people smoked Barclay (*Federal Register*, 1983). The Commission asked which modifications would yield the most appropriate results for all cigarettes and whether modification of the cigarette testing method would

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[7] In conventional aerated cigarettes, air and smoke mixed together as they passed through the filter. Outside air drawn into Barclay's channels, however, went directly into the smoker's mouth before first mixing with any smoke; dilution was supposed to occur in the mouth, not in the filter. Competitors alleged that because the exit holes for the channels were close to the smoker's lips, they were crushed or covered by lips, thus reducing dilution.

result in unintended consequences and affect possible innovation in cigarettes design (*Federal Register*, 1983).

The Commission also took this opportunity to reiterate that its ratings were relative; that the amount of tar, nicotine, and carbon monoxide any particular cigarette delivered depended on how it was smoked; and that in the case of ventilated filter cigarettes, delivery would be increased if ventilation holes were blocked (*Federal Register*, 1983). It then invited comments on a wide range of issues concerning compensatory smoking behavior:

> Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hole blocking by smokers of different ventilated filter cigarettes? Are there problems regarding compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of categories or "bands" of "tar" content rather than specific numerical estimates? Also, should consumers be advised that the

> cigarettes' actual "tar" delivery depends on how it is smoked? (*Federal Register*, 1983)

Shortly after the initial comment period closed,[8] a Federal district court issued an opinion in the Commission's action against B&W over advertisements that continued to describe Barclay as a 1-mg tar cigarette, despite the Commission's revocation of Barclay's 1-mg rating [*FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part, remanded in part*, 778 F.2d 35 (D.C. Cir. 1985)]. During that litigation, B&W contended that "recent scientific evidence demonstrates that the FTC system is so flawed that it is itself deceptive" [580 F. Supp. at 984].[9] The court recognized that compensatory smoking behavior complicated the ratings question but rejected B&W's contention that the system provided no benefit to consumers:

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[8] Comments responsive to the April 13, 1983, *Federal Register* notice were originally due by June 30, 1983. On June 4, 1984, however, the Commission reopened the comment period because certain information that was relevant to the questions addressed in that notice, but had been previously under a court-ordered seal, was now publicly available (*Federal Register*, 1984).

[9] B&W argued that all cigarettes were subject to compensatory smoking behavior and thus all tar numbers were "soft." The Commission acknowledged that low-yield cigarettes were subject to substantial variations in actual smoker intake but contended that Barclay tested differently on the machine from other cigarettes. The Commission's position was that the tar ratings provided a rough comparative scale; that is, a 1 mg cigarette should be comparable to all other 1-mg cigarettes, if all are smoked in an identical manner.

> The FTC system attempts only to determine how much relative tar and nicotine a smoker would get in his mouth were he to smoke two cigarettes in the same manner. B&W has utterly failed to show that the system does not do this. Nor has it shown that a better method for determining the relative health hazards of the many different varieties of cigarettes on the market is currently feasible [580 F. Supp. at 985].

The comments ultimately submitted in response to the Commission's questions about compensatory smoking reflected sharply disparate views. On the one hand, the American Heart Association (AHA), American Lung Association (ALA), and American Cancer Society (ACS) identified problems with the existing methodology, expressed concern over the impact of compensatory smoking behavior, and suggested extensive research to improve the current testing and reporting procedures.[10]

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[10] The ALA stated that given the reality of compensatory smoking, low-tar cigarettes might not be as safe as some consumers were being led to believe and that the Commission's testing and reporting procedures were contributing to questionable advertisements for "safe" cigarettes. The ACS stated that the Commission's test method should be modified to reflect current understanding of compensatory smoking behavior. The AHA expressed its view that the Commission's testing and reporting procedures fostered the belief among consumers that low-tar cigarettes were safer than high-tar brands. However, epidemiological evidence showing a correlation between the risk of coronary heart disease and the number of cigarettes smoked per day, but not a reduced rate of

On the other hand, Philip Morris, R.J. Reynolds Tobacco Company, and American Brands asserted that compensatory smoking behavior was not relevant to the testing methodology and that devising a protocol that accounted for compensatory smoking would require establishing a profile of the average smoker, something the Commission had previously declined to do because of the impossibility of accounting for all the relevant variables. Lorillard stated that data on compensatory smoking were very limited and therefore recommended that the existing system be kept intact. Liggett & Myers suggested that perhaps all cigarette testing should be abolished because smoking behavior could seriously affect tar and nicotine yields and smokers could not be taught to change their behavior.

In response to the Commission's question about possible implementation of a "banding" system for its tar and nicotine ratings, B&W (which had just had Barclay's rating revoked) argued that the current system caused manufacturers to emphasize small differences that might not exist, given the realities of compensatory smoking, and that it should be replaced with a system that would group products

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such disease among low-tar smokers, suggested that smokers of those cigarettes might be engaging in compensatory smoking.

The ALA and ACS recommended that research be conducted to determine how actual intake of tar and other smoke constituents by smokers related to the FTC's ratings; following completion of this research, the Commission should test each cigarette under a range of conditions replicating actual smoking behavior and report those results with a warning that individual yield depends on individual smoking patterns.

into high-tar, medium-tar, low-tar, and ultralow-tar "bands." Philip Morris and American Brands argued that banding would lead to a concentration of brands at the upper limit of each category (in contrast to the existing system, which encouraged reductions across the board). American Brands also contended that banding would confuse consumers, whereas Philip Morris noted that it would substitute the Government's judgment about the significance of differences in tar ratings for that of the individual consumer.

In short, there was no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method. At the same time, abandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's (U.S. Department of Health and Human Services, 1981).[11] Accordingly, at that time the Commission made no changes to its cigarette test method to address compensatory smoking.

In early 1987 the Commission decided to close its cigarette testing laboratory. The Commission found that closing the laboratory was necessary for several reasons, chiefly because the cost of the

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[11] In 1954 the tar yield of the sales-weighted average cigarette was 37 mg (U.S. Department of Health and Human Services, 1981). By 1981 cigarettes yielding 15 mg of tar or less had 56 percent of the domestic market (Federal Trade Commission, 1984).

laboratory was significant and the Commission would have had to commit significant additional funds to continue its operation. The Commission also was persuaded that the same information could be obtained from other sources and that other means were available to verify the accuracy of industry testing results. In fact, the Commission's operation of a testing system for the industry at taxpayer expense was highly unusual. The common scenario is for the industry to conduct its own testing under Government-specified testing protocols.

Since 1987 the Tobacco Institute Testing Laboratory (TITL) has continued to test most cigarettes, using the Commission's approved methodology; the companies report the results to the Commission pursuant to a compulsory request, and the Commission publishes the results. TITL keeps the Commission informed of proposed changes in the testing procedure and solicits Commission approval for all significant changes. TITL's work is regularly monitored by the Commission's contractor, Harold Pillsbury, Jr. (this volume), who has virtually unrestricted access to the laboratory and makes unannounced visits to inspect it and check the testing process. Mr. Pillsbury also checks the data for consistency from run to run and from year to year. Most industry members also have testing facilities; however, the numbers published by the Commission are primarily TITL numbers. (Generic and private label brands, as well as new cigarettes and cigarettes that are not widely available, are not tested by TITL.)

Since the closing of its laboratory, the Commission has continued to review advertising for today's low- and ultralow-yield cigarettes for

deceptive claims. In January 1995 the Commission approved a consent agreement with the American Tobacco Company, settling charges over advertisements that allegedly misused the Commission's tar and nicotine ratings by stating that consumers would get less tar by smoking 10 packs of Carlton brand cigarettes (which are rated as having 1 mg of tar per cigarette) than by smoking a single pack of certain other brands of cigarettes (rated as having more than 10 mg of tar per cigarette).

The Commission's desire to ensure that smokers have accurate and useful information about their cigarettes led to its request for the conference, whose reports are contained in this monograph.

QUESTION AND ANSWER SESSION

Mr. Peeler conducted a question-and-answer session simultaneously with Mr. Pillsbury; see page 12.

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Supreme Court, U.S.
FILED
MAR 31 2008
OFFICE OF THE CLERK

No. 07-562

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX
Volume 3 of 3
(Pages 664a-1087a)

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CERTIORARI GRANTED JANUARY 18, 2008

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Before The

Federal Trade Commission

CIGARETTES AND RELATED MATTERS

Methods To Be Employed In Determining Tar and Nicotine Content

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SUPPLEMENTARY OBSERVATIONS FOLLOWING NOVEMBER 30, 1966 HEARING

* * *

The written submissions and oral discussions at the November 30, 1966 Hearing, indicate that many of those concerned had wholly different approaches, technical understanding, working knowledge of the actual use or inherent limitations or required laboratory equipment, or appreciation of the scientific predicates underlying the Cambridge Filter Method, whose modification or amplification was being considered.

This Memorandum endeavors in simple form to expose and to clarify the complex technological procedures involved in testing the amount of particulate matter (PM) and nicotine in cigarette smoke. That background must be appreciated by anyone responsible for resolving the various points relating to testing which the Commission has under consideration.

What Is Being Measured?

'Whether you call it "tar" or particulate matter (PM), the so-called Ogg Method, employing the Cambridge filter, seeks to determine the non-vapor material in *cigarette smoke* as generated in the *automatic* standardized smoking of a cigarette by a *machine*, not by a human being, according to necessary prescribed standard technical directions.

The *weight* of the material so drawn in the machine smoking of the cigarette is calculated by prescribed procedures, and the *weight* of the nicotine in that material is determined.

The amounts of PM and nicotine (per filter pad, with each pad collecting the smoke of five cigarettes, as described later), being measured either absolutely or relatively, are *miniscule*. They are weight determined from each filter pad to the nearest 0.1 milligram.

A gram is about one twenty-eighth of an ounce. A milligram is one-thousandth of a gram. Put another way, a milligram is 1/28,000 of an ounce.

The weighing of the filter pad, which collects PM from five machine-smoked cigarettes, to 0.1 milligram, is a determination to one ten-thousandth of a gram.

To visualize the quantities and the possible weight differences sought to be determined, one might consider a milligram to be equivalent to a barely visible particle of sugar which when dissolved in a quart of water—could not be tasted. A like comparison of a tenth of a milligram to an ounce would be to compare the apparent size of a period sign on a page of the Federal Register to the entire page.

What Is *Not* Being Measured?

The Ogg Method in fact does not, and cannot, measure either all of the particulate matter (PM), or the total nicotine, from *any* cigarette. It measures only the PM and nicotine in the volume of smoke puffed through a machine on the standardized method. It does not measure the PM or nicotine in *all* of the smoke that any cigarette might produce when totally smoked under any and all conditions.

The Ogg Method does *not* measure the *volume* of smoke—or the PM or nicotine in the volume of smoke—that any *human being* will draw from smoking any particular cigarette. Each smoking characteristic is leveled or averaged out by the standard method.

No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the PM quantity in the smoke generated.

Even with the same type of cigarette, individual smokers take a *different number of puffs* per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen, to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put

their cigarette down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

As to butt length to which individuals smoke various types of cigarettes, as will be seen the average is over 30 millimeters, except where the filter prevents smoking down to that length, or where the rapidity of smoking generates a high heat zone or a change in taste, and causes the smoker to discard the cigarette. But, here again, there are no constants, and there is no relationship between standardized machine smoking of cigarettes and the volume of smoke which any smoker will get in smoking down to any selected butt length. About all that is known is that tobacco itself has some filter effect.

The Ogg Method does not and cannot measure these many variations in human smoking habits. It *does not measure PM or nicotine* in the smoke generated while the cigarette is not being puffed. It does not measure all of the PM or nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method.

These basic standardizations are well understood by all technologists in talking about any testing method.

Standardization Required And Embodied In The Ogg Method

Because of the minute quantities of PM present in smoke and the difficulties in impounding it on a filter pad and measuring these minute levels, the Ogg Method, or indeed any other scientific testing

method, must attempt to reduce all possible variations that will substantially affect the determinations of PM and nicotine.

No standardization of technique can eliminate human error or ineptitude. No method designed can remedy the limitations in a testing method derived from the available equipment, the precision possible in its use, or its inability to secure reproducible results.

What the Ogg Method does standardize are a few of the factors—puff frequency, puff duration, and the puff volume through the filter pad—that affect the burning rate and the amount of PM and nicotine deposited.

Puff Frequency. One puff each 60 seconds, ± one second is essential to the method. Two factors flow from that element of standardization. The first is that whatever smoking machine is used must precisely meet this basic time requirement. The second is a reminder that this puff frequency does not reflect widely varying smoking habits, and is an average.

Puff Duration. The puff is drawn for two seconds, again within a narrow tolerance of two-tenths of a second either way. If any results are to be accurate or remotely comparable, this duration factor must be constantly watched, timed with accurate devices, and rigidly maintained by the machine.

Puff Volume. The Ogg Method standardizes this volume at 35 milliliters. Again, the permitted tolerance is ± 0.5 milliliters. Obviously, puff volume is a basic controlling factor in the determination. There are various smoking machines that control

puff volume, within the duration of each puff, in different ways. Once again, constant careful recalibration is essential. Once again, it must be remembered that the standardized puff volume may bear no direct relation to how any particular individual smokes, and is essentially an average.

The point to be remembered is that all of the difficulties and disclosed limitations in the Ogg Method exist even when these factors are carefully standardized. The Ogg Method of machine smoking was evolved on uniform specially prepared cigarettes. Its published description tells nothing about its use in the comparative testing of cigarettes of different brands which have varying construction, burning rate, and other variations. The Method as published discloses its variability, *e.g.*, its limits of reproducibility, only on weight-selected cigarettes. (Compare *Table 1* in the published Ogg Method.) It tells nothing about smoke volume or PM or nicotine in market-derived brands of cigarettes. For example, in smoking the same brand of conditioned cigarettes, under carefully controlled conditions with experienced technicians, the number of puffs in smoking a cigarette to a specified butt length can vary from seven to ten puffs in a single run of a machine.

How Does A Smoking Machine Collect PM And Nicotine?

For non-scientists to comprehend how a smoking machine works and the difficulties in any method employing smoking machines, there is no substitute for *seeing smoking machines in operation* in the hands of trained technicians. Nevertheless, the published Ogg Method indicates—and even cursory viewing would confirm—a few of the key

unavoidable operating problems. These can be easily visualized by a brief description of how the job must be done.

First, it is essential to equilibrate or condition the samples of each brand of cigarettes being tested because humidity conditions at the various pickup points vary so widely. The relative humidity encountered in New Orleans may be 90 percent whereas in Phoenix it may be only 20 percent. In placing cigarettes on the conditioning screens, care must be exercised not to damage or fragment, or spill tobacco from, the individual cigarettes.

Each filter pad is assembled in a plastic filter holder, the parts of which must be tightly screwed together, to be leak proof.

To one side there is nest attached a piece of rubber membrane with a hole cut in it. This rubber membrane must be tightly locked on with a solid rubber ring.

Each assembled filter unit must then be separately tested for leaks.

Each filter assembly must next be conditioned in the correct humidity and temperature for a sufficient period.

Each unit assembly is then *separately weighed* and recorded to the nearest one-tenth of a milligram.

The assembled filter units are then placed in the smoking machine ports.

Some of the precise controls in placement and smoking may be indicated. The failure to exercise these will markedly affect the results.

To begin with, the smoking machine room must be precisely air conditioned for temperature and humidity control. Automatic controls for temperature and humidity must in turn be regularly verified with manual temperature and humidity checking devices.

The *air flow* in the machine, both at the top vents and at the smoking ports, must be checked each day with precise instruments because such air flow directly affects the burning rate of the cigarette *between puffs* and can materially affect the quantity of PM deposited. Absent proper venting, the machine and the room would accumulate smoke and distort the results.

Cardinally, the *timing controls* must be checked regularly, and on some type of machines even daily.

The entire machine assembly must be regularly checked to insure that it is leak proof throughout.

Even where the smoking machines are fully calibrated, the human factors in their operation are highly variable. When inserting the cigarette in the filter holder, the ends should not be bruised or broken. Where cigarettes are electrically ignited, the lighters should not be permitted to push the cigarettes against the filter pad. As Ogg notes, "Take care that butt end does not come in contact with [the Cambridge] filter disc."

Unless automatic cut-off devices are included in the smoking machine, the problem of watching and remembering "unders" and "overs" of butt length introduces large factors of human error. An operator has to watch, stop, and clear a number of ports within brief periods. Where automatic cut-offs are

provided, carelessness in adjusting the burning threads or the springs can likewise affect the results.

For PM weighing and water and nicotine determination, other human manipulations are necessary which must be performed with both a high degree of skill and constant alert care.

The tare and second weighing of the filter unit must be performed with a chemical balance, preferably a refined, closed-chamber precision balance, within the same air-conditioned room.

In the removal of the filter pad from the smoking holder, the pad must be manually folded over with a large tweezer which is then used to rub all of the remaining PM from the holder onto the filter pad. Unless this pad folding and rubbing operation is performed carefully and completely, there may be marked variations in the latter determinations. Unless the manual wiping of the smoking holder is properly performed, as much as an entire milligram difference in the PM carried forward for the determinations can be here introduced by inexperience or ineptitude.

For water and nicotine determinations, each filter pad is next placed into a separate small flask which is then stoppered. These flasks must be carefully washed and oven dried after each use.

Thereafter each flask containing the separate filter pad must be thoroughly *shaken* with the precisely measured amount of solvent for up to an hour to get the water and nicotine into the solution. This must be accomplished by shaking machines or more rapidly by a spinning agitator.

Experience demonstrates that in the chromatographic determination of water, variations

can occur among different operators in the amount of solvent drawn and in the manner of its injection into these machines, which again requires constant calibration.

In nicotine determination, precise dilutions are necessary. In virtual mass production cigarette testing, that factor may readily become a source of human error.

The calculation of results requires the use of calculating machines and necessarily skilled operatives. Approximately two calculating machines are required in a laboratory utilizing about 40 ports.

These requirements of refined equipment and experienced personnel, and the basic limitations in the Ogg Method, underlie the necessity for the suggested period of training for any personnel given the responsibility for operating a testing laboratory. Even Dr. Hammond found it necessary to offer that caution. (*See Hammond*, Tr. 18-19.) They dictate further that adequate personnel must be provided.

Laboratory determinations of this nature cannot be speeded up to accommodate extraneously determined dates. At the outset, there must be at least one operator for each smoking machine, one for water determination, and two for nicotine determinations if these are to be kept in balance with the smoking machines. Additional personnel are required for calculation and recording, and for filter unit assembly and cleaning of laboratory flasks, and maintenance.

Limits Of Measurements Obtainable In Ogg Method

Even assuming adequate equipment and thoroughly experienced trained personnel, the

available data makes clear the inherent limits in the Ogg Method. These can be talked about either as the limits of reproducibility of results within a single laboratory or as the variances in results found in the testing of identical cigarettes by the Ogg method among different laboratories.

These inescapable variances are *in the Ogg Method* itself, and have nothing to do with any variations in the population of cigarettes being tested. (That factor will be examined later.)

It can never be forgotten that the Ogg Method was evolved on a specially prepared uniform lot of cigarettes. Even so, the percentage coefficients of variance within *single laboratories* ranged between 1.2 percent and 5.9 percent. *Between laboratories* they were never lower than 9.8 percent. The mean standard deviation ranged as high as 3.19 milligrams PM for non-filter cigarettes and 2.48 milligrams PM for filtered cigarettes.

Industry testing of various brands of cigarettes, *e.g.*, not a uniform specially prepared lot, has shown standard deviations as high as 2.8 milligrams per cigarette determined per port.

In short, even with the most accurate refined equipment and experienced personnel, the same laboratory cannot achieve reproducible results on all brands beyond these limits, and if the results of two laboratories are to be compared the spreads are greater. The significance of the variations *in the method* alone will be considered in discussing sample size and reporting.

Against this summary description of the machine smoking of cigarettes and what is involved in determining and reporting PM and nicotine, some

additional comments may be offered on the four questions on which the Commission has invited comment.

Butt Length

Insofar as possible, the butt length to which cigarettes should be smoked in the smoking machine should be based on some rational criteria.

In any method employing machine smoking of cigarettes to determine PM and nicotine there must be standardization of puff frequency, puff duration, and puff volume. These basic factors nonetheless bear no relation to individual smoking by any human being. In that respect, as noted, these factors are when standardized initially averaged.

Because different people smoke to different butt lengths, and even the same individual will smoke to varying butt lengths depending upon the circumstances in which he is engaged, the use of an *average* butt length is the only rational basis to employ. To utilize predetermined average puff duration, puff volume, and puff frequency, and not to use an average butt length, creates both an illogical and unwarranted distortion in both the testing and reporting.

The recorded data makes it clear that the average butt length to which individuals smoke is somewhat in excess of 30 millimeters. No witness testified to an average of less than 30 millimeters.*

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* Dr. Hammond testified that his study showed an average of "approximately 30" millimeters in the United States. (Tr. 33) Dr. Ogg testified that data available to members of the committee at the time of his study "indicated the average butt-length in this country at that time was approximately 30

Those who suggest a shorter butt length, and a different butt length for filtered cigarettes, are not unaware that doing so basically biases the comparative results under the Ogg Method largely in favor of filtered cigarettes.

It may be granted that there are presently no comprehensive studies of butt lengths, and indeed all such studies have inherent weaknesses. Butts obtained from ashtrays invariably indicate a lower average than the true length to which a cigarette is smoked because a great many smokers do not wholly extinguish cigarettes, and others exert varying degrees of pressure in attempting to extinguish them. Moreover, there is evidence that most smokers cannot smoke to less than 30 millimeters without burning their fingers. (*See Hobbs*, Tr. 57)

If 23 millimeters were selected, 90 percent of the filter cigarettes cannot in fact be smoked to that length. Scientifically, it is not rational to adopt a standard butt length which is not applicable to 90 percent of that group of cigarettes. About 99 percent

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[Footnote continued from previous page]

millimeters," and that in a study Dr. Ogg had recently conducted "the averages came out for non-filter cigarettes was 30.2 millimeters and for filter cigarettes was 33.2." (Tr. 38-39.) Dr. Hobbs testified that a butt length of no shorter than 30 to 35 millimeters "does approximate average smoking habits" (Tr. 57.) See also the *Recommendations Submitted by Tennessee Eastman Company* stating that the results of its study "indicated that the average butt length was at least 30 mm." (p. 1) See also the various studies referred to on pages 5-6 of the *Statement to the Federal Trade Commission on Cigarette Smoking Techniques by the Celanese Corporation* all of which showed an average butt length of at least 30 millimeters.

of all cigarettes, both filtered and non-filtered, can be smoked to 30 millimeters.

Finally, there is no way of knowing what additional variances in the Ogg Method, which utilized a butt length of 30 millimeters, would be introduced by adopting a shorter butt length. In addition, any shorter butt length necessarily increases the difficulties for the operator in positioning the cigarettes in the smoking machine. This is a difficult and tedious task even for the most highly skilled operator having great dexterity. Moreover, the problems of terminating the machine smoking, either by observation and withdrawal, or by automatic means, make it clear that additional variances would be introduced. Reducing the butt length would require measurable increases in sample size.

Wet Or Dry Basis

Little need be added to this point. For most cigarettes, water content ranges from 6 1/2 to 13 percent of PM collected on the Cambridge Filter. Water content among brands likewise varies even after conditioning. If the Commission is to test and record PH among brands, the failure to determine and report on a dry basis will be highly misleading.

Experience has demonstrated that test results on a dry basis contribute greater precision. As Dr. Ogg testified (Tr. 40) if the modern gas chromatographic method had been available at the time of his study, those methods would probably have been originally included to permit reporting on a dry basis.

Reporting Of Test Results

There is no challenge that results cannot be reported beyond the precision of the testing method. A spring bathroom scale, accurate only to a pound, cannot give a person's weight in ounces or fractions of an ounce.

As to particulate matter, the errors in the Ogg procedures permit accuracy only to the nearest milligram and not to any more finite values. What has already been noted with respect to the variances in the Ogg Method and the possibilities of human error in the mass testing of cigarettes makes it abundantly clear that any effort to report comparable PM results among different brands of cigarettes to less than the nearest whole milligram would be both unfounded and substantially misleading.

By the same token, the record makes clear that the failure to report results *both* on an average per puff and average per cigarette basis would create bias and have unwarranted adverse competitive effects.

Sampling Procedures and Number of Cigarettes To Be Smoked

There is no need for elaborate additional statistical analysis for the consideration of sample size.

To begin with it may be assumed that picking up samples of each brand at 50 market points will permit the market sample to approach a true probability sample—to which conventional statistical formulas may be applied. Such a market sample will not be a true probability sample, but for practical purposes, considering the other variances which

must be dealt with, it may be considered sufficiently randomized to be utilized as though it were a true probability sample.

Next, there appears to be no disagreement that a confidence level of 95 percent will afford a reasonable criterion.

The determination of the number of cigarettes of each brand to be smoked to afford a pragmatically acceptable estimate for the entire population of a particular brand therefore turns on conventional statistical formulas that will adequately reflect the variations *both* in the method and in the cigarettes. The most conservative figure advanced, developed from reported industry experience, employs a standard deviation of 1.6 milligrams and yields a required sample size to be smoked of 205 cigarettes.

Statistical experts, invited carefully to study the data and make recommendations to the Commission, were in accord in advising that this suggested sample size would have to be regarded as the absolute minimum. As Dr. Herbert Arkin (an outstanding authority as indicated by his qualifications) pointed out, the variations in cigarettes within the same brand *as well as* the variations inherent in the Ogg Method makes it clear that the use of a standard deviation of 1.6 milligrams tends to understate the required sample size. His recommendation is that the highest reported standard deviation, rather than a value nearer the lowest, found in previous testing work, should be used, to avoid sampling and other errors. (*Arkin* Letter, pages 4-6.) He also notes that in most of the previous testing, cigarettes were weight selected rather than tested as they are found on the market and smoked by consumers, a factor that reduces the

standard deviation, and therefore should be considered. In his judgment, therefore, a much larger sample would be appropriate, certainly at the outset and until a standard deviation for each brand has been determined.

On the basis of his conclusion that a sample size, determined by employing a standard deviation of 2.2 to 2.6 milligrams would be appropriate, a sample size of 307 to 519 cigarettes to be smoked would be required. (*See Arkin* Letter, pages 4-5, Appendix A.)

Mr. Hendricks, speaking for both himself and Dr. Alva L. Finkner, of the Research Triangle Institute, emphasized that in the application of conventional statistical formulas to the current problem, the fact that the percentage differences in PM and nicotine may lie within very narrow limits, to achieve the desired precision in reporting test results would call for about 350 cigarettes of each brand to be tested. This would be essential where these percentage differences between brands were 25 percent of the comparative PM values being reported. (*Hendricks* Statement, pages 12-14.)

Moreover, utilizing the published Reader's Digest comparative PM and nicotine values for a number of different market brands, he found that the percentage of difference was very small indeed and that if in the brands tested by the Commission comparable small percentages of differences turned up, far larger samples would be required to be tested. (*Hendricks* Statement, page 14.)

No valid basis was offered at the hearing for reducing the sample size to be tested below the absolute minimum level of 205 advanced by the research scientists of the five cigarette companies.

The suggestion that sample size or butt length can somehow be related to a small fraction of the population of smokers is about as valid as suggesting that *average* weight estimates can be developed by limiting the observations to the skinniest people in the population and drawing a small enough sample to eliminate the contributions to the average made by the heavier or even obese people.

The only remaining point of apparent confusion resides in the failure to understand that (in addition to the disclosed variations inherent in the use of the Ogg Method by thoroughly experienced tobacco technologists) there are inescapable natural variations in cigarettes. Despite recognized close quality control in their manufacture, the tobacco in cigarettes is a natural product, cigarettes are mass produced on fast machinery, and they are distributed under highly varying climatic conditions and periods of storage. In addition, the required handling in conditioning prior to testing, and in the testing procedure itself, occasions further variations. The plain fact is that in the standardized machine smoking of the same brand of cigarettes, randomly selected from a market purchase, the rate of burning causes a difference in the number of puffs ranging from seven to ten puffs per cigarette. This in turn causes variations in the PM and nicotine deposited on the filter, and results more from the variations among cigarettes than from the limits of the method.

In short, any suggestion that every cigarette is precisely and minutely identical to every other cigarette within the same brand is fallacious. No processed natural product can be manufactured to such precise limits. Recognition of the variation in any processed agricultural product is reflected in

every governmental or commercially developed grading standard.

It is perhaps unnecessary to repeat that no factual scientific data exists as to the relevance of PM or so-called "tar" or nicotine content in terms of health.

Respectfully submitted,

THE AMERICAN TOBACCO COMPANY

/s/ CYRIL F. HETSKO

BROWN & WILLIAMSON TOBACCO CORPORATION
/s/ ADDISON YEAMAN

LIGGETT & MYERS TOBACCO COMPANY
/s/ FREDERICK P. HAAS

PHILIP MORRIS INCORPORATED
/s/ PAUL D. SMITH

R. J. REYNOLDS TOBACCO COMPANY
/s/ H. HENRY RAMM

December 20, 1966

December 16, 1998

Ms. Joan Z. Bernstein
Director
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

Dear Ms. Bernstein:

We understand that the Federal Trade Commission has asked the Department of Health and Human Services for assistance in reviewing the Commission's methodology for testing "tar," nicotine, and carbon monoxide in cigarette smoke, which the Commission says it hopes could be completed in 18 months. We further understand that, as requested previously by the National Cancer Institute and others, the Commission will not make any changes in its existing "tar" and nicotine methodology pending this joint review.

You have requested that, pending the joint review, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, and R.J. Reynolds Tobacco Company ("the manufacturers") modify the legend that has long accompanied "tar" and nicotine numbers in cigarette advertisements, by deleting the reference to the term "by FTC method".

This letter confirms that you have provided us with the following assurances with respect to your request, on which the manufacturers understand they may rely until such time as they may be required to comply with a new Rule adopted by the Commission regarding "tar" and nicotine testing and reporting:

1. The manufacturers may continue to disclose in their advertising the "tar" and nicotine numbers for their cigarettes produced by tests conducted under the existing established FTC method.

2. Since, as you have confirmed, all "tar" and nicotine numbers disclosed in the manufacturers' advertising must be based on a uniform testing method, the only method the manufacturers may use as the basis for "tar" and nicotine numbers in their advertising is the existing established FTC method.

3. The Commission will not challenge the manufacturers' disclosure in their advertising of "tar" and nicotine numbers that accurately reflect test results derived from the existing established FTC method, under Section 5 of the FTC Act or any other law.

4. The foregoing assurances apply whether the manufacturers, in conjunction with disclosing "tar" and nicotine numbers in their advertising:

    a. Use, in lieu of "by FTC method", another truthful term to indicate the testing method on which the numbers are based, such as (for example) "by established method", "by prescribed method", or "by uniform method"; or

    b. Use only the "tar" and nicotine numbers, without any indicator of the method used.

Based on he foregoing assurances, each of the manufacturers has decided, and has authorized us to inform you, as follows:

1. Consistent with the FTC's position that there should be no change in the existing testing methodology until completion of the further review requested by the Commission, each has no current plans to discontinue disclosing "tar" and nicotine numbers in its advertisements, except as specified below.

2. Each is willing to acquiesce in the Commission's request in that, in addition to depleting existing inventories, starting with material sent to the printer or production facility as soon as production and placement schedules reasonably allow, each will use an alternative approach, as described in paragraph 4(a) or (b) above, rather than the term "by FC method", to indicate that the "tar" and nicotine numbers disclosed therein are derived from the FTC's existing established methodology.

Sincerely,

/s/
David H. Remes
Counsel for
Brown & Williamson Tobacco Corporation
Lorillard Tobacco Company
R.J. Reynolds Tobacco Company

/s/
Jerome Chapman
Counsel for
Philip Morris

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. C-3547

IN THE MATTER OF:

The American Tobacco Company

COMPLAINT
AND
ORDER

FTC Form 148-A (3/83)

9323368

B164486

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
THE AMERICAN TOBACCO COMPANY, A corporation.	)	DOCKET NO. C-3547

COMPLAINT

The Federal Trade Commission, having reason to believe that The American Tobacco Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by

it in respect thereof would be in the public interest, alleges:

PARAGRAPH ONE: Respondent The American Tobacco Company is a Delaware corporation, with its office and principal place of business located at 281 Tresser Boulevard, Stamford, CT 06901,

PARAGRAPH TWO: Respondent has manufactured, labelled, promoted, offered for sale, sold, and distributed cigarettes, including Carlton brand cigarettes, to consumers.

PARAGRAPH THREE: The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PARAGRAPH FOUR: Respondent has disseminated or has caused to be disseminated advertisements for its Carlton brand cigarettes, including, but not necessarily limited to, the attached Exhibits A-C, which depict ten packs of Carlton brand cigarettes and single packs of other brands of cigarettes, with the tar and nicotine ratings for Carlton and the other brands of cigarettes under each pack. Exhibits A-C contain the following statements:

A. "10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit A.)

B. "A WHOLE CARTON OF CARLTON HAS LESS TAR THAN 1 PACK OF THESE BRANDS." (Exhibit B.)

C. "10 to 1. 10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit C.)

PARAGRAPH FIVE: Through the presentation of the tar of its Carlton, product as a numerical

multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in PARAGRAPH FOUR, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that consumers will get less tar by smoking ten packs of Carlton braid cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads, which are rated as having more than 10 mg. of tax.

PARAGRAPH SIX: In truth and in fact, consumers will not necessarily get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads. Although the cigarettes depicted are rated as having more than 10 mg., of tar, those ratings are obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking. Therefore, the representation set forth in PARAGRAPH FIVE was, and is, false and misleading.

PARAGRAPH SEVEN: Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in PARAGRAPH FOUR, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that at

the time it made the representation set forth in PARAGRAPH FIVE, respondent possessed and relied upon a reasonable basis that substantiated that representation.

PARAGRAPH EIGHT: In truth and in fact, at the time it made the representation set forth in PARAGRAPH FIVE, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in PARAGRAPH SEVEN was, and is, false and misleading.

PARAGRAPH NINE: The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this third day of January, 1995, has issued this complaint against respondent.

By the Commission.

/s/
Donald S. Clark
Secretary

SEAL

* * *

9323368

B164486

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Janet D. Steiger, Chairman
Mary L. Azcuenaga
Roscoe B. Starek, III
Christine A. Varney

In the Matter of	)	
	)	DOCKET NO.
THE AMERICAN TOBACCO COMPANY,	)	C-3547
a corporation.	)	DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as

alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complain, makes the following jurisdictional findings and enters the following order:

1. Respondent The American Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 281 Tresser Boulevard, Stamford, Connecticut 06901.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or

distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand of cigarettes, and/or the visual depiction of ten packs or a cartor of tiny of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar. For purposes of this Order, the term "cigarette" shall be as defined in Section 1332 (1) of Title 15 of the United States Code.

II.

IT IS FURTHER ORDERED that respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, it connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar or nicotine ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand of cigarettes, and/or the visual depiction of more than one pack of any of respondent's brands versus one pack of any other brand, directly or by implication,

that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the, representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in any objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

IT IS FURTHER ORDERED that presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and shall not, in and of itself, be deemed to violate Paragraph I or II of this Order where no more than a single cigarette or pack of respondent's brand is visually depicted versus a single cigarette or pack of any other brand.

IV.

IT IS FURTHER ORDERED that for five (5) years after the last date of dissemination of any representation covered by this Order, respondent or

its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

IT IS FURTHER ORDERED that respondent shall distribute a copy of this Order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this Order.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this Order.

VIII.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade

Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

By the Commission.

/s/
Donald S. Clark
Secretary

ISSUED: January 3, 1995

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	Docket No 8799
AMERICAN BRANDS, INC.,	)	
a corporation.	)	DECISION AND ORDER

The Commission having issued its complaint on September 29, 1969, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and respondent having been served with a copy of that complaint; and

The Commission having duly determined upon motion duly certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provisions of Section 2.34(d) of its Rules, that the consent order procedure shall not be available after issuance of complaint; and

Respondent and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondent of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondent is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's Rules; and

The Commission having considered the aforesaid agreement and having determined that it

provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that Respondent American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stating in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in "tar" by use of the words "low," or "reduced" or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of:

1. The "tar" and nicotine content in milligrams in the smoke produced by the advertised cigarette; and

2. If the "tar" content of the advertised brand is compared to that of another brand or brands of cigarettes, (a) the "tar" and nicotine content in milligrams of the smoke produced by that brand or those brands of cigarette, and (b) the "tar" and nicotine content in milligrams of the lowest yield domestic cigarette; *provided* that a comparison to a class of cigarettes, or to many or most of the cigarettes of a class, shall not be deemed a comparison to another brand or brands of cigarettes.

II.

For the purposes of Paragraph I of this Order:

1. The term "tar" shall mean the total particulate matter in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes; and

2. The term "nicotine" shall mean total alkaloids as nicotine in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes.

III.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in

the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission

/s/
Charles A. Tobin
Acting Secretary

SEAL

ISSUED: August 20, 1971

PHILIP MORRIS U.S.A.

INTER-OFFICE CORRESPONDENCE

Richmond, Virginia

Date: September 17, 1975

TO : Mr. Leo F. Meyer

FROM : Barbro Goodman

SUBJECT: *Marlboro — Marlboro Lights Study Delivery Date*

INTRODUCTION

On January 3, 1975 a memo was sent to you concerning smoker profiles collected in the Marlboro – Marlboro Lights study. Since that time we have been able to use the Smoker Simulator in determining a series of TPM deliveries. Included in these smokings were cigarettes from the study above.

DISCUSSION

The smoker profile data reported earlier indicated that Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro smokers and Marlboro Lights smokers. There were a total of nine smokers participating in the study, which spanned a period of four weeks. The first two weeks they smoked their regular brand and then switched exclusively to the alternate cigarette (Marlboro 85 or Marlboro Lights). The average smoker parameters for the cigarettes smoked on recording units are listed in Table I. The parameter information was obtained by Multivariate Statistical Analysis, a method of averaging which takes into account the fact that all smokers do

not take the same number of puffs. The analysis evaluates each puff according to the total number of puffs on the cigarette rather than giving equal weight to all puffs. Command tapes for Simulator smokings were based on these averages of puff volumes, puff durations, maximum flow rates and the intervals between puffs. The observed arithmetic means of the smoker parameters are illustrated in Figures 1 – 4 for the first nine puffs on both cigarettes.

The Simulator smokings of production Marlboro 85 and Marlboro Lights cigarettes were divided into three states:

A. Command tapes based on data from the entire group of smokers (Tapes #17 and 39).

B. Command tapes based on data from regular Marlboro 85 smokes only (Tapes #40 and 27).

C. Command tapes based on data from Marlboro Lights smokers only (Tapes #34 and 35).

A. The Marlboro 85 cigarettes were smoked on the Simulator with varying parameters. The puff volumes ranged from 49 to 38 cc. TPM delivery was 24.7 mg, which is equal to C.I. puff by puff delivery for the same number of puffs (Tables II and III).

Marlboro Lights, on the other hand, delivered 19.6 mg TPM on the Simulator with puff volumes ranging from 55 to 43 cc. C.I. puff by puff TPM delivery for eight 35 cc puffs was 15 mg (Table III).

There were several possible reasons why the Marlboro Lights delivered more TPM to the smoker than C.I. values would indicate while Marlboro 85's

showed no increase in delivery from the Simulator smokings: (1) the larger puff volumes taken on Marlboro Lights cigarettes, (2) a change in filter efficiency when the test cigarettes were smoked at higher than usual flow rates, (3) the faster burning paper on Marlboro Lights put the last puff closer to the filter where the TPM delivery is higher.

B. The smoker parameters were also grouped by the Smokers' regular brands. The subjects smoking Marlboro 85 as their regular brand took significantly larger puffs than the Marlboro Lights smokers. The differences in puff sizes are contributing directly to the variations in TPM deliveries between the two groups of smokers as shown in Table IV.

The Marlboro 85 smokers' tapes (numbered 40 and 17) contained data not significantly different from each other. Therefore, they would also be expected to give similar levels of TPM for Marlboro 85 and Marlboro Lights cigarettes. Smoked on the Simulator, they both delivered 27.8 mg TPM (Table IV).

C. The tapes generated by Marlboro Lights smokers (numbered 34 and 35) had short puff durations and intervals, even shorter than the standard C.I. puffs. The short intervals and the low volumes contributed to low deliveries from these Simulator smokings. Marlboro Lights delivered 17.9 mg TPM to the smoker and Marlboro 85, which was smoked with the smallest puffs (38.6-27 cc), delivered only 16.5 mg TPM on 9 puffs.

CONCLUSIONS

The smoker data collected in this study are in agreement with results found in other project

studies. The panelists smoked the cigarettes according to physical properties; *i.e.*, the dilution and the lower RTD of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of Marlboro Lights proportionally. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery. Conversely, the Marlboro lights smokers did not increase their smoke when they changed to the regular delivery cigarette.

/s/
Barbro Goodman

BG/hsw

cc:
Mr. F.E. Resnik
Dr. W.F. Gannon w/copy 1/3/75 memo
Mr. R.N. Thomson
Dr. W.L. Dunn w/copy 1/3/75 memo
Mr. W.E. Claflin
Mr. P.N. Gauvin
Mr. M.F. Kelley
Mr. F.J. Ryan

TABLE I

COMMAND TAPE INPUT DATA - SMOKER AVERAGES

Cigarette Smoked By Panelist	Command Tape	Puff Parameter	Puff Number 1	2	3	4	5	6	7	8	9	Average
Marlboro 85	#17[1]	Volume, cc	49.2	47.8	46.4	45.0	43.6	42.2	40.8	39.4	38.0	44.27
		Duration, sec.	2.14	2.05	1.96	1.87	1.78	1.69	1.60	1.51	1.41	1.83
		Interval, sec.	--	37.2	40.6	44.0	47.4	50.9	54.3	57.7	61.1	45.74
		Max. Flow, cc/min.	2326	2369	2413	2456	2499	2543	2586	2630	2673	2478
Marlboro Lights	#39	Volume, cc	55.1	53.5	51.8	50.1	48.4	46.7	45.1	43.4	41.7	49.25
		Duration, sec.	2.16	2.08	2.00	1.92	1.84	1.76	1.68	1.60	1.52	1.88
		Interval, sec.	--	29.6	35.1	40.5	46.0	51.5	57.0	62.4	67.9	43.18
		Max. Flow, cc/min.	2601	2625	2649	2674	2698	2723	2747	2772	2796	2686
Marlboro 85	#40	Volume, cc	56.9	55.5	54.2	52.8	51.4	50.0	48.6	47.3		52.77
		Duration, sec.	1.33	1.25	1.17	1.09	2.01	1.93	1.85	1.77		2.09
		Interval, sec.	--	42.9	48.0	49.0	52.1	55.1	58.2	61.2		49.02
		Max. Flow, cc/min.	2532	2583	2634	2685	2736	2787	2838	2889		2685
Marlboro Lights	#27	Volume, cc	59.6	58.3	56.9	55.6	54.2	52.9	51.5	50.2		55.59
		Duration, sec.	2.33	2.27	2.21	2.15	2.09	2.03	1.97	1.91		2.15
		Interval, sec.	--	36.0	41.6	47.3	52.9	58.6	64.2	69.8		47.27
		Max. Flow, cc/min.	2636	2662	2688	2714	2741	2767	2793	2819		2714
Marlboro Lights	#34	Volume, cc	48.7	46.6	44.5	42.4	40.3	38.2	36.1	34.0	31.9	42.32
		Duration, sec.	1.89	1.79	1.69	1.59	1.49	1.39	1.29	1.19	1.09	1.54
		Interval, sec.	--	25.1	30.4	35.7	40.9	46.2	51.5	56.7	62.0	38.29
		Max. Flow, cc/min.	2573	2595	2617	2640	2662	2684	2707	2729	2752	2651
Marlboro 85	#35	Volume, cc	38.6	37.2	35.8	34.5	32.8	31.5	30.1	28.7	27.3	33.64
		Duration, sec.	1.84	1.74	1.64	1.54	1.44	1.34	1.24	1.14	1.04	1.49
		Interval, sec.	--	32.0	35.9	39.7	43.6	47.4	51.3	55.2	59.0	41.64
		Max. Flow, cc/min.	2099	2133	2167	2201	2235	2269	2303	2337	2371	2218

[1]Category of Smokers Listed in Table II.

TABLE II

TOTAL DELIVERIES OF MARLBORO 85 AND MARLBORO LIGHTS

HUMAN SMOKER SIMULATOR

Command Smoker Tape No.	Cigarette Smoked	TPM (mg)	Tar (mg)	Nicotine (mg)	Water (mg)	Puff Count
27	MR8	34.7	20.2	1.5	3.8	9
39	ML6	22.5	17.8	1.4	3.3	9
40	MR8	[illegible].8	21.7	1.4	4.7	8
27	ML6	27.8	22.1	1.4	4.3	8
34	ML6	17.9	15.2	1.1	1.6	9
35	MR8	16.5	14.3	.9	1.3	9

C.I. PUFF BY PUFF MACHINE

	MR8	24.5	19.5	1.4	3.6	8
	ML6	14.9	12.7	1.0	1.2	8

NOTE:

Tape #17 contains parameter data for all smokers as they smoked Marlboro 85

Tape #39 contains parameter data for all smokers as they smoked Marlboro Lights

Tape #40 contains parameter data for Marlboro 85 smokers as they smoked Marlboro 85

Tape #27 contains parameter data for Marlboro 85 smokers as they smoked Marlboro Lights

Tape #34 contains parameter data for Marlboro Lights smokers as they smoked Marlboro Lights

Tape #35 contains parameter data for Marlboro Lights smokers as they smoked Marlboro 85

MR8 - Marlboro 85

ML6 - Marlboro Lights

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TABLE III

PUFF BY PUFF DELIVERIES FOR
MARLBORO 85 AND MARLBORO LIGHTS - ALL SMOKERS

Cigarette Model	% Recovery	Puff by Puff Delivery (mg) 1	2	3	4	5	6	7	8	9	Total Dely. (mg)	Dely. (mg) at 100% Recovery	
MR6	103.5	1.94	2.38	2.68	2.85	2.97	2.90	3.23	3.24	3.42	25.61	24.74	TPM
Simulator		.10	.15	.17	.18	.19	.18	.19	.18	.18	1.52	1.47	Nic.
Tape #27		.17	.20	.25	.30	.34	.34	.41	.50	.63	3.14	3.03	H_2O
		1.67	2.03	2.26	2.37	2.44	2.38	2.63	2.56	2.61	20.95	20.24	Tar
ML6	104.0	1.78	2.36	2.42	2.65	2.71	2.75	2.73	3.01	3.94	23.37	22.47	TPM
Simulator		.09	.14	.15	.17	.18	.19	.18	.19	.17	1.46	1.40	Nic.
Tape #39		.29	.26	.27	.33	.33	.36	.46	.38	(.58)[1]	3.45	3.32	H_2O
		1.40	1.98	2.00	2.15	2.21	2.20	2.09	2.24	(2.18)	18.46	17.75	Tar
MR6		1.66	2.05	2.37	2.44	2.61	2.75	2.89	3.38	4.52	24.45		TPM
C.I. Lab		.10	.23	.24	.16	.26	.17	.28	.19	.18	1.40		Nic.
Smokings		.19	.25	.20	.26	.24	.26	.32	.52	1.34	3.38		H_2O
		1.37	1.67	1.93	2.01	2.11	2.30	2.39	2.67	3.00	19.46		Tar
ML6													
C.I. Lab		1.28	1.58	1.62	1.69	1.89	2.13	2.21	2.45	--	14.92		TPM
Smokings		.08	.09	.11	.11	.13	.14	.14	.15	--	.96		Nic.
		.10	.15	.13	.14	.17	.15	.17	.23	--	1.23		H_2O
		1.07	1.34	1.38	1.54	1.59	1.83	1.90	1.97	--	12.73		Tar

[1] Data estimated.
MR6 = Marlboro 85
ML6 = Marlboro Lights

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TABLE IV

SIMULATOR DELIVERIES FOR MARLBORO 85 AND MARLBORO LIGHTS SMOKER GROUPS

Smoker Group	Cigarette Smoked	% Recovery	Puff By Puff TPM Delivery (mg) 1	2	3	4	5	6	7	8	9	Total TPM Delivery (mg)	TPM Delivery at 100% Recovery (mg)
MF 85	MF85 Tape #43	103.3	2.64	3.21	3.13	3.41	3.38	3.72	3.91	4.76		28.2	27.3
MF 85	MF85 Tape #40	105.7	2.82	3.28	3.33	3.37	3.62	3.75	4.22	5.58		29.9	28.3
												Avg.	27.8
MF 85	ML6 Tape #27	101.8	2.34	2.57	2.94	3.07	3.39	3.55	3.77	3.91		25.3	24.8
MF 85	ML6 Tape #27	99.6	2.86	3.15	3.44	3.76	3.29	4.24	4.39	5.33		30.5	30.7
MF 85	ML6 Tape #27	106.7	2.62	2.82	3.36	3.58	3.79	3.83	4.51	5.16		29.4	27.9
												Avg.	27.8
ML 6	ML6 Tape #34	100.0	1.73	1.92	1.90	2.11	1.97	2.13	2.61	1.96	2.16	17.9	17.9
ML 6	MF85 Tape #35	105.9	1.63	1.89	1.96	1.94	2.08	1.92	2.12	1.98	2.01	17.5	16.5

MF85 = Marlboro 85

ML6 = Marlboro Lights

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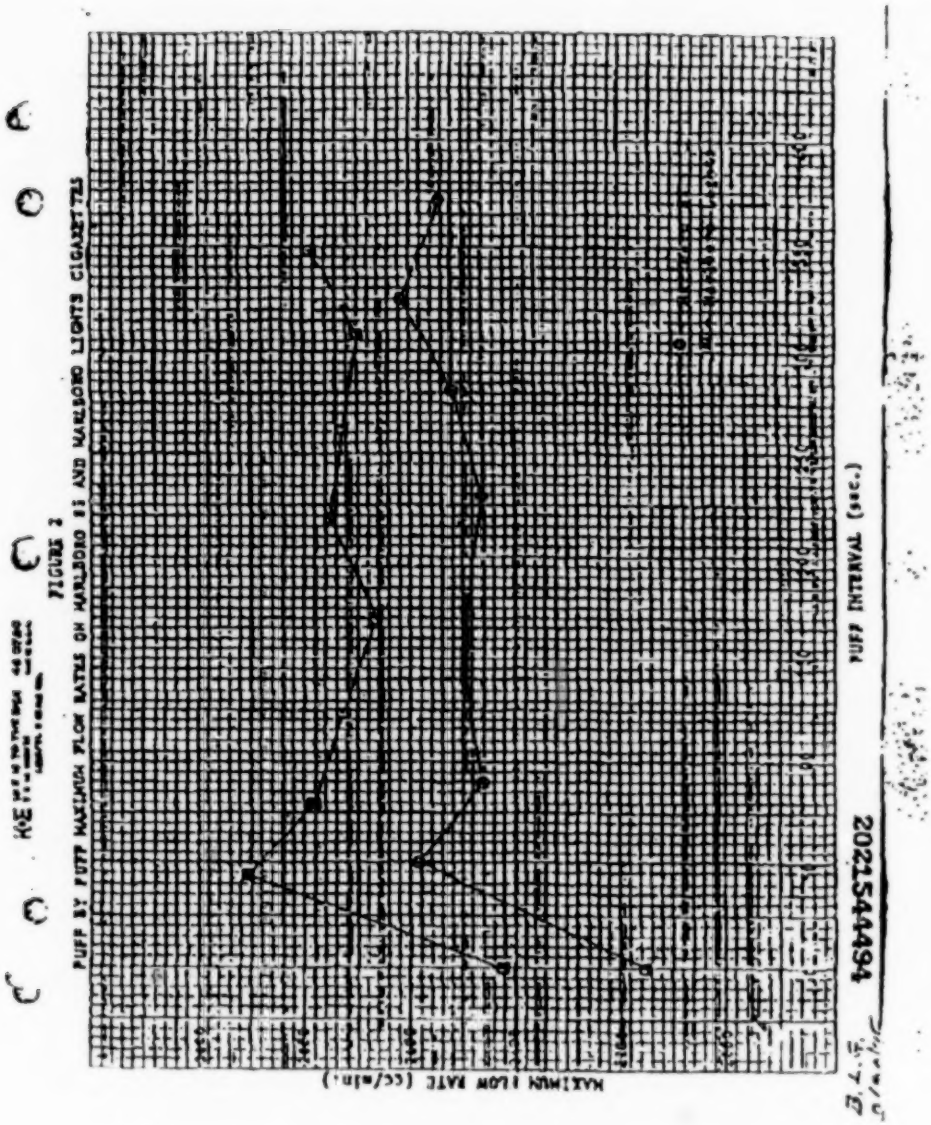
FIGURE 1
PUFF BY PUFF SMOKER VOLUMES ON MARLBORO 85 AND MARLBORO LIGHTS CIGARETTES


PUFF BY PUFF MAXIMUM FLOW RATES ON MARLBORO 85 AND MARLBORO LIGHTS CIGARETTES
MAXIMUM FLOW RATE (cc/min.)
PUFF INTERVAL (sec.)
2021544494

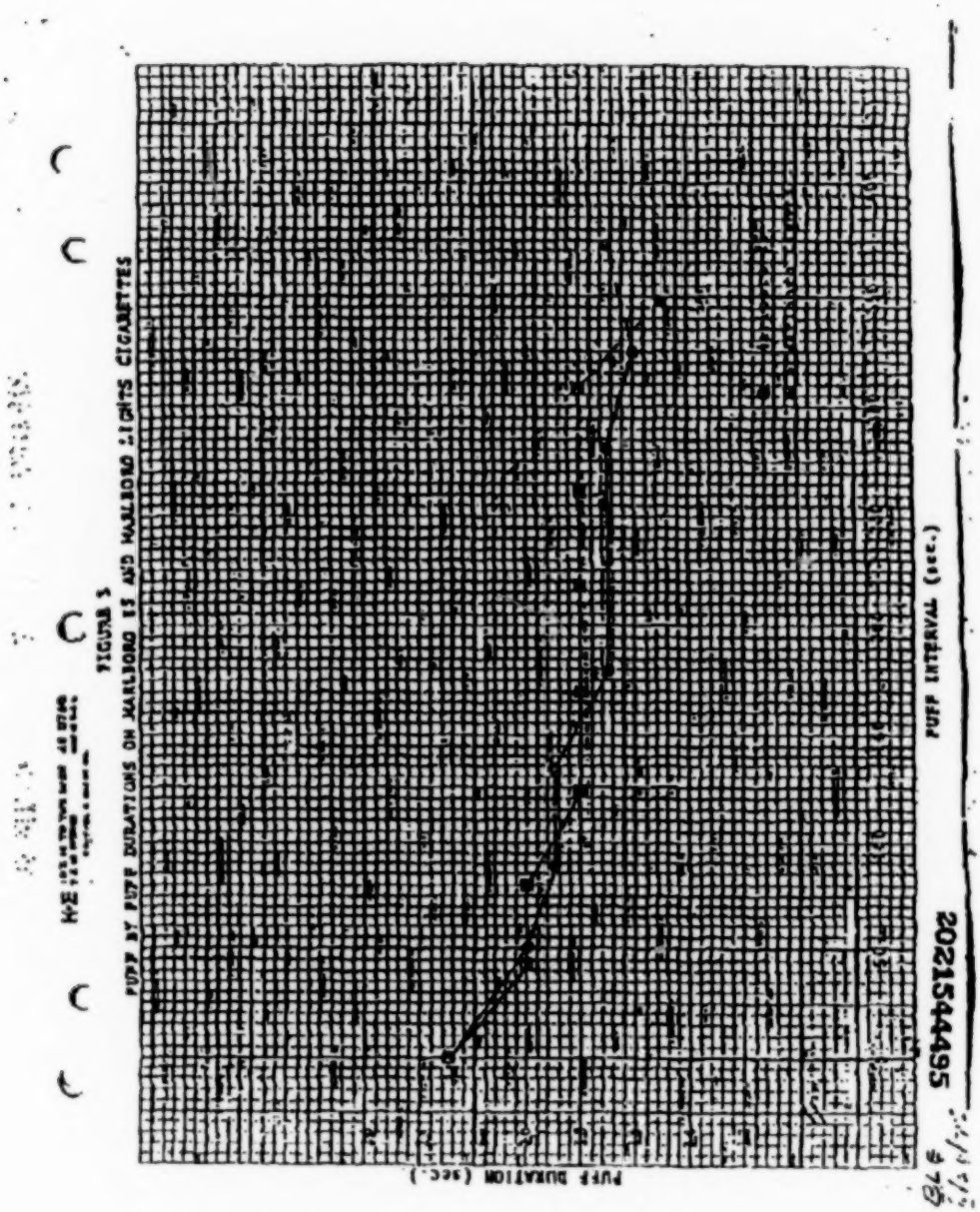


FIGURE 5
PUFF BY PUFF DURATIONS ON MARLBORO 15 AND MARLBORO LIGHTS CIGARETTES

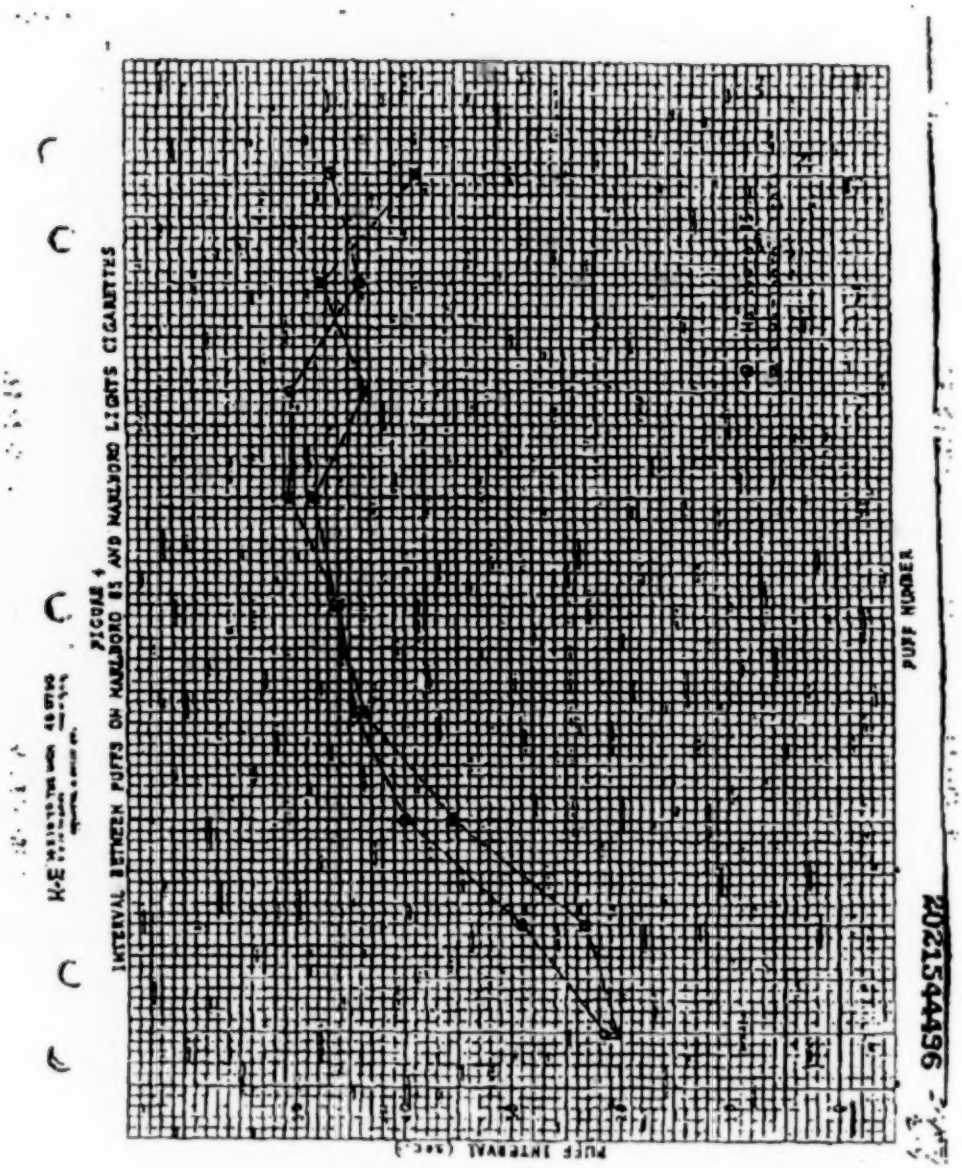


FIGURE 4
INTERVAL BETWEEN PUFFS ON MARLBORO 85 AND MARLBORO LIGHTS CIGARETTES

SMOKING AND
TOBACCO CONTROL

Monograph 13

Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine

U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES
Public Health Service
National Institutes of Health
National Cancer Institute

NATIONAL INSTITUTES OF HEALTH
National Cancer Institute

Smoking and Tobacco Control Monographs Issued to Date

Strategies to Control Tobacco Use in the United States: a blueprint for public health action in the 1990's. Smoking and Tobacco Control Monograph No. 1. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health, National Cancer Institute. NIH Publication No. 92-3316, December 1991.

Smokeless Tobacco or Health: An international perspective. Smoking and Tobacco Control Monograph No. 2. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 92-3461, September 1992.

Major Local Tobacco Control Ordinances in the Unites States. Smoking and Tobacco Control Monograph No. 3. Bethesda, MD: U.S. Department

of Health and Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 93-3532, May 1993.

Respiratory Health Effects of Passive Smoking: Lung cancer and other disorders. The Report of the U.S. Environmental Protection Agency. Smoking and Tobacco Control Monograph No. 4. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health, NIH Publication No. 93-3605, August 1993

Tobacco and the Clinician. Interventions for Medical and Dental Practice. Smoking and Tobacco Control Monograph No. 5. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 94-3693, January 1994.

Community-based Interventions for Smokers: The COMMIT Field Experience. Smoking and Tobacco Control Monograph No. 6. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 95-4028, August 1995.

The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes. Report of the NCI Expert Committee. Smoking and Tobacco Control Monograph No. 7. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 96-4028, August 1996.

Changes in Cigarette Related Disease Risks and Their Implication for Prevention and Control. Smoking and Tobacco Control Monograph No. 8. Bethesda, MD: U.S. Department of Health and

Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 97-4213, February 1997.

Cigars. Health Effects and Trends. Smoking and Tobacco Control Monograph No. 9. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health. NIH Publication No. 98-4302, February 1998.

Health Effects of Exposure to Environmental Tobacco Smoke. The Report of the California Environmental Protection Agency. Smoking and Tobacco Control Monograph No. 10. Bethesda, MD: U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health, National Cancer Institute. NIH Publication No. 99-4645, August 1999.

State and Local Legislative Action to Reduce Tobacco Use. Smoking and Tobacco Control Monograph No, 11. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Publication No. 00-4804, August 2000.

Population Based Smoking Cessation: Proceedings of a Conference on What Works to Influence Cessation in the General Population. Smoking and Tobacco Control Monograph No. 12. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Publication No. 00-4892, November 2000.

Preface

This monograph, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, is the 13th report

published in the National Cancer Institute's (NCI) Smoking and Tobacco Control Program Monograph Series. The concept for this series was formed by the late Dr. Joseph W. Cullen, former Deputy Director of the Division of Cancer Prevention and Control. On the inside front cover of this volume, appears a list of previously published monographs. In addition to the current monograph, there are two more under development. One will be entitled *Changing Adolescent Smoking Behavior: Where It Is and Why*. The other will be called *Is the Target Hardening*? The "target" refers to those long-term smokers who, in many cases, have tried to stop smoking and been unable to do so. Future monographs will address important and timely issues on tobacco control, and will reflect our continuing mission to reduce cancer risk, incidence, morbidity, and mortality caused by tobacco use, as well as enhance the quality of life of current and former users of tobacco.

The initial meeting of the authors for the Low Tar Monograph took place in November of 1999. At that meeting, each author presented a preliminary paper or outline. The group discussed each presentation and made suggestions as to which subtopics might be removed from or added to each chapter and determined the boundaries of the various chapters.

One feature of the this monograph is that it blends the old with the new. Monograph 7, *The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes*, covered the history of that protocol and recommended changes in its procedures. Chapter 2 of this publication cites this earlier monograph, brings us up to date on the FTC method, and

provides additional suggestions as to what can be done to help alert the public to the dangers of smoking.

The examination of the scientific literature on low-tar and low-nicotine cigarettes is not unique to this monograph. Several of the earlier volumes devoted one or more chapters to discussions of the various health aspects of tar and nicotine levels. However, this monograph includes more than just the study of amounts of tar and nicotine. Chapter 5 includes a discussion on the continued health risks to smokers, even those who smoke a low-tar/low-nicotine cigarette, while Chapter 2 describes how changes in the cigarette design affect an individual's smoking habit. Chapter 7 points out how the tobacco companies' advertisements have changed to match the emerging public preference for low-tar/low-nicotine cigarettes.

This monograph is unique in another important aspect. For the first time, the authors who prepared the various chapters have had extensive access to the information gleaned from the internal documents of the tobacco companies. The tobacco industry files now open to the public and available on the Internet constitute some 33 million pages of formal and informal memos, meeting notes, research papers, and similar corporate documents. Included are marketing strategies that express the growing concern among the various tobacco companies of the potential loss of new recruits. This concern over the potential loss of market was due to the evolving public opinion that smoking is harmful to health and that it is related to many of the illnesses that smokers experience over the course of their lives.

The singular message that has been delivered to the public—smoking causes cancer—is gradually being accepted by more and more people of all ages. This message has been reported in many scientific papers over the last 50 years. In a historical context, however, the bellwether publication that galvanized the public opinion was the original 1964 Surgeon General Report, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*. The fact that the public has slowly realized and, more importantly, accepted the danger of smoking undoubtedly concerned the tobacco companies.

Access to internal industry papers allowed monograph authors to cite a number of tobacco company documents that show a long-term trend altering the tar and nicotine content of cigarettes by various chemical and mechanical procedures. The documents further reveal the industry's efforts to produce cigarettes that could be marketed as acceptable to health-conscious consumers. Ultimately, these low-tar/low-nicotine cigarettes were part of the industry's plan to maintain and expand its consumer base.

The monograph authors show that the tobacco companies set out to develop cigarette designs that markedly lowered the tar and nicotine yield results as measured by the Federal Trade Commission (FTC) testing method. Yet, these cigarettes can be manipulated by the smoker to increase the intake of tar and nicotine. The use of these "decreased risk" cigarettes have not significantly decreased the disease risk. In fact, the use of these cigarettes may be partly responsible for the increase in lung cancer for long-term smokers who have switched to the-low-

tar/low-nicotine brands. Finally, switching to these cigarettes may provide smokers with a false sense of reduced risk, when the actual amount of tar and nicotine consumed may be the same as, or more than, the previously used higher yield brand.

This monograph compliments the recently released Institute of Medicine report entitled *Clearing the Smoke: Assessing the Science Base for Tobacco Harm Reduction*. Together, the documents reflect a growing body of research that has explored the impact of products intended to reduce harm in an environment where there is near universal recognition of tobacco's harmful effects. Both documents reflect the need for more research to better understand the feasibility and desirability of developing and marketing products intended to reduce risk, but both also conclude that there is currently no safe tobacco product.

We hope that this evidence-based review will inform any potential recommendations that the Department of Health and Human Services (DHHS) might make to the FTC regarding the cigarette testing method.

* * *

INTRODUCTION

Cigarettes have changed dramatically over the last 50 years, but the data contained in this volume make it clear that the disease risks associated with smoking have not. Following the demonstration that cigarettes could cause cancer in the 1950s (Wynder and Graham, 1950; Doll and Hill, 1952, 1954; Hammond and Horn, 1958), cigarette manufacturers added filters to their products. They also embarked on an effort to lower the machine-measured tar and

nicotine yields produced by their cigarettes when tested under a protocol specified by the Federal Trade Commission (FTC) (Pillsbury, 1996). These changes led to more than a 60-percent reduction in machine-measured tar yields of U.S. cigarettes over the last 50 years (see Figure 1-1).

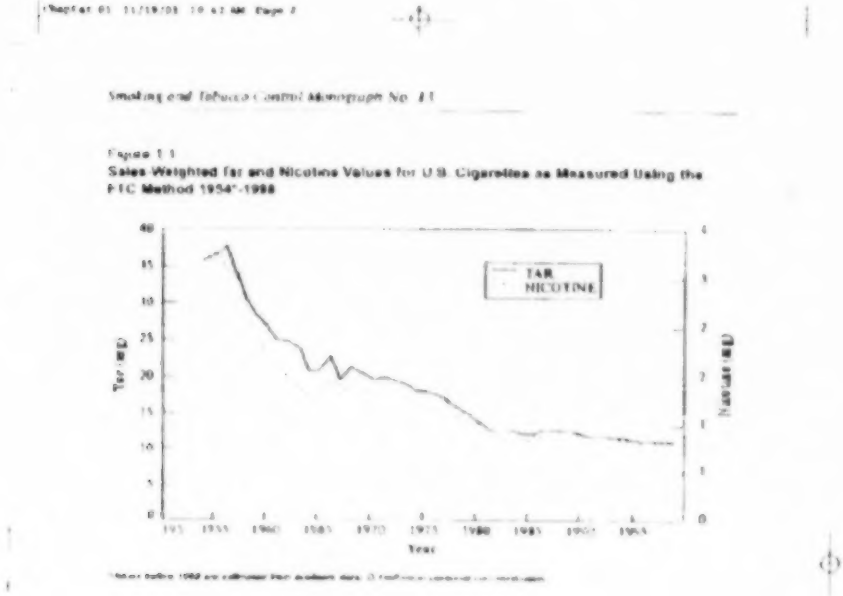
However, it appears that many of the same changes in cigarette design that reduced machine-measured tar yields also led to a disassociation between the machine-measured yield of the cigarette and the amount of tar and nicotine actually received by the smoker (see Chapters 2 and 3). As a result, tar and nicotine measurements made by the FTC method for current cigarettes have little meaning for the smoker, either for how much he or she will receive from a given cigarette or for differences in the amount of tar and nicotine received when he or she smokes different brands of cigarettes.

The absence of meaningful differences in smoke exposure when different brands of cigarettes are smoked (see Chapter 3) and the resultant absence of meaningful differences in risk (see Chapter 4) make the marketing of these cigarettes as lower-delivery and lower-risk products deceptive for the smoker (see Chapters 6 and 7). The reality that many smokers chose these products as an alternative to cessation—a change that would produce real reductions in disease risks—makes this deception an urgent public health issue.

HOW DID IT HAPPEN?

Epidemiological studies established an increased risk of lung cancer among cigarette smokers in the 1950s (Wynder and Graham, 1950; Doll and Hill, 1952, 1954; Hammond and Horn, 1958). At the same time, it was discovered that

painting tobacco tar on the backs of mice could produce cancers (Wynder *et al.*, 1953). Widespread public dissemination of the results of these studies led many smokers to quit (Burns *et al.*, 1997), but the majority of smokers were addicted and were unable to quit or unwilling to try. Faced with the continuing exposure of large numbers of smokers to the cancer-causing substances in tobacco smoke, public health authorities made the valid conclusion that cigarettes that delivered less tar



to smokers would be likely to produce less cancer as well (U.S. Congress, 1967), and the effort to produce and market low-tar cigarettes began to gather momentum.

The recommendation by public health authorities to produce low-tar cigarettes failed to appreciate two important realities. First, smokers were powerfully addicted to the nicotine in cigarettes. They actively changed the way they smoked individual cigarettes (see Chapters 2 and 3)—and some smokers increased the number of cigarettes they smoked per day (see Chapter 4)—in order to preserve their moment-to-moment and daily intake of nicotine. Because cigarettes deliver smoke with a relatively fixed ratio of tar to nicotine, smokers also preserved their dose of tar when they preserved their dose of nicotine.

Second, public health authorities dramatically underestimated the ability of cigarette manufacturers to engineer cigarettes that would yield very low tar and nicotine values when machine smoked, but yielded much higher levels of tar and nicotine when smoked by a smoker. Cigarettes were designed with an elasticity of delivery that allowed smokers to get much yields of tar and nicotine by altering their pattern of puffing. Smokers may also obtain higher yields of tar and nicotine by blocking ventilation holes in the filters with their fingers or lips (see Chapter 2). Low-yield cigarettes were designed in such a way that the same alterations in puff profile (e.g., larger, faster puffs) that resulted from a smoker's effort to compensate for a reduced nicotine delivery also generated much higher deliveries of tar and nicotine from the cigarette. In addition, the ventilation holes in cigarette filters were placed in locations where they could easily be blocked by smokers' lips or fingers. The combination of these two phenomena—compensation on the part of the smoker and elasticity of delivery in the cigarette—meant that most, perhaps nearly all,

smokers who switched to these low-yield brands did not substantially alter their exposure to tar and nicotine and, correspondingly, did not lower their risk.

COMPENSATION IN SMOKERS

Nicotine intake is a principal reason why most smokers smoke (U.S. DHHS, 1988). In the absence of nicotine, smokers do not continue the compulsive use of cigarettes that characterizes addiction. Tobacco companies recognized early in the process of developing lower yield cigarettes that smokers would attempt to preserve the amount of nicotine derived from smoking (Wakeham, 1961). Compensation for reduced delivery of nicotine takes many forms and develops over time after shifting to lower yield cigarettes (see Chapter 3). Smokers may take larger puffs, inhale more deeply, take more rapid or more frequent puffs, block ventilation holes in the filters with their fingers or lips, or increase the number of cigarettes they smoke per day.

The most important question on compensatory smoking is the extent to which it occurs when smokers actually switch brands of cigarettes through their own choice. Unfortunately, this is also the most difficult circumstance under which to obtain detailed measurements of large numbers of smokers. Many studies have examined smokers when smoking in a laboratory setting or when asked to switch at specific points in time or to specific brands of cigarettes. These studies offer some insight into how smokers compensate, but may not reflect smokers' behavior when they are switching of their own volition to a brand of their choice.

Some compensatory smoking changes are evident immediately upon switching to lower yield

cigarettes, but it is common for smokers to require some time to learn how to smoke lower yield cigarettes in ways that increase the delivery of nicotine to the smoker. Even under laboratory conditions, when smokers are rapidly switched to lower yield cigarettes, considerable compensation is evident. The extent of compensation increases in smokers who are allowed longer periods to adapt to smoking the new cigarettes or who are switched under conditions that more closely mimic the voluntary switching of smokers to lower yield cigarettes. When smokers of cigarettes with different machine-measured nicotine yields from the general population are examined, there is little or no relationship between the nominal nicotine yield of the cigarette smoked and measures of nicotine intake by the smoker, such as blood cotinine levels (Benowitz *et al.*, 1983: Benowitz, 1996; Jarvis *et al.*, 2001). These observations suggest that, at least when considering modern cigarettes, switching from higher to lower yield cigarettes per se is not likely to reduce tar intake and resultant disease risks.

ELASTICITY OF DEMAND IN THE CIGARETTE

Early in the 1950s, cigarette manufacturers began to place filters on the end of the cigarette rod. Many different filters were developed, but the most common type used in the United States was made of cellulose acetate. A variety of other approaches to tar reduction was also utilized, including "puffing" the tobacco to reduce the weight of tobacco in a cigarette, altering the blends of tobacco and porosity of the paper wrapper, changing the density of the tobacco rod, using tobacco stems and reconstituted

tobacco sheet, and using a wide variety of filter materials (see Chapter 5).

In exploring these approaches, cigarette manufacturers recognized that approaches to reduction of tar yields that actually reduced the nicotine (and tar) delivery to smokers resulted in smokers discontinuing the use of these brands of cigarettes. This led to an effort to design into the cigarette an elasticity of delivery so that smokers could extract from the cigarette as much nicotine as they needed by changing the pattern of puffing on the cigarette (see Chapter 2). The goal of this effort was to develop cigarettes that would produce very low yields of tar when tested by machine smoking using the FTC protocol, but would deliver a much higher dose of nicotine when these cigarettes were smoked by actual smokers with the puffing profiles the companies knew they would use.

An important cigarette design feature allowing a low machine-measured yield with a higher actual yield is the use of ventilated filters. Holes are cut into the paper wrapping the filter in locations where they are not covered when the cigarettes are placed into the smoking machine. However, the lips or fingers of the smoker can easily cover the holes. When the holes are uncovered and the low draw rates specified by the FTC protocol are used, air is drawn into the smoking machine, diluting the smoke coming through the rod of tobacco and lowering the machine-measured tar values. When the holes are covered or when the smoker draws more rapidly on the cigarette, much more of the puff volume is composed of smoke drawn through the rod of tobacco and much less is composed of air drawn from the ventilation holes. The result is a dramatic rise in the

tar and nicotine delivered to the smoker by the cigarette.

A given cigarette can be made to deliver any lower level of tar in machine measurements by increasing the size or number of the ventilation holes in the filter. The amount of nicotine in the unburned tobacco is similar for cigarettes with a wide range of machine-measured nicotine yields, as is the tar-to-nicotine ratios of the smoke from these cigarettes when they are smoked under conditions that mimic those of actual smokers (see Chapter 3). This combination of factors, plus the learned compensatory behaviors of the smoker, allows most cigarettes to deliver similar amounts of tar and nicotine to cigarette smokers without regard to the amount of tar and nicotine reported using the FTC method.

This effort by cigarette manufacturers to design cigarettes that could yield very low levels of tar when smoked by the machine while delivering full doses of tar and nicotine to smokers was not the only option available to the cigarette manufacturers. Internal tobacco company documents are replete with descriptions of filters that could selectively remove toxic smoke constituents, of treatments of tobacco with catalysts like palladium that reduced levels of carcinogens in the smoke, and of other promising modifications of cigarette toxicity. Many of the changes in cigarette design developed by cigarette manufacturers lowered levels of the toxic constituents in cigarette smoke, at least as the cigarettes were smoked using the FTC protocol. However, these paths were not pursued to the point of bringing products to market with scientifically established reductions in toxicity or carcinogenicity

for smokers. The principal marketing advantage of a cigarette design scientifically established to cause less harm would be the reduced toxicity of the product. Because cigarette manufacturers persistently maintained that cigarette smoking did not cause any disease, they could not advertise a product as safer since it would be necessary to acknowledge the risks of their existing products.

One unfortunate outcome of the tobacco companies' position that cigarettes had not been established to cause any disease is the lost opportunity to develop cigarettes that have actual reductions in biological toxicity rather than simply the ability to reassure smokers concerned about the risk of smoking. The more unfortunate outcome of this position was the marketing of cigarettes with no real difference in disease risks as "safer" products.

MARKETING OF LOW YIELD CIGARETTES

The link between tar and cancer risk also led to marketing of cigarettes with lower machine-measured tar yields as reduced-risk cigarettes. Terms such as 'Light' and 'Ultra-Light' were added to brand names, and substantial numbers of smokers switched to these brands in an effort to reduce their disease risks (see Chapter 6). Marketing this illusion of risk reduction would have been of concern even if the target for these brands had been confined to continuing smokers. Instead, these brands were targeted at those smokers who were thinking of quitting in an effort to intercept the smokers and keep them smoking cigarettes (see Chapter 7). The switch to low machine-measured-yield cigarettes with the illusion of risk reduction was, therefore, substituted for a real risk reduction that would have occurred had the smoker quit smoking altogether.

Beginning in the 1950s, filter cigarettes were advertised using claims of scientific discoveries, modern pure materials, and implied endorsements from medical and scientific organizations. These claims were not supported by testing that demonstrated lower deliveries of tar and nicotine to smokers or by studies of actual disease risks. However, the clear message delivered to smokers by the advertising was that these cigarettes were safer.

With the endorsement of lower tar cigarettes by public health-authorities in the 1960s (U.S. Congress, 1967), cigarette marketing began to focus on machine-measured tar deliveries. Tobacco industry research and engineering efforts recognized that at least two directions were possible with the development of either a health-image (health reassurance) cigarette or a cigarette with minimal biological activity (one that would actually produce less disease) (Green, 1968). Unfortunately, the dominant direction taken was the production of health reassurance cigarettes engineered so that they would deliver low yields of tar under FTC machine-smoking conditions. These low machine yields were touted in the advertisements and incorporated into cigarette brand names with terms such as 'Light' and 'Ultra-Light'. However, the promise of low tar delivery was only valid for the smoking machine. Smokers received a much higher dose of tar and enough nicotine to satisfy their addiction.

Figure 1-2
Low Tar Is Important to Me

This dichotomy of delivery between smokers and machines was the intended result of the engineering effort to design elasticity of delivery into cigarettes. Testing of these design concepts on actual smokers revealed that Light and Regular cigarettes delivered the same levels of tar and nicotine when smoked by smokers (Goodman, 1975) and that advertising these cigarettes as low-tar-yield cigarettes was deceptive (Peeples, 1976). But these cigarettes satisfied the demand for cigarettes that could be marketed as low-tar cigarettes with full flavor or taste (See Figure 1-2). The low-tar claim presented in the ad only existed for machine smoking and the full flavor received by the smoker was accompanied by full yields of tar and full disease risks.

DISEASE RISKS

Having demonstrated that smokers derive similar amounts of nicotine from cigarettes with a wide variety of machine-measured nicotine yields because those cigarettes were designed to deliver a full dose of nicotine (and tar) to the smoker, one might expect that there would be little or no

difference in disease risks among groups of smokers who smoke cigarettes with different machine-measured tar and nicotine yields. However, epidemiological studies have demonstrated that smokers of lower tar or filtered cigarettes had lower lung cancer risks (see Chapter 4). These findings, made in the late 1960s and 1970s, were particularly exciting since smokers had been smoking these reduced-yield cigarettes for only short periods of time. As more individuals used these products for longer periods of time, the reduction in disease risk would be expected to increase and national lung cancer death rates would fall.

Use of lower yield cigarettes grew until they were the dominant type of cigarette on the U.S. market, with 97 percent of the cigarettes currently sold in the United States being filtered cigarettes, but lung cancer rates continued to rise. Lung cancer death rates finally peaked in 1990 among White males; they continue to rise among women in spite of a higher prevalence of low-yield cigarette use among females. Examination of these trends show that they are explained by changes in smoking prevalence without postulating reductions in disease risks due to changes in cigarette design (Mannino *et al.*, 2001; see Chapter 4).

In addition, prospective mortality studies examining smokers in the United States (Thun and Heath, 1997; Thun *et al.*, 1997) and the United Kingdom (Doll *et al.*, 1994) revealed an increase—rather than a decrease—in the risk of smoking over a period when tar and nicotine yields of cigarettes were declining. Data from two large prospective mortality studies conducted by the American Cancer Society (ACS) more than 20 years apart are

particularly compelling (Thun and Heath, 1997). Machine-measured tar and nicotine yields of U.S. cigarettes declined dramatically in the interval between these two studies (see Figure 1-1), and the machine-measured yields of the cigarettes actually smoked by the participants in these two studies were dramatically different as a result (see Figure 1-3). Despite the substantive reduction in tar yield of the cigarettes smoked in CPS (Cancer Prevention Study)-II, lung cancer disease risks increased, rather than decreased, compared to CPS-I, even when controlled for differences between the two studies in number of cigarettes smoked per day and duration of smoking.

The risk reduction with use of lower yield cigarettes demonstrated in epidemiological studies and the absence of a risk reduction in U.S. lung cancer mortality trends or in the two ACS studies with changing cigarette design are observations that offer apparently conflicting interpretations of the likely disease consequences of smoking lower yield cigarettes. The epidemiological observation of lower risks with use of filtered and lower tar cigarettes has been reproduced in multiple populations and cannot be dismissed as an artifact of a single analysis or a single population. Similarly, national death rate trends are real observations not easily dismissed.

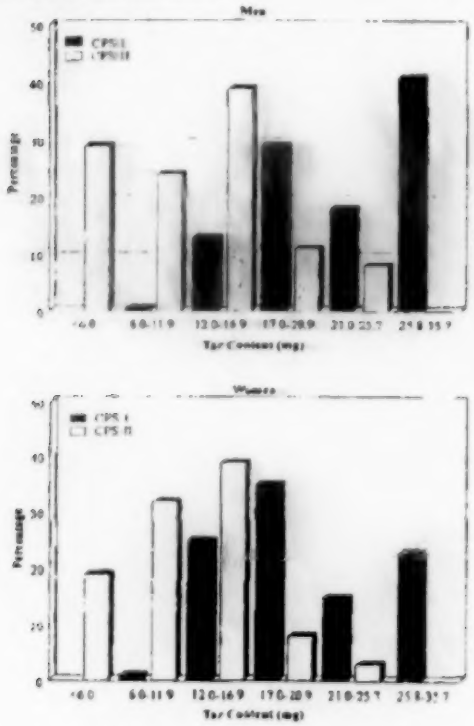
Epidemiological studies and national death rates both measure the impact of low-yield cigarettes in somewhat different ways. Epidemiological studies of disease risks compare disease rates among populations of smokers who use cigarettes with different characteristics. These studies can define whether the disease experiences of smokers of different types of cigarettes are different. However,

attributing differences in disease experience to the type of cigarette smoked requires careful consideration of, and adjustment for, characteristics of the two groups that may influence disease risks other than the type of cigarette smoked.

National mortality rate trends are the cumulative result of all of the changes in smoking behavior over time, changes in cigarette design, demographic changes, and changes in smoking behavior. However, smokers of different types of cigarettes cannot be examined directly for their contribution to these trends.

The marketing of low-yield cigarettes as less risky (see Chapters 6 and 7) results in smokers switching from higher to lower yield cigarettes in an effort to reduce their disease risks (Cohen, 1996a & b; see Chapters 6 and 7), in an effort to quit, or in an effort to substantially reduce their smoking (Giovino *et al.*, 1996). Because of these health concerns and an ongoing interest in cessation, these same low-yield cigarette smokers may also have higher rates of successful long-term smoking cessation or may voluntarily reduce the amount that they smoke for health reasons. Risk reductions that

Figure 1-3
Percentage Distribution of Tar Content, as Measured by Machine Smoking, of the Cigarette Brand Smoked at Enrollment



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accompany cessation or lowered smoking intensity may appear to be related to the tar level of the cigarette smoked when a population is followed longitudinally for assessment of disease risk without repeated follow-up assessment of smoking status. This effect and other differences in health-related behaviors linked to low-yield cigarette use may confound the analysis of disease risk in prospective studies of low yield cigarettes.

Many published epidemiological studies of low-yield cigarettes have adjusted for the number of cigarettes smoked per day because it is the most readily available quantitative measure of smoking intensity. The potential for smokers to increase the number of cigarettes they smoke per day when they switch to lower yield cigarettes can confound analyses of disease risks among smokers of different types of cigarettes in both case-control and prospective epidemiological evaluations (see Chapter 4). Data presented in Chapter 4 show that smokers who switched to low-yield cigarettes in the ACS CPS-I increased the number of cigarettes that they smoked per day, and that smokers of ultralow-nicotine-yield cigarettes smoked more cigarettes per day in recent California tobacco surveys.

The differences between self-selected populations of smokers of different types of cigarettes and the potential for confounding between type of cigarette smoked and the number of cigarettes smoked per day may explain why epidemiological studies have demonstrated a risk difference when one has not appeared in national death rates.

However, it is clear that the expected lung cancer risk reduction offered by the reduction in lung cancer rates in epidemiological studies has not been realized in national lung cancer death rate trends. When all of the epidemiological evidence is considered in the context of what is currently known about cigarette design and compensation, it does not support the conclusion that a reduction in disease risks has occurred in the population of smokers due to the design changes that occurred in cigarettes over the last 50 years.

This report reviews evidence on the FTC method for measuring tar and nicotine yields and the disease risks of machine-measured low-tar cigarettes. The evidence is derived from research on human behavior and exposures, cigarette design and yields, smoke chemistry, epidemiological other and population-based data on human disease risk. In conducting this review, the objective was to determine whether the evidence taken as a whole shows that the cumulative effect of engineering changes in cigarette design over the last 50 years has reduced disease risks in smokers. Traditional scientific judgment requires compelling evidence of a difference before concluding that use of lower yield products reduces disease risk. These judgments are especially important for harm reduction claims, as they may deter smokers from cessation of tobacco use. Moreover, there have been previous public policy statements on the likely benefits of lower yield products. These prior statements may lead to confusion by creating an implication that the appropriate standard for judgment would require proof of the absence of an effect before the policy recommendations should be withdrawn. Given the consequences of being wrong on the advice given to smokers, the burden of proof should not be shifted from proving the presence of an effect. The perspective of this report is whether the existing evidence is sufficient to support claims that disease risks are reduced when smokers switch to lower yield cigarettes and policy recommendations that smokers who cannot quit should switch to these products. The answers to these questions are that current evidence does not support either claims of reduced harm or policy recommendations to switch to these products.

Many questions remain unanswered. For example, the disease risks of recently introduced cigarettes or cigarette-like products are not known. Similarly, the cancer risks for individuals who have only used low and ultralow cigarettes, and who may have different intensities of smoking as a result, have yet to be fully described. Changes in age-specific lung cancer death rates at younger ages in the United Kingdom suggest that the future lung cancer experiences of these young smokers may differ from that of prior generations of smokers. In addition, the possibility exists that individual product design changes, or future changes in tobacco industry produced nicotine delivery devices, may reduce disease risks in the future. However, the burden of proof for these benefits must remain with those who would make the claims. The proof must integrate both measurements of dose and measures of actual biological effect. The very real probability that addicted smokers will seek out and rely upon the promised potential of reduced risk for products that allow continued smoking creates an obligation to require clear scientific proof of harm reduction claims before they are communicated to potential product users.

CONCLUSIONS

1. Epidemiological and other scientific evidence, including patterns of mortality from smoking-caused diseases, does not indicate a benefit to public health from changes in cigarette design and manufacturing over the last fifty years.

2. For spontaneous brand switchers, there appears to be complete compensation for nicotine delivery, reflecting more intensive smoking of lower-yield cigarettes.

3. Widespread adoption of lower yield cigarettes in the United States has not prevented the sustained increase in lung cancer among older smokers.

4. Many smokers switch to lower yield cigarettes out of concern for their health, believing these cigarettes to be less risky or to be a step toward quitting. Advertising and marketing of lower yield cigarettes may promote initiation and impede cessation, more important determinants of smoking-related diseases.

5. Measurements of tar and nicotine yields using the FTC method do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette. The measurements also do not offer meaningful information on the relative amounts of tar and nicotine exposure likely to be received from smoking different brands of cigarettes.

* * *

CIGARETTE-YIELD TESTING BY SMOKING MACHINE USING THE FTC PROTOCOL

The modern low-yield cigarette is defined by a standardized smoking-machine test commonly referred to as the FTC method (Pecler, 1996), based on the Federal Trade Commission protocol. This smoking-machine procedure simulates a precise manner of smoking by fixing puff size (35 ml), puffing rate (once per minute), puff duration (2 seconds), and butt length to which the cigarette is smoked (23 mm on an unfiltered cigarette or overwrap, plus 3 mm on a filtered cigarette). The number of puffs to be taken is not specified. The standard yields of tar and nicotine measured are

reported in cigarette advertising (according to a cooperative agreement) and on some very low-tar cigarette packs (as measured by the FTC method) at the manufacturer's discretion (Peeler, 1996; Kozlowski *et al.*, 1998c). Carbon monoxide (CO) is also measured, but is not reported in advertising. The same basic methodology is used for cigarette testing in Canada, Australia, and the United Kingdom. In the United States, cigarette brands yielding approximately 1-5 or 6 mg tar by this standard method are generally called 'Ultra-Light'; brands yielding between approximately 6 or 7-15 mg tar are called 'Light'; and brands yielding more than 15 mg tar are called 'Regular' or 'Full Flavor'. By convention, cigarettes yielding 15 mg tar by the FTC method are called 'low tar'.

The origins of the FTC method can be found in the early efforts of tobacco industry researchers to compare cigarettes of the day. They arbitrarily selected the smoking parameters of a 35-ml puff volume, a 2-second puff duration, and a one-puff-per-minute frequency (Bradford *et al.*, 1936). At the time, nearly all cigarettes were unfiltered, lacked overwraps, and were of similar length, weight, and circumference; presumably, most had similar burn times, a characteristic closely related to the number of puffs taken. The past 30 years has seen dramatic growth of variation in the physical characteristics of cigarettes, with differences in circumference ('slims' to 'wides'), length (70-120 mm), and weights.

CHANGES IN FTC MACHINE-SMOKED YIELDS OVER TIME

Each year since 1968, the FTC has reported sales weighted yields of tar and nicotine based on the FTC protocol (Table 2-1). Average sales-weighted

standard tar yield decreased from 21.6 mg in 1968 to 12.0 mg in 1997 (44.4 percent), while average sales-weighted nicotine yield decreased from 1.35 mg to 0.89 mg (34.1 percent). Though standard tar and nicotine yields have the status of official FTC data, it would be wrong to assume that these numbers have any bearing on smoker exposure to tar and nicotine.

Table 2-1
Sales-Weighted Tar and Nicotine Yields: 1968-1997

Year	Tar(mg)	Nicotine(mg)	Tar/Nicotine
1968	21.6	1.35	16.00
1969	20.7	1.38	15.00
1970	20.0	1.31	15.27
1971	20.2	1.32	15.30
1972	19.9	1.39	14.32
1973	19.3	1.32	14.62
1974	18.4	1.24	14.84
1975	18.6	1.21	15.37
1976	18.1	1.16	15.60
1977	16.8	1.12	15.00
1978	16.1	1.11	14.50
1979	15.1	1.07	14.11
1980	14.1	1.04	13.56
1981	13.2	0.92	14.35
1982	13.5	0.89	15.17
1983	13.4	0.88	15.23
1984	13.0	0.89	14.61
1985	13.0	0.95	13.68
1986	13.4	0.93	14.41
1987	13.3	0.94	14.15
1988	13.3	0.94	14.15
1989	13.1	0.96	13.65
1990	12.5	0.93	13.44
1991	12.6	0.94	13.40
1992	12.4	0.92	13.48
1993	12.4	0.90	13.78

1994	12.1	0.90	13.44
1995	12.0	0.87	13.79
1996	12.0	0.88	13.65
1997	12.0	0.89	13.48

DESIGN CHANGES THAT REDUCE STANDARD YIELDS

Changes in cigarette design have produced the reductions in standard yields of tar and nicotine measured over the past several decades. Although it is unlikely that decreases in FTC tar yields of only a few milligrams are toxicologically consequential, cigarette manufacturers can manipulate variables that combine to make small changes in yields or in the sensory effects of cigarettes. Such reformulations can have important policy implications. For example, changing a cigarette slightly to reduce the standard tar yield from 16 mg to 15 mg would increase the percentage of low-tar cigarettes on the market, and thereby reduce sales-weighted tar levels. However, even without compensatory smoking, such a small change would likely have negligible effects on health.

Cigarette design manipulations intended to decrease standard yields can be divided into those having two broad functional effects: 1) reducing the number of puffs per cigarette, and 2) reducing the tar and nicotine concentration in smoke per puff (Kozlowski, 1983). Table 2-2 provides a summary

Table 2-2
Main Ways to Reduce Standard Tar and Nicotine Yields

A. Reduce the number of puffs taken by:

1) decreasing the length of the available tobacco column with

a. longer filter overwraps,
b. longer filters;

2) increasing the burn rate of the column with
a. chemical additives in paper or tobacco,
b. higher porosity paper,
c. less tobacco (by weight),
d. lower diameter tobacco column.

B. Reduce concentration of tar and nicotine per puff by:

1) increasing fitter efficiency with
a. ventilated filters (by reducing tobacco amount/puff),
b. longer filters,
c. denser filters,
d. 'active' filters;

2) increasing air dilution of mainstream smoke with
a. ventilated filters,
b. higher porosity paper;

3) decreasing the density of tobacco with
a. reconstituted sheet tobacco,
b. puffed or expanded tobaccos,
c. flavorings (casings) and additives,
d. smaller circumference cigarettes;

4) tobacco blending with
a. use of lower nicotine yield tobacco strains,
b. flue-cured, burley, oriental tobaccos,
c. different parts/leaf positions of plants.

of these factors. Manufacturing cigarettes that produce lower FTC tar and nicotine yields is a complex, multi-factorial process—a complicated recipe. Manipulating one variable also affects other

variables. Cigarette design involves alteration of elements within a complex system. For example, if one simply increased filter ventilation greatly, this would cause less tobacco to be consumed with each standard puff, and thereby cause an increased number of puffs. Altering design to increase the inter-puff burn rate (e.g., chemical treatments of the cigarette paper or using less tobacco) deals with this issue (Philip Morris, 1980).

The design features listed in Table 2-2 should not be considered 'secrets' of cigarette manufacture. Many of these design characteristics were discussed in a classic book on tobacco and tobacco smoke by Wynder and Hoffman (1967) and more recently by Browne (1990). Journals such as *Beitrage Zur Tabakforschung* and *Tobacco Science* have been available in research libraries for decades. Research articles on such design features have been published by various industry scientists (*e.g.*, Parker and Montgomery, 1979; Shoffner and Ireland, 1982). What is secret, however, is the exact formulation of a particular brand at any given time. Even if details are supplied in some of the formerly secret tobacco company documents, there is no guarantee, for example, that the Marlboro Light® brand of 1985 is the same in all attributes as the same named brand in 2000.

Three design features that can influence standard yield will be discussed. They are: available length of tobacco (which relates to burn rate), tobacco column nicotine content, and filter ventilation.

Available Length of Tobacco

Because the last few puffs on a cigarette have higher deliveries than the first few puffs, eliminating the last puff by increasing the burn rate has a

relatively large effect on reducing tar and nicotine yields. The FTC test method has never required the recording or reporting of the number of puffs taken by the smoking machine, yet industry testing of cigarettes has routinely done so. The official Canadian cigarette testing laboratory (Labstat Incorporated, Kitchener, Ontario) has customarily collected the number of puffs taken by the machine for each cigarette smoked. In one study, 12 best-selling Canadian cigarette brands were shown to have decreased from 9.8 to 8.8 puffs per cigarette (a 10 percent reduction) between 1969 and 1974; during the same period, tar yield decreased 13.6 percent, from 22 mg to 19 mg (Kozlowski *et al.*, 1980b).

There is some evidence that increases in the length of the overwrap (the distinctive paper wrap covering the outside of the filter) have been used to decrease the number of puffs taken (Grunberg *et al.*, 1985). Other things being equal, a longer "filter plus overwrap" will result in a longer butt being left in the smoking machine. However, tobacco exists under the overwrap that is still available to be smoked by the human smoker. This additional tobacco would not be burned in the FTC test, resulting in a lower standard yield, but a potentially higher yield for the actual smoker.

Nicotine Content of Tobacco

Different types of tobacco can contain different amounts of nicotine, with burley being the highest and flue-cured tobacco being somewhat lower. Oriental tobaccos and reconstituted tobacco sheet have substantially lower nicotine contents. Different parts of the same tobacco plant can contain different nicotine levels based on stalk position, soil nitrogen, and the curing process. Blends of tobacco strains

and tobacco from particular segments can contribute to the blend of a particular cigarette brand. These blends, combined with the use of fillers, additives, and reconstituted sheet tobacco in the tobacco column of cigarettes, can lead to-differences in nicotine contents among brands. Kozlowski and colleagues (1998b) measured the nicotine content of the "tobacco column" (a complex of tobacco, reconstituted sheet, flavorings, and casings) in American, British, and Canadian cigarette brands. On the whole, American cigarette brands contained less nicotine per cigarette (10.2 mg ± 0.25 SEM) than either British (12.5 mg ± 0.33 SEM) or Canadian (13.5 mg ± 0.49 SEM) brands ($p < 0.008$). Among American brands, nicotine contents ranged from a high of 13.4 mg (Newport Full-Flavor®) to a low of 7.3 mg (GPC Lights®). The nicotine content of Canadian brands ranged from a high of 18.3 mg (Players Extra Light®) to a low of 8.0 mg (Players Full Flavour®), while British brands ranged from a high of 15.9 mg (Knightsbridge® Super King) to a low of 9.0 mg (Dorchester). Brands with the lowest standard nicotine yield (0.1 mg), such as Carlton®, Carlton® 100, Merit Ultima®, and Craven Ultra-Mild®, contained between 8.7-11.2 mg nicotine per cigarette (Kozlowski *et al.*, 1998b).

These same authors found a significant positive correlation ($r = 0.51$ [95% CI = 0.20-0.73]) between brand FTC nicotine yield and the nicotine content of tobacco. In 1997, the state of Massachusetts required testing of the best-selling cigarettes ($N = 15$ brand groups) for nicotine content of whole tobacco (American Cancer Society, 2000). This testing showed no significant differences between brand categories (Full Flavor, Light, or Ultra-Light). This discrepancy in the relationship between standard

yields and nicotine content may be due to the exclusion of poor-selling, very low FTC tar brands from the Massachusetts sample. But substantial differences in nicotine content of tobacco were nonetheless found between some brands. Values ranged from a low of 8.3 mg for GPC Lights® King Size to a high of 15.48 mg for Marlboro® 100 Soft Pack (an 87 percent difference—low to high), which cannot be viewed as a small difference. Note that Kozlowski and associates (1998b) found an 84 percent difference between the lowest and highest nicotine content observed (see above).

Filter Ventilation

Although each of the manufacturing changes listed in Table 2-2 (including those intended to reduce the number of puffs per cigarette) has contributed to the development of lower tar and nicotine cigarettes, filter ventilation has been the major innovation behind the modern low-yield cigarette (Kozlowski, 1983; Kozlowski *et al.*, 1998b). Filter vents, which usually are one or more rings of small holes or perforations, serve to dilute smoke with air, thereby reducing standard yields of tar, nicotine, and CO,

A 1956 Philip Morris memo to the company's most senior executives maintained that ventilation could serve as a "counter-attack" to negative health claims about smoking because it reduced "smoke solids," CO, and irritation (DuPuis, 1956).

Vents are placed in the filter by one of three main processes: electrostatic perforation, mechanical perforation, or laser perforation (Helms, 1983; Helms and Lorenzen, 1984). The method of perforation can influence actual tar and nicotine delivery to the smoker (this issue will be addressed

further in the next section). Whatever the method of perforation, the location of filter vents generally ranges from 11 to 15 mm from the mouth end of the filter. In a recent study, the filter ventilation levels of 32 U.S. cigarette brands were tested and found to range from 0 to 83 percent (Kozlowski *et al.*, 1998b). A cigarette with 0 percent filter ventilation would produce a puff of smoke undiluted by air from filter vents. A cigarette with 83 percent filter ventilation would produce a puff that is 83 percent air from vents and 17 percent smoke undiluted by air from vents.

Increases in ventilation appear to have been important in meeting the tar-yield maximum in the European Economic Community. Internal Philip Morris documents indicated that the company's strategy for reducing the smoke deliveries of its Marlboro brands in Europe rested primarily on increasing filter ventilation (Stolt, 1977). Tests have shown that Full-Flavor Marlboro® cigarettes are now twice as ventilated in the United Kingdom as in the United States (19.5 versus 10.2 percent); similar differences are seen for Marlboro Light® (44.9 versus 22.5 percent) (Kozlowski *et al.*, 1998b).

COMPENSATION AND CIGARETTE DESIGN: DIFFERENCE IN YIELD WITH DIFFERENT SMOKING PATTERNS

The observed decreases in standardized yields of tar and nicotine that have occurred since 1968 do not seem to translate into reduced exposures for smokers. Smokers can consciously or unconsciously compensate for lower standard yields in a number of easy and effective ways.

Increasing Puff Number

Of course, smokers are not limited in the number of puffs they may take from a cigarette. Smokers can counteract yield reduction methods that reduce puff number simply by taking more puffs per cigarette. If smokers receive less tar and nicotine per puff from lower yield products, they can easily compensate by taking more puffs or, of course, smoking more cigarettes per day. Across 32 studies cited by the Surgeon General (U.S. DHHS, 1988), the average of the mean inter-puff intervals was 34 seconds, with a range of 18-64 seconds. This contrasts with the 58-second inter-puff interval used with the FTC method. Naturally, the actual range of inter-puff intervals would be much larger than this range of means. Results from a recent laboratory study revealed that smokers of low-yield (≤ 0.8 mg nicotine by FTC method) and high-yield (0.9-1.2 mg nicotine by FTC method) cigarette brands had significantly shorter inter-puff intervals (about 20 seconds) than those of the FTC protocol (Djordjevic *et al.*, 2000). Clearly, smokers often take more than one puff per minute and can thereby increase their actual yield.

Increasing Puff Volume

A major and easy way for the smoker to increase smoke intake is to increase the volume of each puff. Total puff volume per cigarette is a function of puff number and volume per puff. In terms of overall exposure, total volume per cigarette is a better index and gives insight into how much 'work' the smoker performed in smoking the cigarette. Smokers are free to take large or small puffs on their cigarettes. The 32 studies summarized in the Surgeon General report (U.S. DHHS, 1988)

confirmed that puff volumes often deviate from the FTC standard. The average of mean puff volumes across the studies was 43 ml, with a range of 22-66 ml. Again, because these represent ranges of means, the actual ranges of individual scores would be broader.

Published studies confirm that smokers will change their puff sizes in response to the type of cigarette that they smoke. Herning and associates (1981) studied smokers who were smoking the first cigarette of the day. These smokers showed larger puff volumes on the low-nicotine cigarettes (47.8 ml) than on either the medium- or high-nicotine cigarettes (35.9 ml and 36.9 ml, respectively). Among 10 participants studied by Tobin and Sackner (1982), larger puff volumes were taken from the low-tar cigarettes (52 ml) than from the high-tar cigarettes (39 ml) ($P < 0.001$). A study by Moody (1980) reported a mean puff volume of 43.5 ml. Djordjevic and colleagues (2000) recently reported that the average volumes of smoke per puff for smokers of low-yield and medium-yield cigarette brands were 48.6 ml and 44.1 ml, respectively. Other investigators have noted similar findings (*e.g.*, Zacny *et al.*, 1986, 1987; Zacny and Stitzer, 1988). These studies showed that the FTC test underestimates the volume of smoke taken from lower tar cigarettes. Industry studies show that smokers often take far more in total volume of smoke than is predicted by the FTC test. In two separate Philip Morris studies, smokers (one in each study) independently took nearly 1,400 ml of smoke from Carlton® cigarettes, in both cases nearly five times the expected FTC value for a whole cigarette (Wakeham, 1974; Kelley, 1977).

Additionally, unpublished industry research revealed that puff volumes increase as standard yields decrease (see Norman and Ihrig, 1980a & b, at Lorillard, discussed later in the chapter). Clearly, puff volume changes represent a significant and easy mode of compensation for low-yield products.

Dilution and Puff Volume

As discussed earlier, filter ventilation dilutes smoke with air. One way for the smoker to compensate for the reduced nicotine delivery that results from air dilution is to increase puff volume. If a smoker increases puff volume, he or she will receive more smoke from the cigarette along with more air. This larger puff might feel 'lighter' to the smoker than if they had taken a smaller, more concentrated puff of equivalent yield from an unventilated or less-ventilated cigarette. This effect of 'softening' the taste or reducing the harshness of taste may be an important reason for the perception of 'lightness' in lower standard-yield cigarettes (Kozlowski *et al.*, 1998a, 1999, 2000).

Consider a simplified model of ventilation and puff volume. A curvilinear relationship exists between the level of dilution and the puff volume needed to compensate for reduced yield (Sutton *et al.*, 1978). The formula for puff volume percentage increase needed to compensate is as follows: percentage increase in puff volume = (% dilution/[100 – % dilution]) x 100. As dilution increases, puff volume to compensate increases exponentially. According to Kozlowski and colleagues (1998b), for a cigarette with 13 percent dilution (e.g., Marlboro® Full Flavor), a small puff volume increase (15 percent, from 35 ml to 40 ml) would provide full compensation for the dilution. To compensate fully

for a 40 percent diluted cigarette (e.g., Virginia Slims Light® 100), a puff volume of 58 ml (a 67 percent increase) would be needed. In contrast with a highly ventilated cigarette such as Carlton® 100 (83 percent diluted), a large and generally impractical puff volume of 206 ml would be required. These estimates assume a 35 ml base puff (the base puff is what is assumed to occur with no ventilation). For those with a 45 ml base puff, a heroic puff of 265 ml would be required to compensate for the 83 percent dilution on the 1 mg tar cigarette. The bestselling Marlboro Light® cigarette is just 23 percent diluted, and an easy puff of about 60 ml (from a 45 ml base) or only 45 ml (from a 35 ml base) would fully compensate. Increased puff volume is a very likely mode of compensation when it can be performed without significant additional effort (*i.e.*, for a Light cigarette with low-to-moderate air dilution). For a heavily ventilated cigarette (*e.g.*, 83 percent diluted, 1 mg tar), increasing per-puff volume within acceptable bounds of comfort and effort alone will not generally provide full or even substantial compensation. (Of course, smokers are not constrained to simply take bigger puffs; they may also take more puffs; for more, see, Kozlowski *et al.*, 1998b.)

The phenomenon of compensating with bigger puffs is well known to industry scientists. For example, Norman and Ihrig (1980a) of Lorillard conducted a series of studies concerning puff volumes and puff velocities on lower tar cigarettes being greater than those for higher tar cigarettes. These authors assumed that ultralow-tar brands were more palatable to the smoker if compensatory smoking required a modest amount of additional effort. To describe this effort, they derived the "puffing power

function" (Norman and Ihrig, 1980b), defined as the product of the flow rate through the cigarette and pressure drop required to produce that flow.

These authors examined the relationship between puffing power functions (expressed in 'puffing power units' or PPU) and puffing regimens (at standard FTC 35 ml as well as 50 ml puffs). The increase in PPU represented the "extra effort needed to obtain a given amount of additional [tar] from the cigarette" (Norman and Ihrig, 1980b). They thought that an understanding of puffing effort is critical for very low-yield brands, since these are most likely to be smoked with extra effort to obtain more smoke.

Increasing puff volume can have additional effects, especially if puff velocity also increases. Other things being equal, a higher velocity puff (*i.e.*, > 17.5 ml/sec) will reduce filter efficiency (i.e., the percentage of what enters the filter that remains in the filter). Further, filter tip ventilation decreases as flow rate increases. If the cigarette is ventilated with high-porosity paper, however, the opposite is true—dilution increases with increasing flow rate:

". . . [A] cigarette constructed with low paper porosity but with filter tip ventilation would more readily allow a smoker to take a higher delivery of smoke by increasing the velocity of puffing. Such a cigarette construction would provide a marketing opportunity to offer a LOW to LOW TO MIDDLE delivery product when smoked by machine, which could be a LOW TO MIDDLE to MIDDLE delivery product when smoked by the smoker."

. . . "Alternatively, if a cigarette is manufactured to have no filter tip ventilation, but high paper porosity, the smoker would not be able to compensate for reduced delivery by puffing harder;

in fact, the higher the velocity of the puff, the lower the delivery. Theoretically the smoker would be able to increase delivery by reducing his puffing velocity and increasing the duration of the puff. This is unlikely to occur to any marked extent as it would require a marked change of habit that would probably feel uncomfortable to the smoker." (See Creighton, 1978a.)

Air drawn through the vents dilutes the smoke, but also generally reduces the draw resistance through the filter and tobacco rod (Creighton, 1978a). For example, Zacny and associates (1986) found that the average "resistance to draw" (RTD—the amount of pressure that must be exerted on the filter for inhalation) of an unblocked (*i.e.*, fully ventilated) Now® cigarette was 92.5 mm H20 (for Kozlowski *et al.*, 1998b, Now® was 66.3 percent diluted). In contrast, the same cigarette fully blocked (i.e., unventilated) had an RTD of 184.4 mm H20, a 100 percent increase. This lower RTD for the ventilated cigarette means the smoker can easily take a larger puff on the cigarette with little added effort and receive more smoke from the cigarette. Lower RTD, in effect, promotes the use of increased puff volume as a compensation method. Industry studies bear this observation out (Long, 1955; Goodman, 1977; Creighton and Watts, 1972; Mendell, 1983). The air-diluted smoke would also be less irritating than the same smoke undiluted, and thereby would also facilitate increased puff volumes because inhibitory oral and respiratory cues would be milder.

Additional industry research has looked at interactions between the type of ventilation used and puff volume. A. B. Norman and others at R. J.

Reynolds Tobacco Co. compared laser, mechanical, and electrostatic perforation types (Norman *et al.*, 1984). Laser perforations were found to promote compensation with increased puff volumes. That is, as puff volumes increased, filter air dilution decreased most significantly with laser perforations. W. I. Casey (1994) at R. J. Reynolds explored yields from different tobacco blends with perforations as "holes" versus "slots" (hole versus slot is not defined). Cigarettes were tested according to FTC procedures as well as "50/30" procedures (50 ml puff, every 30 seconds); brands had approximately equal air-dilution levels (80-85 percent). Two rows of slots gave the same nicotine (0.11 mg) as did two rows of holes under FTC conditions, but gave more nicotine under the 50/30 condition: 0.67 versus 0.53 mg. Ventilation holes increased yield by 382 percent and ventilation slots increased yield by 509 percent over FTC estimates, simply by increasing puff volume and puff number. This effect of slots versus holes was not found for another tobacco blend. Here, one can see that design features (e.g., filter ventilation and tobacco blend) can interact dramatically with smoker behavior (puff volume/puff interval) to produce more elastic products (*i.e.*, giving low values to the smoking machine, but higher values to smokers).

Blocking Filter Vents

Another technique smokers can use to increase smoke concentration is the blocking of filter vents. Research has found that the majority of smokers are unaware of the presence of vents in general or even on their own brands (Kozlowski *et al.*, 1996, 1998d). At best, filter vents are placed just millimeters from lips or fingers, and they are often not noticed by smokers (Kozlowski *et al.*, 1998d). Smokers can and

do obstruct the vents with either their lips or fingers, thereby diminishing or defeating the air-dilution effect. The ease with which smokers can unknowingly compensate for low standard yields by interfering with this important design feature has long been known within the cigarette industry. Internal company documents from the British American Tobacco Co. indicate that the industry acknowledges the importance of filter ventilation for designing products to be compensatable or elastic. For example, in one document, this question was asked—"Which product/design properties influence elasticity?" The answer—"1. Tip ventilation: bigger effects at higher degree of ventilation, .. 2. Delivery of the blend . . ." (Brown & Williamson, 1984).

Effects of Vent Blocking on Smoke Exposure

The earliest of the published studies to examine the effects of vent blocking used smoking machine estimates to simulate the effect of vent blocking. Blocking half the vents of a 4 mg tar cigarette, for example, increased the smoking-machine yields of tar -by 60 percent (from 4.40 to 7.03 mg), nicotine by 62 percent (from 0.45 to 0.73 mg), and CO by 73 percent (from 4.50 to 7.80 mg) (Kozlowski *et al.*, 1980a & b). Blocking all of the filter vents of these same cigarettes with tape increased yields of tar by 186 percent (from 4.40 to 12.60 mg), nicotine by 118 percent (from 0.45 to 0.98 mg), and CO by 293 percent (from 4.50 to 17.70 mg). In another study, Kozlowski and colleagues (1982) completely tape-blocked the vents on different brands of 1 mg tar cigarettes from Canada, the United States, and the United Kingdom. Cigarettes were smoked more intensely in the blocked condition (2.4 second puff duration; 44 second puff interval; 47 ml puff volume).

Tar yield increased from 1,360 percent (Cambridge® [0.8-11.7 mg]) to 3,800 percent (Viscount No. 1® [0.3-11.7 mg]). Nicotine yield increased from 720 percent (Cambridge® [0.1-0.82 mg]) to 1,767 percent (John Player Ultra Mild® King Size [0.12-2.24 mg]). Similarly, CO yield increased from 870 percent (Cambridge® [1.8-17.5 mg]) to 4,180 percent (John Player Ultra Mild® King Size [0.50-21.4 mg]) under the more intense smoking conditions. Compare this to an unventilated reference cigarette, which saw yield increases of 46 percent for tar, 35.8 percent for nicotine, and 35.7 percent for CO under these intense conditions.

In a 1983 study, Rickert and associates tested 36 brands of Canadian cigarettes (including 28 brands that had ventilated filters) on a smoking machine under three experimental conditions to simulate how smokers' exposure to toxic substances would be affected by smoking patterns of different intensities. In the 'moderate' condition (which was used to represent more typical smoking behavior), puff volume was increased to 48 ml, puff duration was increased to 2.4 seconds, and puff interval was reduced to 44 seconds. The parameters of the 'intense' condition were exactly the same as the 'moderate' condition, except that 50 percent of the vent holes were covered with tape. Comparing yields obtained under the moderate and intense conditions, then, shows the effect of blocking 50 percent of filter vents (Rickert *et al.*, 1983).

A secondary analysis of these data was performed on the 28 ventilated-filter brands. These were divided into three standard yield bands: 1-2 mg tar (n = 4), 3-5 mg tar (n = 11), and 6-14 mg tar (n = 13), roughly corresponding to Lowest Tar, Ultra-

Light, and Light designations. Lowest Tar cigarettes showed a nicotine yield increase of 0.22 mg (130 percent), Ultra-Light cigarettes showed an increase of 0.31 mg (57 percent), and Light cigarettes showed an increase of 0.43 mg (36 percent). Lowest Tar cigarettes showed an increase of 2.5 mg tar (160 percent), compared to a 4.0 mg tar (63 percent) increase in Ultra-Light and a 5.5 mg tar (38 percent) increase in Lights. CO yields in Lights were increased by 4.7 mg (36 percent), while Ultra-Light brands increased 4.9 mg (75 percent) and Lowest Tar brands increased 2.6 g (150 percent).

Baker and colleagues (1998) presented an industry experiment on the effects of differing degrees of vent blocking on smoke yields. Both Light (9.3 mg tar, 0.89 mg nicotine, 8.7 mg CO at FTC conditions) and Ultra-Light (4.1 mg tar, 0.35 mg nicotine, 4.0 mg CO at FTC conditions) cigarettes were tested for the effect of vent blocking on yield under the FTC protocol. The Light cigarette showed an increase of 0.8 mg tar (8.6 percent), 0.08 mg nicotine (9.0 percent), and 1.4 mg CO (16 percent) when smoked with 50 percent of the vents blocked. The Ultra-Light cigarette showed an increase of 1.1 mg tar (27 percent), 0.09 mg nicotine (26 percent), and 2.3 mg CO (57.5 percent) with 50 percent vent blockage (Baker *et al.*, 1998).

Baker and Lewis (1997) provided the results of previously unreleased industry reports in which smoking machines were used to simulate the effect of vent blocking with lips and fingers on tar yields. These estimates were calculated assuming that the maximum coverage of filter vents is approximately 50 percent for lips and 25 percent for fingers. These researchers reported that blocking filter vents with

fingers would increase the total particulate matter (TPM—tar plus nicotine, minus water) of a 1.3 mg tar cigarette by 23 percent to 1.6; blocking vents on the same brand with lips would increase the TPM by 92 percent to 2.5. Blocking filter vents with fingers would increase the TPM of a 2.2 mg tar cigarette by 32 percent-to 2.9; blocking vents on the same brand with lips would increase the TPM by 59 percent to 3.5. Blocking filter vents with fingers would increase the TPM of a 6.7 mg tar cigarette by 10 percent to 7.4; blocking vents on the same brand with lips would increase the TPM by 21 percent to 8.1. Note that a negative relationship exists between tar yield and percentage of increase in TPM (Baker and Lewis, 1997).

Interestingly, the yield increases seen as a result of 50 percent blocking were significantly different between the Rickert and associates' (1983) and the industry's (Baker and Lewis, 1997; Baker *et al.*, 1998) studies. For example, nicotine yield in Ultra-Light cigarettes increased 57 percent in the Rickert and associates (1983) study, but only 26 percent in the Baker and colleagues (1998) study. Similarly, Rickert and associates found a 63 percent increase in tar, while Baker and colleagues found only a 27 percent increase. Baker and Lewis (who downplayed the effects of vent blocking) found that blocking 50 percent of vents caused a TPM increase of 59 percent, comparable to the Rickert results. However, they found a smaller effect for Lights (38 percent versus 22 percent increase in tar).

Why are there such discrepancies in the effects of vent blocking in these studies? Perhaps smoking conditions contribute to the effect of vent blocking. In the Rickert and associates (1983) study, cigarettes

were smoked at a larger puff volume with shorter intervals than the FTC conditions used by Baker and colleagues (1998) and Baker and Lewis (1997). For example, to approach the 57 percent increase in nicotine yield at 50 percent blockage of Ultra-Lights seen by Rickert and associates, Baker and colleagues tested their Ultra-Lights with 100 percent of vents blocked, and even here the yield increase was only 51 percent. An alternative explanation is that the cigarette designs selected for use in the Baker and colleagues study may be more resistant to the effect of vent blocking.

Zacny and associates (1986) evaluated the effect of vent blocking on smoke exposure in smokers. They found that blocking 0 percent, 50 percent, and 100 percent of the filter vents on a 1 mg tar cigarette with tape, while holding all other smoking parameters as constant as possible, increased CO exposure in an orderly fashion. Mean CO boosts (post-cigarette expired air CO level minus pre-cigarette expired air CO level) were 0.83 ppm, 2.87 ppm, and 7.07 ppm when 0 percent, 50 percent, and 100 percent of the filter vents were blocked.

This research was extended by Kozlowski and colleagues (1996b) to assess the effect of a behavioral vent blocking maneuver (*i.e.*, blocking vents with lips) on smoke exposure from the 1 mg tar Ultra-Light brand, Now®. Blocking filter vents with lips (estimated to be about 50 percent blockage) more than doubled the CO exposure from these cigarettes: CO boosts for the unblocked, lip-blocked, and 100 percent tape-blocked conditions averaged 2.7 ppm (SE = 0.52), 6.7 ppm (SE = 1.0), and 12.9 ppm (SE = 2.2), respectively.

Sweeney and Kozlowski (1998) examined the effect of blocking the filter vents of the best-selling cigarette brand, Marlboro Light®. CO boosts for the unblocked, lip-blocked, tape-blocked (50 percent coverage), and finger-blocked conditions were remarkably similar: 5.0 ppm (SE = 0.47), 4.9 ppm (SE = 0.86), 4.8 ppm (SE = 0.47), and 4.9 ppm (SE = 0.50), respectively. This "no-effect" finding for Marlboro Light® was subsequently replicated in a second study comparing the effects of finger-blocking and not blocking: the mean CO boosts for the unblocked and finger-blocked conditions were nearly identical: 6.3 ppm (SE = 0.50) and 6.5 ppm (SE = 0.52). In this same study, finger-blocking the vents on the 1 mg tar brand Now® led to a significantly higher (P = 0.0004) CO boost (5.4 ppm, SE = 0.64) than when filter vents were not blocked (2.8 ppm, SE = 0.34).

Puff number, puff duration, and puff interval were all controlled in these studies to examine the independent effects of vent blocking on smoke exposure. What type of an effect does vent blocking have on smoke exposure under more naturalistic conditions when parameters such as puff number and puff duration are free to vary? Zacny and associates (1986) explored this question with five smokers who smoked 1 mg tar cigarettes ad lib (i.e., puff and inhalation parameters were free to vary) under each of three vent blocking conditions: 0 percent of the filter vents blocked; 50 percent of filter vents blocked with tape; and 100 percent of filter vents blocked with tape. Participants took significantly more puffs with significantly shorter interpuff intervals from cigarettes with unblocked filter vents than from cigarettes with blocked filter vents. Puff durations were similar across conditions,

but puff volumes were larger when subjects smoked cigarettes with unblocked filter vents than when smoking cigarettes with blocked filter vents. Smokers were trying to compensate for smoke dilution by smoking the unblocked cigarettes more intensely. Nevertheless, participants still had greater CO exposure when smoking vent-blocked as compared with unblocked cigarettes, indicating that compensation was not complete. Mean CO boosts were 4.32 ppm, 6.44 ppm, and 8.96 ppm, when 0 percent, 50 percent, and 100 percent of filter vents were blocked, respectively (standard errors of the mean were not reported).

The two most recent studies in this area (Sweeney and Kozlowski, 1998; Sweeney *et al.*, 1999) further extended this research by examining the effects of behavioral vent-blocking maneuvers under ad lib smoking conditions. In the first study, participants smoked cigarettes from the brands Now® (1 mg tar by FTC method) and Marlboro Light® (10 mg tar by FTC method) under each of two vent-blocking conditions: unblocked and finger blocked. Blocking filter vents with fingers led to an 85 percent increase in CO exposure from Now®, but had no added effect on CO exposure from Marlboro Light®. The generalizability of these findings to all brands of Ultra-Light and Light cigarettes is limited, however, given that only one brand from each category was examined. A second study examined the effects of vent blocking using several cigarette brands of varying ventilation levels and standard tar yields. In a repeated-measures study with female daily cigarette smokers, the effect of lip-blocking on CO exposure was examined using four cigarette brands: Carlton® (1 mg FTC tar; 83 percent ventilated), Now® (2 mg FTC tar; 66 percent

ventilated), Virginia Slims Ultra-Light® (5 mg FTC tar; 56 percent ventilated), and Virginia Slims Light® (8 mg FTC tar; 40 percent ventilated). Results showed that behavioral blocking caused all four brands to produce similar CO exposures. Blocking vents increased smokers' exposure to CO by 239 percent when smoking Carlton® and by 44 percent when smoking Now®. No significant increases in CO exposure with blocking were found for either of the Virginia Slims® brands.

The previous studies have used CO measures as an index of vent blocking because they are more practical and easy to obtain. However, one study has obtained salivary cotinine levels from self-selected 1 mg tar cigarette smokers (Kozlowski *et al.*, 1989). Here, large cotinine values were found in smokers who blocked the vents of 1 mg tar cigarettes; these values are larger than would be expected given the standard yield of their product and appear to compensate fully for that reduced yield. No other studies have been identified that investigated the effects of vent blocking on nicotine or cotinine levels. Obviously, further studies must be conducted on nicotine intake before concluding that vent blocking in Light cigarettes is inconsequential to exposure.

Prevalence of Vent Blocking

Published, peer-reviewed research has shown that a substantial proportion of smokers block vents. Using an unobtrusive indicator of vent blocking (stain pattern; discussed below), one study found that 58 percent of 135 cigarette filters from various Ultra-Light brands (4 mg tar or less) gave evidence of at least some vent blocking (Kozlowski *et al.*, 1988). Using similar procedures, another study found evidence of vent blocking in 53 percent of 158

filters of Light brands that were collected (Kozlowski *et al.*, 1994). In a study of 'high-risk' smoking practices used by the homeless, Aloot and colleagues (1993) found that 24 percent reported blocking filter vents (Aloot *et al.*, 1993).

The stain pattern technique for determining vent-blocking is straightforward. Trained raters observe the mouth ends of cigarette butts and judge whether or not vent blocking has occurred based on the extent of the tar stain on the filter. A "bull's eye" pattern on the filter indicates that little or no vent blocking occurred, while a more uniform pattern across the filter would indicate that filter vents had been blocked. This technique has been validated and has been shown reliable on a number of brands (e.g., Carlton®, Now®, Merit Ultima®, Camel Light®) through numerous refinements (Kozlowski *et al.*, 1980a & b; Pillitteri *et al.*, 1994; Sweeney, 1998). It must be stressed that this technique detects the presence or absence of any vent blocking with either fingers or lips. It should not be used to indicate the extent of vent blocking.

Industry scientists have objected to the use of the stain pattern technique (Baker and Lewis, 1997). They criticize raters' accuracy in judging the presence or absence of blocking and allege that the properties of laser-perforated filter vents produce variant patterns. Instead, the industry touts saliva-based measurements of lip placement around the ventilation zone as a better gauge of vent blocking. These techniques use ninhydrin and other biochemical stains to detect remnants of saliva in filters. These saliva-based techniques can detect vent blocking, but are impaired by factors such as lip dryness and so may underestimate its extent.

Advocates of saliva-based measures admit that the technique often can fail to give a lip imprint stain for up to 20 percent of butts (Baker *et al.*, 1998). Another limitation of the saliva-based measures is that they will only detect lip blocking, totally ignoring finger blocking (unless the fingers have saliva on them).

During more than 15 years of published research on vent blocking, no formal response from the industry was put forth. In 1997, Baker and Lewis, two industry scientists, published their critique of peer-reviewed work on the subject. Their assertions were that: 1) vent blocking is not a significant mode of compensation because it does not occur often; 2) when vent blocking does occur, it hardly increases yields; and 3) mouth insertion depths of cigarettes do not differ greatly for ventilated and unventilated cigarettes.

Between 1974 and 1997, 10 studies were conducted by the tobacco industry in an attempt to measure the depth to which smokers insert cigarettes into their mouths by examining spent cigarette filters from public areas, such as shopping malls (Baker and Lewis, 1997). In these studies, a visible imprint of the lip marks on the filter was obtained by spraying the filter with either iodine or ninhydrin solutions to detect certain enzymes and amino acids in dried saliva on the filter. Across 10 studies, insertion depth measures ranged from 3 to 25 mm, with mean values ranging between 10.1 and 11.5 mm. Using both mouth insertion data based on 2,232 cigarette butts from a pair of 1997 Canadian studies, as well as information on ventilation zone location for leading U.S. brands, Baker and Lewis (1997) estimated the proportion of smokers that

would cover filter vents while smoking. They concluded that 36 percent of smokers will cover vents for at least one puff when they are placed at 11 mm, versus 6 percent of smokers who will cover the vent holes in at least one puff with ventilation zones positioned 17 mm from the mouth end of the filter.

Brands vary greatly in the placement of vents on the filter, and vent placement can bear little relationship to the standard yield of the cigarette. For example, a Marlboro® Full Flavor (16 mg tar) has vents at 12.5 mm from the mouth end, whereas a Carlton® (1 mg tar) has vents at 15 mm. Merit Ultima® (1 mg tar) has vents at 11.0 mm, whereas Camel® Full Flavor (17 mg tar) has vents at 14.5 mm (Kozlowksi *et al.*, 1997).

In an unpublished study by Roper (cited in Baker and Lewis, 1997), an attempt was made to assess more directly the prevalence of lip blocking by having 52 smokers take 1 puff on 5 cigarettes from each of 3 ventilated-filter brands. Of the 735 visible lip imprints that were obtained, 48 percent had at least some coverage of the ventilation zone.

Baker and colleagues (1998) examined 900 British smokers' filters for evidence of vent blocking using saliva-based techniques. They report that 15 percent of butts had at least partial vent coverage, while 85 percent showed no vent zone coverage. More interesting, however, are differences in coverage and insertion depth among standard (unventilated), Light, and Ultra-Light cigarettes. Light cigarettes showed partial coverage in 11.5 percent of cases and complete coverage in 1.5 percent of cases. In contrast, Ultra-Light cigarettes showed partial coverage in 9.6 percent of cases and complete coverage in 6.5 percent of cases. Further, standard

cigarettes were inserted a mean of 7.8 mm (SD = 3.6) into a smoker's mouth, whereas Ultra-Light cigarettes were inserted a mean of 9.5 mm (SD = 5.0) into the mouth; in these cigarettes, the vents were placed 13.5-14.5 mm from the mouth end (Baker *et al.*, 1998).

Porter and Dunn (1998) of Imperial Tobacco examined butts collected in Montreal, Toronto, and Vancouver, Canada, for signs of vent blocking by examining mouth insertion depths. They found that the difference in insertion depths between ventilated and unventilated cigarettes was negligible (10.6 ± 3.6 mm versus 11.0 ± 3.6 mm). Further, they found that between 14 percent and 20 percent showed some evidence of partial vent coverage, whereas between 4 and 10 percent showed evidence of complete blockage (Porter and Dunn, 1998). In a similar study, McBride (1985), also of Imperial Tobacco, found that there were no significant differences in insertion depths between ventilated and unventilated cigarettes. However, McBride noted that "insertion depths were greatest for cigarettes in the very low delivery category." (McBride, 1985)

A study by British American Tobacco/Suisse (1984) examined the depths to which smokers inserted cigarettes into their mouths. Baker and Lewis (1997) cited this study along with several others as evidence that insertion depths are not large enough to interfere with ventilation in most cases. However, further examination of the results revealed that an interesting effect was obscured—insertion depths were greatest for the lowest yield cigarettes. The researchers concluded that "highly ventilated cigarettes are inserted deeply into the smokers mouth and consequently the ventilation level is

reduced during normal smoking" (British American Tobacco/Suisse, 1984). For example, an Ultra-Low delivery cigarette (1 mg tar, 0.1 mg nicotine, 78 percent diluted) showed 43 percent of insertions beyond the vents, whereas a Full-Flavor brand (16 mg tar, 1.2 mg nicotine, 17 percent diluted) had only 22 percent of insertions beyond the vents; both brands had vents at 11-13 mm. By this technique, lip imprints beyond the vents were taken as evidence of vent blockage.

Large insertion depths seem to be about twice as common among less-popular 1 mg tar cigarettes. Given the relative disparity in sales (much greater for higher yield cigarettes), the 'few' blocked 1 mg tar cigarettes can be 'hidden' among the shallow insertion depths of more popular higher yielding brands. This causes average insertion depths to appear low enough not to interfere very much with vents. Furthermore, this permits the industry to argue (based on average insertion depths) that vent hole covering is not a major problem, when, in fact, their data suggest it is a significant problem for the lowest yield cigarettes. Porter and Dunn (1998) cited McBride's prior work, but made no mention of that researcher's finding of greater insertion depths for lower yield cigarettes (McBride, 1985), nor did they address the similar findings of the British American Tobacco/Suisse study (1984).

Ferris of the British American Tobacco Co. (cited by Baker and Lewis, 1997) conducted a study in 3 British cities in which 133 smokers of ventilated-filter cigarettes were videotaped. A total of 798 puffs were individually assessed from the video recordings: during 12 percent of the puffs, smokers' fingers were in contact with the cigarette

for all or part of a puff. During 81 percent of the puffs, there was no finger contact with the cigarette. Ten percent of the puffs could not be assessed. During 29 percent of the final puffs, however, smokers' fingers were at least partially in contact with the cigarette. Eleven percent of participants had their fingers in contact with the cigarette for one or more puffs. However, since finger and lip blocking are mutually exclusive, it is noteworthy that lip blocking was not included in this study.

Baker and Lewis (1997) noted that when smoking an Ultra-Light cigarette (2.2 mg FTC tar), 45 percent of smokers blocked vents to some degree with their lips. Further, 21 percent of smokers (or nearly half of those who blocked vents) increased tar yields to at least 3.3 mg tar (50 percent). It was estimated that approximately 1 in 10 smokers doubled their tar yield from lip blocking alone; this is not insignificant, yet Baker and Lewis seemed to downplay these results.

Table 2-3 outlines the conditions under which different modes of compensation will be likely to occur. Reviewing the literature, vent blocking appears to be a significant mode of compensation for reduced yield among smokers of Lowest Tar cigarettes (*e.g.*, 1 mg FTC tar), but not likely among most smokers of Light and Ultra-Light cigarette brands.

Brand selection is usually not forced upon smokers. The self-selected choice of brands is due to many factors. It should be noted that some

Table 2-3

Major Compensatory Behaviors in Relation to Cigarette Designs That Increase Total Smoke Volume per Cigarette

A. For more-popular lightly and moderately diluted cigarettes (i.e., <60% ventilated, >4 mg FTC tar yield—"Light" and "Ultra-Light")

1) Increase volume per puff.
   Probably the easiest, most common method; for example, the smoke intake from a 45 ml puff on a 23% ventilated cigarette can be equivalent to the smoke intake from a 35 ml puff on an unventilated cigarette.
2) Increase number of puffs taken.
3) Reduce air dilution (as in Section B below).
   This likely will be a lesser-to-negligible compensation mode because (a) the effect is relatively small for these brands, and (b) increased puff volume and number can achieve all needed/desired compensation.

B. For less-popular heavily diluted cigarettes (Le., 60-85% ventilated, 1-2 mg FTC tar yield" Ultra-Low Tar")

1) Reduce air diluation by blocking filter vents with lips or fingers.
   Filter designs that promote ventilation 'compromise' (*e.g.*, Actron®) avoid the need to behaviorally block vents.
2) Increase volume per puff.

This technique would be more effective when coupled with some dilution reduction. Laser filter vents become relatively less effective with increased puff volumes.

3) Increase number of puffs taken.

smokers of the lowest yield cigarettes appear to have very low nicotine needs and are disinclined to over-smoke these cigarettes, while other smokers of the lowest yield cigarettes have high nicotine needs and can fully compensate using these brands (Kozlowski *et al.*, 1989).

In summary, published, peer-reviewed research has shown that a substantial proportion of smokers block vents and that it is a common mechanism used by smokers to compensate for the reduced nicotine yield of ventilated cigarettes.

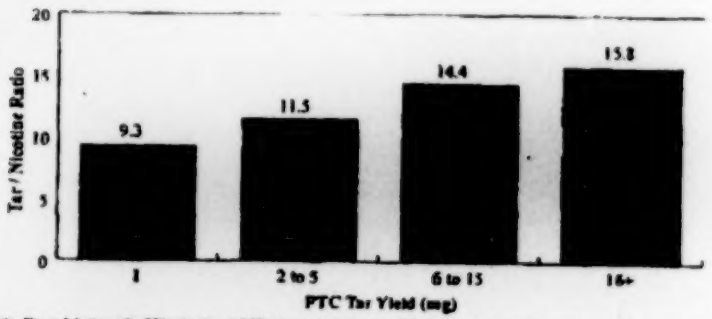
Tar/Nicotine Ratios Depend on Smoking Conditions

During the period 1968-1997, the average sales weighted ratio of tar to nicotine (T/N ratio) decreased 15.8 percent. Generally, the higher the yield, the higher the T/N ratio (see Figure 2-1). However, compensatory smoking behaviors (taking more frequent puffs, taking larger puffs, or vent blocking) can have dramatic effects on T/N ratios (Creighton and Lewis, 1978; Kozlowski *et al.*, 1980b; Rickert *et al.*, 1983). Given that some researchers have indicated an interest in using these ratios in the governmental regulation of cigarettes (*e.g.*, Russell, 1976; Gori, 1990; Bates *et al.*, 1999), this issue takes on greater importance.

In their study, Rickert and associates (1983) demonstrated that as intensity of smoking increased, T/N ratios increased. Intensely smoked Ultra-Light ciga-

Smoking and Tobacco Control Monograph No. 13

Figure 2-1
FTC Tar/Nicotine Ratios for 2,052 Brands Tested as a Function of FTC Tar Yield Categories (FTC, 1999)



Note: Figure 2-1 shows the T/N ratios for all 2,052 brands tested by the FTC method in 1997 (FTC, 1999) as a function of FTC tar yield categories. One-way analysis of variance shows that T/N ratios increase as tar yield increases (P<0.0001; all pairwise comparisons significant P<0.001, Bonferroni t-tests) (Hs, SEbh. 18, 0.90; 159, 0.72; 972, 0.07; 186, 0.17)

rettes provided a nearly identical T/N ratio (12.2) as Light cigarettes smoked under standard conditions (11.9). The difference between standard and intense condition T/N ratios across all brands is significant (P< 0.0001). The blocking of vents has a greater effect on the change in T/N ratios in Lowest Tar brands (1.90 or 20.5 percent) than in Lights (0.78 or 6.5 percent) (P = 0.0146).

Internal tobacco company studies revealed that there is great variability in the T/N ratios of otherwise equivalent cigarettes. An R. J. Reynolds study tested the yields of Now® brand cigarettes and comparable experimental cigarettes (both 1 mg tar/FTC) smoked under two conditions, the standard FTC method and the previously mentioned "50/30"

condition (a 50 ml puff taken every 30 seconds) (Casey, 1994). The T/N ratio of the Now® blend under standard conditions was 8.33; however, under 50/30 conditions, the ratio rose to 10.98 (an increase of 31.8 percent). At the same time, an experimental blend saw its T/N ratio increase from 6.36 at standard conditions to 6.72 at 50/30 conditions (an increase of only 5.7 percent) (Casey, 1999). It would appear that the trends for reduced "standardized smoking-machine" T/N ratios may have little relation to the ratios delivered to actual smokers. Empirical evidence for this proposition is presented in Chapter 3.

Elastic Cigarette Designs

The rules or constraints of the FTC measurement regimen can be viewed as obstacles to be overcome by manufacturers that wish to design cigarettes that deliver lower yields during the course of the standardized smoking-machine test, while enabling smokers to achieve yields higher than would be predicted by smoking machines. A design that gives a low value to smoking machines but can potentially give higher values to smokers is termed 'elastic'. Internal tobacco industry documents revealed a concern for cigarette elasticity:

> "Smokers have disappointed us in that they have not chosen to smoke twice as many 10mg cigarettes if they changed from 20mg products. Thus in order to reinforce the primary pleasures of smoking, I have proposed to make it easier for smokers to take what they want from a cigarette which might well have a low delivery when smoked by machine which overcomes current legal constraints and to enhance

> the sensations from the first few puffs." (See Creighton, 1980s.)
>
> "Irrespective of the ethics involved, we should develop alternative designs (that do not invite obvious criticism) which will allow the smoker to obtain significant enhanced deliveries should he so wish" (See British American Tobacco Company, 1984.)
>
> "Compensation - It exists; most smokers practice it, but we need to understand it better before advantage can be taken in the marketplace. Here, I believe designing to the subconscious is preferred to requiring the smoker to commit a conscious act." (See Sandford, 1985.)

In a presentation given to marketers at the British American Tobacco Co., scientist D. E. Creighton described advances in the design of "compensatable" filter products:

> "The design of a cigarette with a compensatable filter will have a high taste to tar ratio. . . . This [the HH filter] was designed in BAT Hamburg and has been tested on consumers, who found the cigarettes too strong. As the sample cigarettes had a machine smoked delivery of about 1mg tar, the product must be very compensatable. Our own tests both subjective and objective suggested that it is a compensatable filter, when smoked against conventionally constructed controls. The objective test we have, used is to smoke at 35 and 50ml puff volumes and to see if the increase in delivery at the higher puff volume is pro-rata or more. With HH, the

> delivery was more than pro-rata." [This paper goes on to compare the HH filter to the Actron filter used in Barclay®, discussed below.] (See Creighton, 1980s.)

The ventilated Actron filter makes use of plastic channels to feed air from vent holes back to the end of the filter. It appears that this channel system dramatically increased the likelihood of vent blocking because, in addition to blocking air intake holes, one could also subvert the ventilation system by either causing the fragile plastic channels to collapse or by blocking air exit holes with lips. This filter design caused competing manufacturers to complain to the FTC that this cigarette design was classified as 1 mg but gave much higher actual deliveries. The courts ruled that the FTC test could not properly provide tar and nicotine numbers for this type of filter (FTC v. Brown & Williamson Tobacco Corporation, 1985). The Actron filter can still be found on Brown & Williamson's Barclay® and Kool Ultra® brands.

With some brands, elasticity arose from the ease with which a smoker could alter their smoking patterns on the product. Internal tobacco company documents show an industry aware that some lower yield products were smoked more intensely than higher yield products:

> "The smoker profile data reported earlier indicated that Marlboro Lights cigarettes were not smoked like regular Marlboros. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery." (See Goodman, 1975.)

> "Numerous experiments have been carried out in Hamburg, Montreal and Southampton within the company, as well as many other experiments by research workers in independent organisations, that show that generally smokers do change their smoking patterns in response to changes in the machine smoked deliveries of cigarettes." (See Creighton, 1978b.)

Cigarette Length

In the late 1960s, Philip Morris undertook the Smoke Exposure Study, termed SEX-1 in their internal documents. While the actual report is currently unavailable in the company's Internet document archive, references to the results are available in other documents. In a memo discussing reasons to publish the SEX-1 report, the effect of cigarette length on exposure is discussed. It appears that smokers of 100 mm cigarettes showed an increased intake of tar and nicotine compared to 85 mm cigarette smokers. However, it is noted that this increase was "not as great as would have been predicted from the increase in available tar" (Dunn, 1971). This issue of cigarette length and exposure was evidently significant, because the design of a subsequent study (SEX-2) was modified to include smokers who switched from 85 mm to 100 mm cigarettes to determine changes in daily smoke intake (Dunn, 1969). While the results of the SEX-1 study are far from clear, no other findings related to cigarette length are known to exist.

Interestingly, the percentage of cigarettes sold ranging in length from 94 to 101 mm increased from 9 to 39 percent during the period 1967-1997 (FTC, 1999).

In summary, the tobacco industry has a stake in smokers' continued use of their products. Cigarette designs that promote compensation and/or elasticity of yield have been used, both in the research and development laboratories and in the marketplace. These designs allow the smoker to obtain more smoke (tar, nicotine, and CO) from each cigarette than would be indicated by the FTC testing method.

MORE EVIDENCE FROM INDUSTRY DOCUMENTS RELATED TO COMPENSATION, CIGARETTE DESIGN, AND THE FTC TESTING METHOD

As shown in previous sections, considerable evidence exists in tobacco industry documents of knowledge regarding compensation and elasticity. Also revealed in industry documents are discussions about whether smokers might be misled by FTC tar and nicotine ratings used in advertisements and league tables. Particularly of concern were those customers who switched to a lower yield brand due to health concerns:

> "Should we market cigarettes intended to re-assure the smoker that they are safer without assuring ourselves that indeed they are so or are not less safe? For example should we 'cheat' smokers by 'cheating' League Tables? If we are prepared to accept that government has created league tables to encourage lower delivery cigarette smoking and further if we make league table claims as implied health claims—or allow health claims to be so implied—should we use our superior knowledge of our products to design them so that they

give low league table positions but higher deliveries on human smoking?"

. . . "Are smokers entitled to expect that cigarettes shown as lower delivery in league tables will in fact deliver less to their lungs than cigarettes shown higher?" (See British American Tobacco Company, 1977.)

"It is difficult to ignore the advice of Health Authorities who advise smokers to give up smoking or change to a lower delivery brand but there is now sufficient evidence to challenge the advice to change to a lower delivery brand, at least in the short term. In general a majority of habitual smokers compensate for changed delivery, if they change to a lower delivery brand." (See Creighton, 1978b.)

"1) Some concern has been expressed concerning the moral obligation of Philip Morris (and perhaps the tobacco industry) to reveal to the FTC the fact that some cigarette smokers may be getting more tar than the FTC rating of that cigarette. . . . 2) I believe that there need be no such concern, at least from a position of morality. It is obvious that. HEW [Department of Health, Education, and Welfare; now the Department of Health and Human Services) knows that smokers vary their intake. Otherwise they would not urge smokers to take fewer puffs. There are published papers which show that different puffing patterns on the same cigarette will yield different amounts of tar." (See Fagan, 1974)

SUMMARY

Many smokers switch to cigarette brands advertised as delivering lower yields out of concerns for their health, believing them to be less risky or a step toward quitting (Kozlowski *et al.*, 1998a, 1999; Giovino *et al.*, 1996). These decisions are often based on the FTC tar ratings, which can be inaccurate in assessing human smoking conditions. Through compensation behaviors (*i.e.*, vent blocking on Ultra-Low FTC tar cigarettes, larger puff volumes, or more frequent puffs), many smokers can obtain adequate nicotine from their new lower yield brand to sustain their addiction.

Published research results, supplemented by previously unavailable industry data, show that the 44 percent reduction in standard tar yield and 34 percent reduction in standard nicotine yield seen since 1968 do not necessarily mean that smokers have been receiving less tar and nicotine from their cigarettes with each passing year. Smokers can and do compensate for reduced tar and nicotine yield by altering their smoking patterns. Compensation behaviors can range from simple maneuvers such as taking more puffs per cigarette, to increasing volume per puff, to blocking filter vents with fingers or lips. Changes in cigarette design have engineered cigarettes that have an elasticity of delivery, which allows smokers to derive markedly different amounts of nicotine from the same cigarette by changing the way that they smoke it. This designed elasticity is intrinsic to the process of compensation when smokers switch to lower yield cigarettes. Elastic products such as the Actron filter, laser-perforated filters, and invisible filter vents on cigarettes facilitate compensation behaviors in smokers.

Larger puff volumes, increasing puff frequency, and other changes in smoking behavior allow smokers to derive doses of nicotine from cigarettes with low machine-measured yields sufficient to fully satisfy their addiction. Smokers are increasingly likely to engage in compensation as the machine-measured yields of cigarettes fall and the percentages of ventilation increase.

CONCLUSIONS

1. Several design changes in the way that cigarettes are manufactured have led to a substantial reduction in the machine-measured tar and nicotine yields of U.S. cigarettes over the last several decades.

2. Many of the same design changes that have reduced machine-measured tar yields, particularly placing ventilation holes in the cigarette filters, also create an elasticity of delivery for the cigarette, allowing a wide range of tar and nicotine deliveries from the same cigarette when a smoker alters his or her smoking behavior.

3. Increasing puff volume and frequency, covering the ventilation holes with fingers or lips, and other changes in smoking behavior known to occur with use of low machine-measured-tar cigarettes can dramatically increase the tar and nicotine delivery of low- and ultralow-yield brands.

4. Variations in the tar and nicotine delivery that result from the known compensatory alterations in smoking behaviors make the current U.S. cigarette tar and nicotine yields as measured by the FTC method not useful to the smoker either for understanding how much tar and nicotine he or she is likely to inhale from smoking a given cigarette or

for comparing the tar and nicotine intake that is likely to result from smoking different brands of cigarettes.

* * *

Compensatory Smoking of Low-Yield Cigarettes

Neal L. Benowitz

INTRODUCTION

Most smokers are addicted to nicotine (U.S. DHHS, 1988). Nicotine addiction results in smokers seeking to take in a constant level of nicotine from smoking each day (Benowitz, 1988; U.S. DHHS, 1988). Consequently, when faced with low-yield cigarettes, smokers tend to take in more nicotine and other tobacco smoke constituents from these cigarettes than would be predicted by machine testing in order to sustain optimal levels of nicotine intake. This phenomenon of taking in similar levels of nicotine from day to day has been termed 'regulation' or 'titration' of nicotine intake. The behavior of smoking cigarettes of different machine yields more or less intensively, and/or smoking more or fewer cigarettes to achieve a particular intake of nicotine, has been called 'compensation'. If regulation of nicotine intake is precise, that is, compensation is complete, then switching to low-yield cigarettes would not be expected to reduce exposure to tobacco toxins, nor to reduce the risk of disease from smoking.

Earlier chapters have described the nature of low-yield cigarettes and the ways in which smokers can modify their smoking behaviors to take in more tobacco smoke from their cigarettes than predicted

by the standard smoking-machine test. In brief review—when faced with lower yield cigarettes, smokers can smoke more cigarettes per day, can take more and deeper puffs, can puff with a faster draw rate, and/or can block ventilation holes. Using these last four techniques, a smoker can increase his or her smoke intake from a particular cigarette several fold above the machine-predicted yields.

This chapter will review nicotine addiction and the evidence that smokers regulate their intake of nicotine from cigarettes. The focus will be on primarily studies in which human exposure has been biochemically assessed. Evidence from both experimental and cross-sectional studies will be examined. The question of whether or not tar exposure might be reduced despite compensation for nicotine itself when switching to low-yield cigarettes will also be examined.

ROLE OF NICOTINE IN MAINTAINING TOBACCO ADDICTION

Nicotine is the main determinant of tobacco use and addiction. Detailed reviews of the pharmacology of nicotine and the evidence that nicotine is addictive have been published in Surgeon General's reports (for example, the 1988 Surgeon General's report, *The Health Consequences of Smoking: Nicotine Addiction)*, as well as in a number of other reviews (Benowitz, 1988, 1999b; U.S. DHHS, 1988).

Nicotine is delivered to the smoker in particulate matter and, to some extent, in the gaseous phase of tobacco smoke. It is rapidly absorbed from the lungs into the arterial circulation, from which it goes to various organs, including the brain. Rapid delivery of nicotine to the brain is particularly important to the issue of compensation

because it provides rapid feedback to the smoker on the dose of nicotine absorbed, and allows minute-to-minute titration of nicotine effects.

In the brain, nicotine binds to and activates nicotinic cholinergic receptors. There are a variety of nicotinic cholinergic receptor subtypes, which are believed to mediate different actions of nicotine in different parts of the brain (Picciotto *et al.*, 2000). Nicotinic receptor activation works, at least in part, by facilitating the release of neurotransmitters, including acetylcholine, norepinephrine, dopamine, beta endorphin, glutamate, gamma aminobutyric acid (GABA), and others. Nicotine also releases growth hormone, prolactin, and adrenocorticotropic hormone (ACTH). Most of the behavioral effects of nicotine in people are believed to be mediated by its actions on central nervous system receptors.

Nicotine self-administration appears to be motivated both by positive and negative reinforcement. Positive reinforcement includes pleasure, arousal, relaxation, reduced stress, enhanced vigilance, improved cognitive function, mood modulation, and lower body weight. With prolonged exposure to nicotine, there is an increase in the number of nicotinic cholinergic receptors in the brain that occurs in association with the development of tolerance to the effects of nicotine (Collins *et al.*, 1994; Breese *et al.*, 1997). In the tolerant state, nicotine is necessary to maintain normal brain functioning. In the absence of nicotine, brain functioning becomes abnormal and the individual experiences nicotine withdrawal symptoms, reflecting physical dependence. Withdrawal symptoms include nervousness, restlessness, irritability, anxiety, impaired

concentration, impaired cognitive function, increased appetite, and weight gain. Negative reinforcement refers to the relief of withdrawal symptoms by nicotine intake. It is difficult to separate positive reinforcement from relief of withdrawal symptoms in smokers. However, it is clear that nicotine is used by smokers to modulate their levels of arousal, mood, and performance.

The cigarette is a drug delivery system for nicotine. Smokers tend to take in similar doses of nicotine on a day-to-day basis (Benowitz, 1988; U.S. DHHS, 1988), presumably to optimize the levels of arousal and mood. A variety of experimental studies support the theory that smokers regulate daily intake of nicotine. In addition to studies of changed smoking behavior in response to different brands of cigarettes (which was discussed in detail in Chapter 2), smokers have been shown to change smoking behavior in response to other interventions that alter nicotine availability. For example, when the excretion of nicotine from the body is accelerated by acidification of the urine, smokers will increase their smoking to take in more nicotine (Benowitz and Jacob, 1985). Conversely, when nicotine is administered intravenously or by administration of nicotine patches, smokers reduce their nicotine intake from smoking (Benowitz and Jacob, 1990; Benowitz *et al.*, 1998).

In summary, cigarettes smoking can be viewed as a process of delivering nicotine to the body. Daily smoking can be viewed as a situation in which nicotine is taken initially for pleasure, for arousal, and/or for mood modulation. As the day progresses for the smoker, tolerance develops to many of the effects of nicotine, and further nicotine may be taken

to primarily relieve withdrawal symptoms that emerge between cigarettes. Smokers appear to have particular desirable levels of nicotine intake throughout the day that result in optimal functioning. The need for a particular level of nicotine is central to the concept of compensation for low-yield cigarettes.

BIOMARKERS OF TOBACCO SMOKE EXPOSURE

As discussed previously, there is considerable individual variability in the way smokers smoke their cigarettes. Therefore, neither the number of cigarettes smoked per day, nor the machine-determined yield, nor even a combination of the two can provide complete information on the intake by an individual smoker of tobacco smoke toxins. To determine intake most accurately, one must measure human exposure to chemicals in tobacco smoke.

The tobacco smoke constituents that have been most widely used in quantitating human exposure to smoke are nicotine and carbon monoxide (CO) (Benowitz, 1996, 1999a). Nicotine can be measured directly in blood, but more commonly nicotine intake is estimated by measuring levels of its proximate metabolite, cotinine. Cotinine has a much longer half-life than nicotine; therefore, cotinine levels in the body vary much less throughout the day than do nicotine levels. Thus, sampling time for cotinine with respect to when the last cigarette was smoked is less critical. In addition, cotinine can be readily measured in blood, saliva, and urine. Measurement of the sum of nicotine and its metabolites in urine can also be used to assess nicotine exposure from smoking.

CO is present in high concentrations in tobacco smoke and is a useful marker of exposure to the gaseous fraction of tobacco smoke, but the short half-life of CO excretion makes it a measure that is predominantly influenced by smoking within the most recent several hours. There is no reason to believe that smokers adjust their smoking to regulate CO levels in the body. Therefore, discrepancies between CO levels measured in smokers and those predicted on machine yields are most likely a result of attempts to regulate nicotine intake. Changes in CO levels in response to different smoking behaviors may differ from changes in nicotine levels, because CO absorption is more heavily influenced by depth of inhalation than is nicotine. CO is absorbed across alveolar surfaces, whereas nicotine can be absorbed across the mucosa in the upper and lower airways, as well as across the alveolar surface. Levels of CO can be measured in expired air or in the blood, the latter as carboxyhemoglobin (COHb). CO is a widely used measure of cigarette smoke exposure, although its level can be influenced by environmental exposures and the rate of its elimination is markedly influenced by the level of physical activity.

Hydrogen cyanide is another component of tobacco smoke. In the body, cyanide is metabolized to thiocyanate, which can be measured in blood or saliva. Thiocyanate has been used as a marker of tobacco smoke exposure in many studies. Its main limitation is that there are many dietary sources of thiocyanate, and thiocyanate levels in nonsmokers are substantial. Thus, measurement of thiocyanate yields relatively poor sensitivity and specificity for tobacco smoke exposure, particularly at low levels of cigarette smoking.

In considering smoking-related cancer risks, it would be most appropriate to measure exposure to tobacco smoke carcinogens. Such carcinogens in tobacco smoke include polycyclic aromatic hydrocarbons (PAHs), various nitrosamines, naphthylamines, polonium-210, and others. The carcinogen biomarker that has shown the most promise has been a measurement of nicotine-derived nitrosamines (Hecht, 1998). The nicotine-derived nitrosamine, 4-(methylnitrosamino)-1-(3-pyridy1)-1-butanone (NNK), is specific for tobacco smoke exposure and is metabolized to a butanol metabolite, 4-(methylnitrosamino)-1-(3-pyridy1)-1-butanol (NNAL) and its glucuronide (NNAL-GLUC). Urine levels of NNAL + NNAL-GLUC are elevated in smokers (Hecht *et al.*, 1993). The assay for NNAL is technically demanding. As yet, studies of NNAL levels in smokers of different yields of cigarettes have not been published.

Other potential markers of carcinogen exposure include adducts of 4- aminobiphenyl to hemoglobin in red blood cells (Bartsch *et al.*, 1990); adducts of benzo(a)pyrene and other potential carcinogens to DNA in white blood cells (Jahnke *et al.*, 1990; van Maanen *et al.*, 1994); adducts of PAHs to plasma albumin (Mooney *et al.*, 1995); and urinary hydroxyproline or N-nitrosoproline excretion (Adlkofer *et al.*, 1984). None of these markers has been used to date in studying smokers of different yields of cigarettes.

One indirect measure of carcinogen exposure that has been used is the measurement of mutagenic activity of the urine (Yamasaki and Ames, 1977). This is commonly done using the Salmonella histadine auxotroph reversion assay. In vitro studies

indicate that the mutagenic components of cigarette smoke are found primarily in the tar rather than in the gaseous fraction (Florin *et al.*, 1980). It is known that the urine of cigarette smokers is mutagenic. For an individual smoker, mutagenic activity of the urine tends to be constant from day to day and there is a relationship between mutagenic activity and the number of cigarettes smoked per day (Sorsa *et al.*, 1984; Benowitz, 1989). The test is limited in that it is not specific for exposure to particular carcinogens, there is considerable variability in results from assay to assay and from person to person, and dietary and environmental chemical exposures can influence mutagenic activity. However, for within-subject comparisons when assays are compared for the same individual, the test provides a quantitative estimate of exposure to tar and, thus, potential carcinogen exposure.

NICOTINE ABSORPTION FROM CIGARETTE SMOKING

The intake of nicotine from a single cigarette or while smoking cigarettes throughout the day can be estimated by measuring blood levels of nicotine at frequent time intervals. If the clearance (a measure of the rate of metabolism and excretion) of nicotine is known, then blood level data can be converted to actual intake of nicotine from smoking. Nicotine clearance can be measured by measuring blood levels during and after an intravenous infusion of a known dose. This technique has been used in the laboratory or on smokers in a research ward to determine the intake of nicotine from smoking (Benowitz and Jacob, 1984a; Feyerabend *et al.*, 1985; Benowitz *et al.*, 1991). On average, smokers take in about 1 mg of nicotine per cigarette. The intake of nicotine is

quite variable from person to person, appears to be largely independent of machine-determined yield, and can increase threefold or more in response to restricted cigarette availability (Benowitz and Jacob, 1984a; Benowitz *et al.*, 1986a).

As noted previously, cotinine can be used as a measure of nicotine intake from cigarette smoking (Benowitz, 1996). On average, 70-80 percent of nicotine is metabolized to cotinine. Cotinine has a half-life averaging 16 hours, such that levels are relatively stable throughout the day in smokers. There is some individual variation in the quantitative relationship between cotinine levels in blood, saliva, or urine, and the intake of nicotine. This is because different people convert different percentages of nicotine to cotinine (usual range is 55-92 percent) and because different people metabolize cotinine itself at different rates (Benowitz and Jacob, 1994).

The relationship between nicotine intake and cotinine levels can be expressed mathematically as:

$$\text{Intake of nicotine} = \frac{C_{ss}(CL_{COT})}{\%Conv_{NIC \rightarrow COT}}$$

where C_{ss} is the steady-state blood cotinine concentration, CL_{COT} is the clearance of cotinine, and $\%Conv_{NIC \rightarrow COT}$ is the percent conversion of nicotine to cotinine.

Rearranging the equation,

$$\text{intake of nicotine} = \left[\frac{CL_{COT}}{\%Conv_{NIC \rightarrow COT}}\right] C_{ss} = K\,(C_{ss})$$

In adult smokers, the conversion factor K averages 0.08 mg/24 hours/ng/ml (Benowitz and Jacob, 1994). Thus, a cotinine level of 300 ng/ml in a typical smoker corresponds to a daily nicotine intake of 24 mg. Although cotinine screening levels do not precisely predict nicotine intake for an individual because of individual variability in the conversion factor, cotinine levels in groups of smokers are expected to predict average group exposure to nicotine. Thus, the K factor can be used in population studies to relate cotinine levels to overall intake of nicotine from particular brands of cigarettes.

Another way to estimate nicotine intake from cigarette smoking is to measure urinary excretion of nicotine and its metabolites (Byrd *et al.*, 1995, 1998). Measurement of all currently known metabolites of nicotine can account for approximately 90 percent of a dose of nicotine (Benowitz *et al.*, 1994). Assuming a steady level of smoking from day to day, the sum of nicotine and its metabolites (as measured in 24-hour urine samples) reflects the dose of nicotine taken in each day. A related but less precise way to assess nicotine intake is to measure nicotine and its metabolites in urine using a nonspecific colorimetric assay (Peach *et al.*, 1985). This assay does not distinguish particular nicotine metabolites and is less quantitative, but allows a semi-quantitative comparison of nicotine exposure in populations of smokers.

ESTIMATING THE EXTENT OF COMPENSATION

The analysis of biochemical markers after cigarette brand switching is often expressed as degree of percentage of compensation. Complete

compensation means that the same amount of nicotine or other tobacco smoke constituents is taken in before and after a switch to a cigarette with a different nominal yield. No compensation means the intake changes in direct proportion to the change in machine-determined yields relative to the new brand.

Compensation, defined as the degree to which proportional changes in a smoker's intake of a smoke constituent make up for the same proportional change in the machine-determined yield of that constituent, can be expressed mathematically in the following equation (Alison *et al.*, 1989):

$$C = 1 - \left[\frac{\log(\text{marker}_2) - \log(\text{marker}_1)}{\log(\text{yield}_2) - \log(\text{yield}_1)} \right]$$

where C = extent of compensation, marker, and yield, represent the levels of biomarker and yield before the brand change, and marker and yield represent the levels in the changed brand condition.

The Zacny and Stitzer (1988) data, which will be described in more detail later, were used to illustrate the use of this equation. Smokers were switched from their usual cigarettes with an average nicotine yield of 1.0 mg to cigarettes with an average nicotine yield of 0.4 mg. The average plasma cotinine concentrations were 252 ng/ml while smoking the higher yield and 188 ng/ml while smoking the lower yield cigarettes. Using the equation above,

$$C = 1 - \left[\frac{\log(189) - \log(252)}{\log(0.4) - \log(1.0)}\right]$$

where data are available, the degree of compensation will be reported for the various studies discussed in subsequent sections.

STUDIES OF SMOKING CIGARETTES WITH DIFFERENT MACHINE-DETERMINED YIELDS: METHODOLOGICAL CONSIDERATIONS

The remainder of this chapter will review studies of human exposure to tobacco smoke chemicals that have used three main types of research designs. The first design is the experimental forced-switching study, in which smokers are asked to switch to brands of higher or lower machine-determined yield compared to their usual brand. These experimental studies have been separated into short term (up to 4 weeks) and long term (more than 4 weeks). Forced-switching studies are particularly useful in that smoking behavior and exposure can be assessed under dose observation. The limitations of such studies include the fact that smokers are switching only for the purpose of the research. Motivation and cigarette acceptability are dissimilar from the natural situation of brand switching. These studies are performed over periods of time that may not provide adequate duration to adjust to the taste or puffing characteristics of the new cigarettes. Many of the short-term studies have been performed in laboratories or on research wards, environments in which individuals may not smoke

cigarettes as they normally do. Longer term forced-switching studies do allow more time to become accustomed to the new cigarette and are conducted in the smoker's natural environment, but they still do not measure the effect of self-determined brand switching. Nonetheless, experimental switching studies have provided useful information on the mechanism and extent of compensation that can occur.

A second study design is one that follows smokers who smoke self-selected cigarette brands. These are cross-sectional studies of chemical exposures in smokers who have selected the brand of cigarette that they find satisfying. Data from this type of study provide the best estimate of chemical exposure in smokers smoking different brands of cigarettes, but do not address the question of what happens if a person switches brands—for example, if someone switches from high- to low-yield cigarettes.

The third type of study design is one that examines spontaneous brand switching. These are studies of smokers who have chosen to switch from higher to lower machine-determined yield cigarettes, or vice versa. In these studies, the brand of cigarettes has been selected by the smoker, not by the researchers. Such studies are more informative of smokers' exposure in the real world when switching from higher to lower yield cigarettes.

SHORT-TERM EXPERIMENTAL SWITCHING STUDIES

A number of studies have examined the effects of switching from high- to low-yield cigarettes over a short period of time, defined for the purposes of this report as up to one month. The effects of short-term switching to low-yield cigarettes on how a cigarette is

puffed and on vent hole blocking are discussed elsewhere in this volume. This section will focus on switching studies in which bio-markers of tobacco smoke exposure were measured.

Russell and coworkers (1975) studied 10 smokers on different days when they were smoking their usual brand (average yield, 1.34 mg nicotine), or when they were switched to higher yield (2.3 mg nicotine) or to lower yield (0.14 mg nicotine) cigarettes. The subjects were studied in the morning while smoking their usual brands, and then again after 5 hours of smoking either their usual, high-, or low-yield brands. Plasma nicotine concentrations were measured 3 minutes after smoking a cigarette as the indicator of nicotine exposure. Plasma nicotine concentrations were similar while smoking the usual and high-yield cigarettes (30.1 and 29.2 ng/ml, respectively) and significantly lower (8.5 ng/ml) while smoking the low-yield cigarette. The extent of compensation is estimated to be 96 percent for the high-yield and 20 percent for the low-yield cigarettes, respectively. The number of cigarettes smoked in the 5 hours of ad libitum smoking showed a 38 percent reduction while smoking the high-yield cigarettes and an increase from an average of 10.7 to 12.5 cigarettes per day for low-yield cigarettes (the latter comparison was not statistically significant).

Benowitz and Jacob (1984b) studied 11 smokers in a hospital research ward. They were smoking their own brand of cigarettes (average yield, 16.3 mg tar, 1.1 mg nicotine), or were switched to either Camel® (15.4 mg tar, 1.0 mg nicotine) or True® (4.6 mg tar, 0.4 mg nicotine) for 4 days each. Cigarette brands were assigned in a balanced order. Nicotine intake was determined by measuring blood nicotine

concentrations throughout the day. When switched from their usual brand to either Camel® or True®, the smokers showed an approximately one-third decline in nicotine exposure. However, the intakes of nicotine and CO were similar when smoking Camel® or True®. Thus, using Camel®s as a comparator, the degree of compensation when smoking True® was 100 percent. Similar findings were obtained for CO exposure (based on measurements of COHb) or mutagenic activity in a 24-hour urine collection (a measure of exposure to potentially carcinogenic chemicals).

A similarly designed study was performed where 11 subjects were switched from their usual brand (average yield, 14.7 mg tar, 1.1 mg nicotine) to Camel® (15.4 mg tar, 1.0 mg nicotine) or to ultra-low Carlton® (tar 0.8 mg, nicotine 0.1 mg) cigarettes (Benowitz *et al.*, 1986b). Compared to the high-yield Camel® cigarette, when the participants smoked the Carlton® brand, their nicotine, CO, and mutagenic activity levels were reduced by 56, 36, and 49 percent, respectively. The percent compensation based on nicotine exposure was estimated to be 74 percent.

West and associates (1984) randomized 26 smokers of high-yield cigarettes (average yield, 14.2 mg tar, 1.3 mg nicotine) who either continued their own brand or switched to an ultra-low-yield cigarette (1 mg tar, 0.1 mg nicotine) for 10 days. Subjects smoked a similar number of cigarettes in the two conditions. The trough plasma nicotine level averaged 22.8 mg/ml for the usual brand condition versus 9.4 ng/ml for the ultra-low-yield brand condition. The latter is consistent with 36 percent

compensation. A similar degree of compensation was estimated based on expired CO levels.

Zacny and Stitzer (1988) studied 10 smokers of high-yield cigarettes (average, 1.0 mg nicotine) who smoked five different brands of cigarettes—their own and cigarettes with yields of 0.1, 0.4, 0.7, and 1.1 mg nicotine—each for 5 days, in random order. Subjects smoked significantly more cigarettes per day of the two brands with the lowest yields compared to the three higher yield cigarettes. When smoking low-yield cigarettes, larger and more frequent puffs were taken as well. The plasma cotinine levels at the end of each smoking period averaged 152, 188, 221, 252, and 259 ng/ml for the 0.1, 0.4, 0.7, 1.0, and 1.1 mg nicotine brands, respectively. The cotinine levels measured when smoking the two lowest yield cigarettes were significantly lower than for the three others. Based on group average data, compensation was estimated to be 56, 58, and 60 percent for the 0.1, 0.4, and 0.7 mg nicotine brands, respectively.

A Benowitz study mentioned previously allowed a comparison of tar-to-nicotine ratios as predicted by the smoking machine and as experienced by the smoker (Benowitz *et al.*, 1986a). The machine-determined tar-to-nicotine ratios for low-yield cigarettes are generally lower than those for high-yield cigarettes. For example, the tar-to-nicotine ratios for cigarettes in this study were 15.4 for Camel®, 11.5 for True®, and 7.3 for Carlton®. Assuming that urinary mutagenicity is a quantitative measure of tar exposure (which is reasonable, since most mutagenic activity comes from tar), changes in the ratio of urinary mutagenicity to the area under the plasma nicotine concentration time curve over 24 hours can be used

as an indicator of changes in the ratio of actual tar-to-nicotine exposure in the smoker. While urinary mutagenicity did decline when smokers were switched to ultra-low-yield cigarettes, the ratio of mutagenic activity to nicotine exposure did not differ for any of the cigarette types. This observation is consistent with smoking-machine studies in which vent-hole blocking and/or more intensive smoking of low-yield cigarettes resulted in increased tar-to-nicotine ratios (Rickert *et al.*, 1983). It has been suggested that low-yield cigarettes may be less hazardous, even if full compensation for nicotine occurs, because the lower tar-to-nicotine ratio would lead to less intake of tar for any given level of intake of nicotine. However, based on the urinary mutagenicity data, one must question whether predictions about lower exposure to tar based on machine-determined tar-to-nicotine ratios are valid.

In summary, these short-term switching studies demonstrated that smokers compensate for reduced nicotine deliveries, but the extent of compensation varied in different studies—from 20 percent to 100 percent. The degree of compensation is likely to be less in short-term switching studies compared to longer term switching studies, or studies in which smokers have selected their own brand of cigarettes. This is because 1) smokers have not chosen to smoke the particular brand of cigarette they are switched to, 2) they often find the low-yield cigarettes to be unsatisfying, and 3) they may not be smoking the cigarettes long enough to develop effective compensatory smoking behaviors. These short-term switching studies demonstrated that compensation occurs by a combination of smoking more cigarettes per day and by taking in more tobacco smoke per cigarette compared to smoking-machine predictions.

The one study that estimated tar-to-nicotine ratios delivered to the smoker suggested that this ratio is much higher than is predicted by smoking-machine tests in smokers of low-yield cigarettes, consistent with smoking-machine studies that showed that intensive puffing increases tar-to-nicotine ratios.

LONG-TERM EXPERIMENTAL SWITCHING STUDIES

Several studies have biochemically assessed the extent of compensation after switching from higher to lower yield cigarettes for periods of more than a few weeks. Russell and associates (1982) studied 12 smokers who typically smoked an average of 38 'middle-tar' cigarettes per day with an average yield of 17.4 mg tar and 1.3 mg nicotine. These subjects were switched to a low-tar cigarette (yield of 10.9 mg tar and 0.7 mg nicotine) for 10 weeks. Compared to baseline, the average cigarette consumption increased by about three cigarettes per day while smoking the low-yield cigarette, although this was not statistically significant. Plasma nicotine concentration (measured 2 minutes after smoking a test cigarette) and plasma cotinine concentrations declined by an average of 30 percent. There was no change in plasma thiocyanate or blood COHb. The percentage compensation based on plasma nicotine or plasma cotinine levels was 36 percent.

Robinson and colleagues (1983) switched a group of smokers of high-nicotine cigarettes (average yield, 1.8 to 1.1 mg nicotine) to lower yield brands over two stages. Six of the subjects, who served as controls, were switched to cigarettes similar to their usual brand. Sixteen subjects were switched initially to brands with 33 percent, then to brands with 61 percent reduction of nicotine yields over 8 weeks.

The average serum cotinine level did not significantly decrease in those who decreased their brand yield (284 versus 244 ng/ml). Likewise, there was no significant reduction in plasma thiocyanate or blood COHb levels. Thus, the Robinson study demonstrated nearly complete compensation when switching to lower yield cigarettes. Some smokers in this study achieved compensation by smoking more cigarettes per day, but for most smokers the main mechanism was smoking cigarettes more intensively and/or blocking ventilation holes.

Peach and associates (1986) studied 183 smokers of middle-tar cigarettes who were randomized to switch from their own brand to cigarettes of a similar yield (average, 15.5 mg tar, 1.5 mg nicotine) or a lower yield (9.0 mg tar, 0.9 mg nicotine). Test cigarettes could be purchased at a discount. The subjects were followed for 5 weeks and smoked an average of 20 cigarettes per day, a rate that did not differ between middle- and low-tar cigarettes. However, urine nicotine metabolite excretion was no different for individuals smoking the two types of cigarettes, indicating 100 percent compensation.

Guyatt and colleagues (1989) studied 29 smokers who smoked their usual brand for 4 months and then were switched to a lower tar brand for 9 months. The usual cigarette brand had an average yield of 15.6 mg tar and 1.3 mg nicotine. Subjects were switched to cigarettes of at least 3 mg lower tar than the usual brand—the average switch was to 9.3 mg tar and 0.9 mg nicotine. Smokers on average smoked a greater number of low-yield cigarettes compared to the usual brand (28.5 versus 24.9 cigarettes per day), but the difference was not

statistically significant. Smokers did take more puffs and larger puff volumes when smoking the lower yield cigarettes. Plasma cotinine and COHb levels declined by 18 percent. Compensation was estimated by the authors to be 61 percent based on cotinine and 56 percent based on COHb levels. The main mechanism for compensation was judged to be more intensive puffing rather than greater cigarette consumption.

Frost and associates (1995) studied 434 smokers of high-yield cigarettes who were switched to cigarettes of approximately 50 percent lower yield compared to their usual brands. One group was switched to the cigarettes immediately, and another was switched gradually over several months. A third group, the control group, was switched to cigarettes of 10 percent lower yield than their usual cigarettes. Subjects were allowed to select the brand that they would smoke within the specified yield range. The follow-up was over 6 months. Compared to the preswitching value, levels of serum cotinine in the fast yield-reduction group declined by an average of 11 percent and COHb declined by 14 percent. In the slow yield-reduction group, there was a decrease of 6 percent in cotinine and 16 percent in COHb. For the two groups combined, the extent of compensation was estimated by the authors to be 79 percent based on cotinine and 65 percent based on COHb. There was no significant difference in the extent of compensation based on how fast the yields were reduced. On average, smokers reduced the number of cigarettes they smoked after switching, which was interpreted by the authors to reflect the desire of this group of smokers to reduce their smoking in general. The high degree of compensation despite smoking fewer cigarettes per day further demonstrates the

point that cigarette yields are substantially increased by smoking lower yield cigarettes more intensively.

In summary, the data from these experimental long-term switching studies indicated that there was some reduction in smoke exposure, but that the magnitude of that reduction was small. The larger studies indicated that the extent of compensation based on nicotine intake was about 80 percent. Compensation occurred primarily by increasing the intensity with which cigarettes were smoked, in addition to the variable contribution of increased numbers of cigarettes smoked per day in the different studies. It is possible that voluntary efforts to cut down on smoking by subjects in some of these studies may have limited the increase in cigarette consumption that has been observed in response to switching to lower yield cigarettes in other studies.

STUDIES OF SMOKERS SMOKING SELF-SELECTED BRANDS

Studies of Nicotine Exposure

Cross-sectional population studies can provide data on exposure to tobacco smoke constituents in people who have selected the brand of cigarettes they find satisfying. While these studies may supply valuable data on tobacco smoke chemical exposure in smokers of different brands, there are limitations in extrapolating such data to brand switching. For example, the acceptability of nicotine delivery from a particular cigarette may influence brand selection, and a highly dependent smoker would choose only those cigarettes that would provide adequate doses of nicotine. Cross-sectional studies will also include some people who are in transition—that is, transition to regular smoking, to cessation, or in the

process of relapsing from a, previous cessation attempt. Health concerns may also affect brand selection. All these factors would be expected to affect the relationship between self-selected brand and measures of intensity of smoking. Therefore, self-selected brand studies are not a perfect model for studying compensation in response to brand switching.

The biomarkers used in cross-sectional studies include markers of nicotine exposure (blood nicotine, blood or saliva cotinine, or urinary nicotine metabolites) and markers of gas-phase exposure, such as CO and thiocyanate. This section focuses on studies that measured nicotine intake. Table 3-1 summarizes a number of studies in which nicotine intake was estimated in people who smoked cigarettes with different nominal yields. Most studies found either weak or no significant correlations between nominal yields and nicotine intakes.

Three large studies, which involved general populations of smokers, warrant particular discussion. Cori and Lynch (1985) recruited 865 smokers from shopping malls in different areas of the United States. Plasma nicotine and cotinine concentrations were weakly correlated with the Federal Trade Commission (FTC) method for machine-measuring nicotine yield (see Figure 3-1). Woodward and Tunstall-Pedoe (1992) studied 2,754 smokers as part of the baseline assessment in the Scottish Heart Health Study, which was conducted between 1984 and 1986. Their main analysis presented plasma cotinine data based on categories of yield: low tar (less than 13 mg/cigarette), middle tar (14-15 mg), and high tar (greater than 14 mg).

The mean cotinine values were no different across categories for males (276, 294, and 278 ng/ml for low-, middle-, and high-tar groups, respectively). For females, the cotinine level was 26 percent lower in the low-tar group (199 ng/ml) but similar for the middle- and high-tar groups (270 and 270 ng/ml, respectively). Woodward and Tunstall-Pedoe (1993) performed another analysis of the same data with comparison of the cotinine concentrations to specific yields of tar, nicotine, and CO (see Figure 3-2). Multiple regression analysis—which included tar, nicotine, and CO yields as well as cigarette consumption and gender—found that tar was the best predictor of cotinine level, with an interaction for gender as previously discussed. However, the best regression model accounted for only 19 percent of the variance in cotinine levels.

Jarvis and colleagues (2001) conducted a study of 2,031 adult smokers in the United Kingdom as part of the 1998 Health Survey for England. Smokers were defined as anyone who reported current smoking and included those who smoked only occasionally. Saliva cotinine concentrations correlated weakly with machine-determined nicotine yield ($r = 0.19$, $P < 0.001$). After, controlling for confounders, machine-determined yield accounted for 0.79 percent of the variance in saliva cotinine. Using the conversion factor for estimating nicotine intake from cotinine level as described earlier, Jarvis and associates estimated a nicotine intake per cigarette of 1.17 mg in smokers of brands with machine yields of less than 0.4 mg (average, 0.14 mg), 1.22 mg nicotine for cigarettes with yields of 0.4-0.75 mg (average, 0.57 mg), and 1.31 mg for brands with yields greater than 0.75 mg (average, 0.91 mg). The authors did not find that smokers of low-yield

cigarettes smoked more cigarettes than smokers of higher yield cigarettes. However, in their analysis, most of the occasional smokers fell into the low-yield cigarette group. Thus, the low-yield group contained a mixture of addicted and nonaddicted smokers, whereas the higher yield groups included a greater proportion of addicted smokers (Jarvis *et al.*, 2001).

Table 3-1
Studies of Nicotine Intake Compared with Machine Nicotine Yield

Study	Population	Nicotine Yields (mg)	Results
Russell *et al*, 1980	330 from smokers' clinics or research volunteers	05.-3.5	PNIC vs. Mach-N $r = 0.21$*
Rickert and Robinson, 1981	84 during routine medical exams	0.25-1.3	PCOT vs. Mach-N $r = 0.08$
Benowitz *et al.*, 1983	222 seeking smoking cessation therapy	<0.1-1.9	BCOT s. FTC-N $r = 0$-.15 (n = 137) $r = 0.06$ (n = 123)
Elbert *et al.*, 1983	76; mix of smoking cessation, hospital employees, and ambulatory patients	0.1-1.5	PNIC v. FTC-N $r = 0.25$*
Gori and Lynch, 1985	865 recruited from shopping malls; 10 or more cigarettes per day	0.1-1.6	PNIC vs. FCT-N $r = 0.37$* PCOT vs. FTC-N $r = 0.23$*
Benowitz *et al.*, 1986b	248 seeking smoking cessation (137 from previous study)	0.1-1.9	BCOT values similar for FTC-N 0.21 to >1.0 BCOT 2/3 of others for FTC-N < 0.20

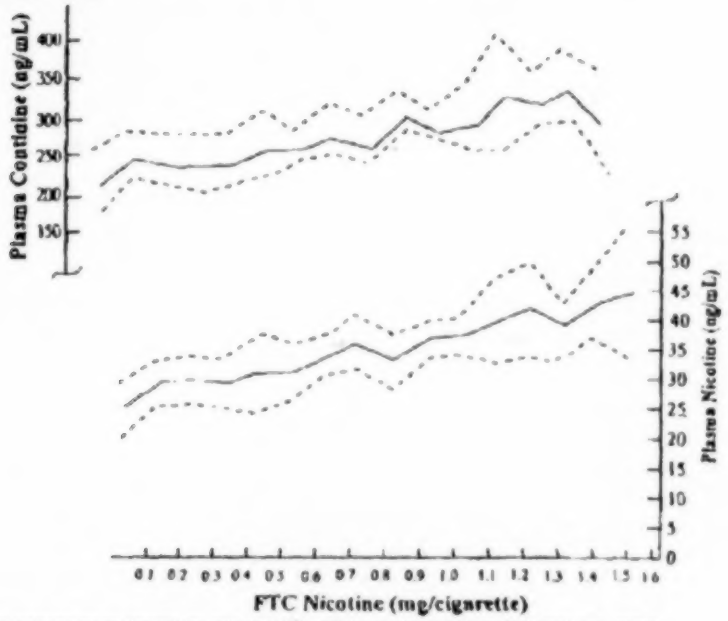
Russell *et al.*, 1986	392 from smokers' clinics	—	BCOT vs. Mach-N $r = 0.13$* BNIC vs. Mach-N $r = 0.26$*
Rosa *et al.*, 1992	125 attending military medical center	0.38-1.38	BCOT vs. Mach-N $r = 0.30$
Coultas *et al.*, 1993	298 from Hispanic household survey	—	SCOT vs. FTC-N $r = 0.12$
Woodward and Tunstall-Pedoe, 1993	2,754 from Scottish Heart Health Study (1984-1986)	0.1-1.7	BCOT vs. Mach Tar, N, and CO and gender (multiple regression); accounted for 19% variance
Byrd *et al.*, 1995	33 volunteers	0.13-1.3	UNIV + metabolites vs. FTC-N N/24 hr: $r = 0.68$* N/cig: $r = 0.79$*
Hee *et al.*, 1995	108 volunteers; 5 or more cigarettes per day	0.09-1.19	UNIC, UCOT vs. Mach-N; NS
Byrd *et al.*, 1998	72 volunteers	0.1-1.4	UNIC + metabolites vs. FTC-N N/24 hr: $r = 0.19$ N/cig: $r = 0.31$* SCOT vs. FTC-N $r = 0.15$

Jarvis *et al.*, 2001	2,031 from 1998 Health Survey for England	0.04-1.06	SCOT vs. Mach-N r = 0.19*

* $P < 0.05$.

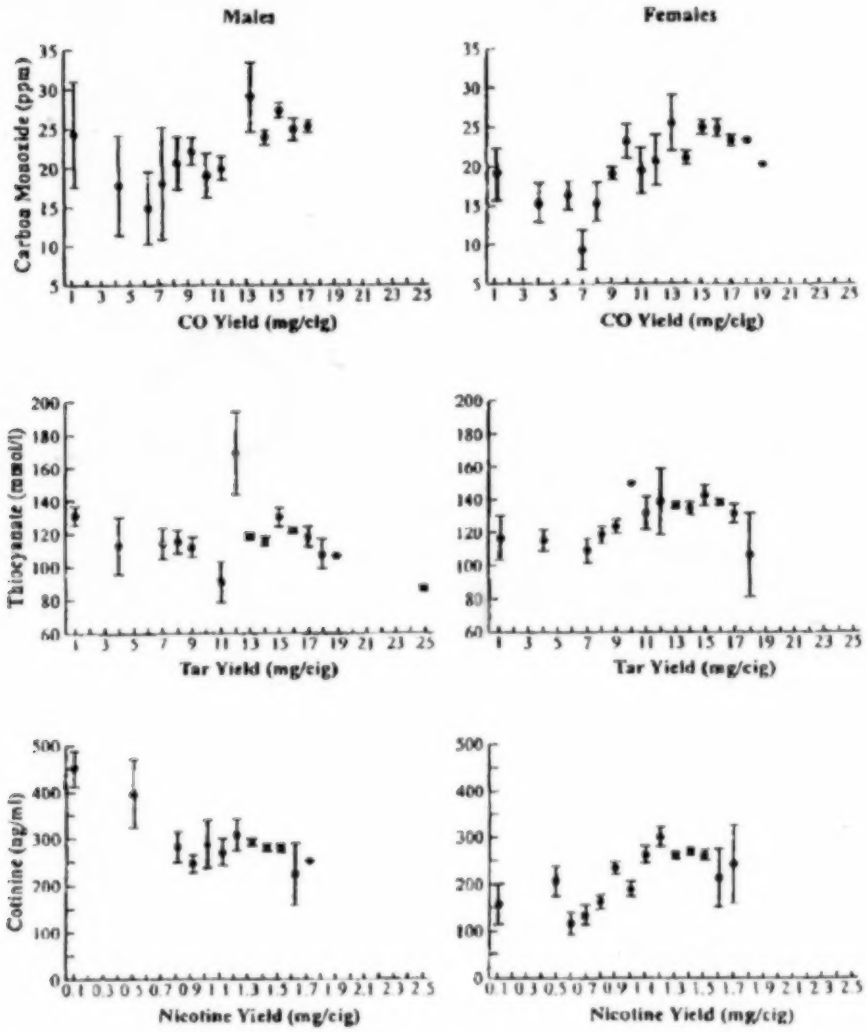
Key: PCOT = plasma cotinine concentration; Mach-N = smoking-machine-determined nicotine yield; PNIC = plasma nicotine concentration; BCOT = blood cotinine concentration; FTC-N = machine yield by Federal Trade Commission method; BNIC = blood nicotine concentration; SCOT = saliva cotinine concentration; UNIC = urine nicotine concentration; UCOT = urine cotinine concentration; N=nicotine; CO = carbon monoxide.

Figure 3-1
Plasma Cotinine and Nicotine Concentrations in Cigarette Smokers According to the FTC Nicotine Yield



Note: Solid line indicates mean, dashed line indicates 95% confidence intervals (from Gori and Lynch, 1985)

Figure 3-2
Mean Values for Expired Carbon Monoxide v. CO Yield, Serum Thiocyanate v. Tar Yield, and Serum Cotinine Against Machine-Determined Yields for Men and Women



Note: Bars indicate one standard error (from Woodward and Tunstall-Pedoe, 1993)

Another study by Gori and Lynch (1983) warrants particular discussion with respect to ultra-low-yield brands of cigarettes. They studied 288 smokers of two ultra-low-yield cigarette brands (1 mg tar). The subjects were recruited in shopping malls, and plasma cotinine levels were measured. The cotinine concentrations in smokers averaged 322 and 195 ng/ml for brands with yields of 0.18 and 0.10 mg nicotine, respectively. The cotinine values of the second brand were about 30 percent lower than the typical smoker population value of 300 mg/ml. Smokers of the first ultra-low brand had cotinine concentrations similar to the smoker population average. These findings were similar to those of a short-term experimental study, by Benowitz and associates, in which smokers were switched from regular to ultra-low-yield cigarettes (Benowitz *et al.*, 1986b). In that study, the intake of nicotine fell by about 30 percent when switching to ultra-low-yield cigarettes compared to the usual brand.

In summary, most studies of nicotine intake in populations smoking self-selected brands of cigarettes showed some differences in nicotine exposure when high- and low-yield brands were compared. However, the differences were quite small and not nearly quantitatively proportional to the changes in nominal yield. Thus, nicotine ratings of cigarettes are poor predictors of actual nicotine intake and of the intake of other toxins as well. The FTC method generally underestimates human exposure to nicotine, particularly in smokers who are smoking low-yield cigarettes.

Studies of Carbon Monoxide Exposure

Studies on CO exposure in populations of self-determined brand smokers are summarized in Table

3-2. An example of CO data from a large group of smokers recruited from shopping centers is shown in Figure 3-3 (Gori and Lynch, 1985). Similar data were reported by Woodward and Tunstall-Pedoe (1992) in the Scottish Heart Health Study (see Figure 3-2). Most other studies likewise found no relationship between machine-determined CO yield and CO exposure, although a few studies did report weak correlations. The conclusions for CO were similar to those discussed above for nicotine; that is, machine-determined yields are poor predictors of human exposure to CO, and presumably to other gaseous components of tobacco smoke as well.

Studies of Other Tobacco Smoke Biomarkers

Several studies have measured plasma or saliva thiocyanate concentrations, and one study measured urinary mutagenic activity. In most studies, thiocyanate concentrations were no different in smokers of cigarettes with different nominal yields. The Woodward and Tunstall-Pedoe study (1993) found a weak relationship between serum thiocyanate and cigarette yield. Benowitz and colleagues (1986b) found that smokers of ultra-low-yield cigarettes had about 25 percent lower thiocyanate levels compared to other brands, but Maion and Fortmann (1987) found no difference in thiocyanate concentration comparing smokers of ultra-low and other brands.

Hee and coworkers (1995) measured urinary mutagenicity in 108 smokers of different yield cigarettes. They found a weak relationship between urinary mutagenicity and nicotine yield ($r = 0.22$, $P > 0.05$).

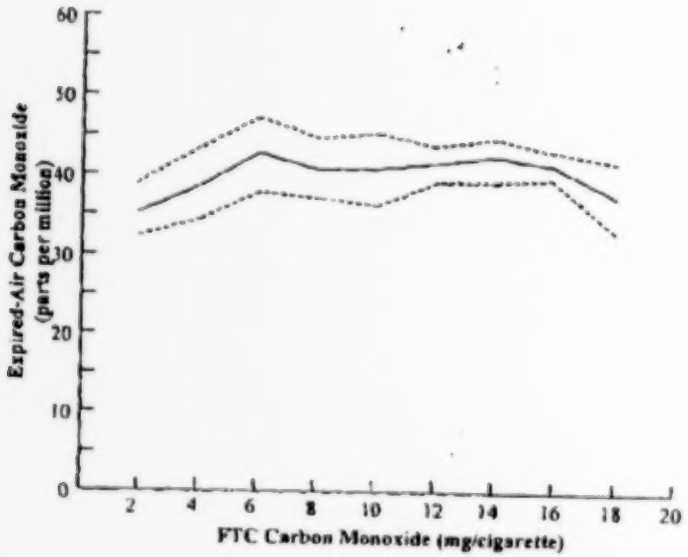
Table 3-2
Studies of Carbon Monoxide Intake Compared with Machine Yield

Study	Population	Machine Yields (mg)	Results
Jaffe *et al.*, 1981	200 recruited from urban workplaces	0.2 - >1.0 mg nicotine	ECO vs. FTC-N $r = 0.028$
Rickert and Robinson, 1981	159 during routine medical exams	4-22 mg CO	COHb vs. Mach-CO $r = 0.10$
Sutton *et al.*, 1982	55 volunteers	11-20 mg CO	COHb vs. Mach-CO $r = 0.03$
Ebert *et al.*, 1983	76; mix of smoking cessation, hospital employees, and ambulatory patients	1-22 mg CO	ECO vs. Mach-CO $r = 0.03$
Wald *et al.*, 1984	2,455 males during health screening exams in London	0.8-28.1 mg CO	CO remained relatively constant regardless of cigarette yield
Gori and Lynch, 1985	865 recruited from shopping malls; 10 or more cigarettes per day	2-18 mg CO	ECO vs. FTC-CO virtually no correlation

Maron and Fortmann, 1987	713 in a community-based survey	<0.2 - >1.0 mg NIC	ECO vs. FTC-N Analysis of variance revealed NSD
Woodward and Tunstall-Pedoe, 1992	2,754 from Scottish Heart Health Study (1984-1986)	1-19 mg CO	ECO vs. Mach Tar, N, and CO and gender (multiple regression) accounted for 19% of variance
Coultas *et al.*, 1993	298 in a population survey, primarily Hispanic	—	ECO vs. FTC-CO $r = 0.03$
Hee *et al.*, 1995	108 volunteers, 5 or more cigarettes per day	1.1-15.0 mg	COHb vs. Mach $r = 0.24$

Key: CO = carbon monoxide; FTC-N = machine yield of nicotine by Federal Trade Commission method; ECO = expired CO; COHb = blood carboxyhemoglobin; Mach-CO = smoking-machine-measured CO.

Figure 3-3
Expired Cabon Monoxide Concentrations in Smokers According to FTC CO Yields of Cigarettes Smoked



Note: Solid line indicates mean, dashed line indicates 95% confidence intervals (from Goff and Lynch, 1985).

Thus, the data on other biomarkers support the overall conclusions of studies that measured nicotine and CO—that there is very little difference in tobacco smoke exposure in people smoking cigarettes of different machine-determined yields. For the general population of smokers who select their own brand of cigarettes, the extent of nicotine compensation appears to be almost complete.

SPONTANEOUS BRAND SWITCHING

Smokers in their natural environment have chosen the brand of cigarettes they smoke. A smoker's choice of cigarette brand is influenced by a variety of factors, including the brand smoked by peers, the influence of advertising and promotional materials, a desire to reduce the health risks of

smoking (which is, in turn, influenced by advertising and promotion), and the characteristics of the cigarette (*i.e.*, adequacy of nicotine dose, taste, etc.). Experimental studies of brand switching are, to some extent, artificial in that the researchers select the brand. Spontaneous brand switching studies are more informative of smokers' exposures in the real world when they switch to lower yield cigarettes. Two studies of spontaneous brand switching were reviewed for this chapter. Lynch and Benowitz (1987) reported on 197 smokers who had measurements of plasma cotinine and COHb while smoking self-selected brands on 2 occasions, 6 years apart. Of these smokers, 104 were smoking cigarettes of the same or similar machine-determined yields as before, 62 had switched to a lower yield (0.2 mg or more reduction in nicotine delivery), and 31 had switched to higher yields (0.2 mg or more increase in nicotine delivery). Plasma samples and expired CO were measured on approximately the same day at baseline and on retesting. Smokers who did not change the nicotine yield showed a slight decrease in the numbers of cigarettes smoked per day, but there was no change in cotinine or CO levels (see Figure 3-4). Smokers who switched to lower yield cigarettes initially smoked cigarettes with higher nicotine yields (average 1.09 mg) and then switched to cigarettes with an average yield of 0.68 mg, a 38 percent reduction. Brand switching was associated with a reduction in cotinine and expired CO of about 20 percent. However, these smokers had also decreased their cigarette consumption by about 20 percent. Analysis of cotinine concentration or CO per cigarette showed no change despite reduction in yield. Thus, the smokers obtained the same dose of

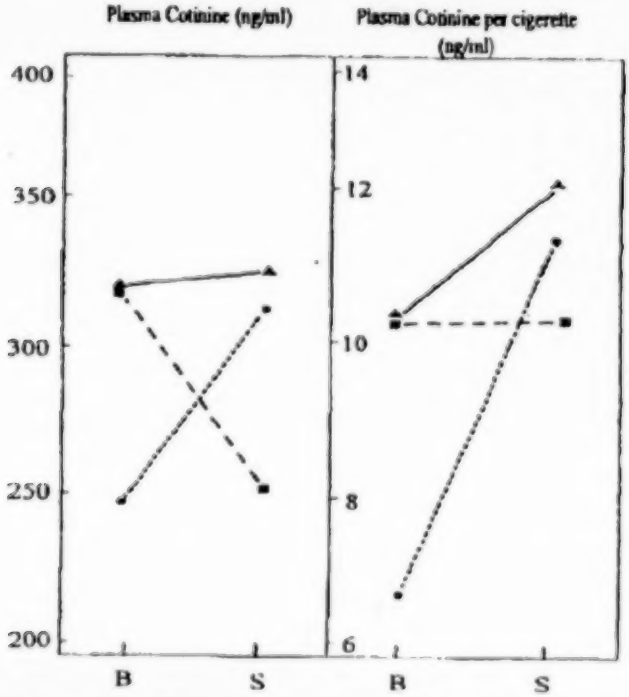
nicotine and CO from each cigarette even though the yield was lower. This observation is consistent with findings described previously showing that when switching from high- to low-yield cigarettes, full compensation from each cigarette is easily achieved. Reduction in daily exposure to tobacco smoke occurred primarily because certain smokers who switched to low-yield cigarettes smoked fewer cigarettes. Possibly, switching was part of an attempt by these individuals to reduce their health risks by smoking both lower yields and fewer cigarettes per day.

Switchers to high-yield cigarettes had smoked a low-yield cigarette at the initial study (average, 0.42 mg nicotine) and switched to cigarettes with an average yield of 0.85 mg, a 102 percent increase. After switching, cotinine levels increased by 23 percent and expired CO by 5 percent (see Figure 3-5). In this case, smokers did take in more nicotine and CO per cigarette, although much less than predicted by the relative increase in machine yield. Because these subjects were smoking lower yield cigarettes and had lower cotinine levels at baseline compared to subjects who switched to cigarettes of similar or lower yields, it is likely that this group was composed of smokers in an escalating phase of developing tobacco dependence. This idea was supported by the observation that, after switching, cotinine levels rose to levels similar to those of the other two groups at baseline.

Peach and coworkers studied 599 males over 13 years (from 1971 to 1984) in a study of the effects of brand switching on phlegm production on pulmonary function tests (Peach *et al.*, 1986a). Average cigarette consumption decreased in all smokers, but

less so in those smokers who switched to lower yield cigarettes. Nicotine intake was estimated by a colorimetric assay of total nicotine plus metabolite excretion in the urine. At the 1984 assessment, no difference in nicotine metabolite excretion was observed in individuals who had or had not switched from higher to lower yield cigarettes. This suggests full compensation when switching to lower yield cigarettes.

Figure 3-4
Spontaneous Brand Switching Study: Plasma Concentrations of Cotinine and Cotinine Concentration Normalized for Cigarettes Smoked per Day



Note: B indicates baseline and S indicates follow up study.
Symbols: Triangles=subjects who did not switch brands (n=109); solid squares=decreasers (n=67), solid circles=increasers (n=32); asterisks indicate significant change from baseline to follow-up study (from Lynch and Bonnett, 1987).

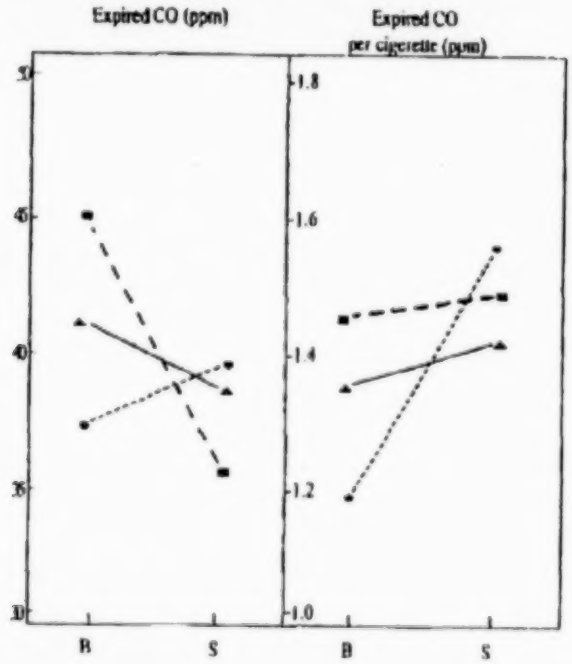
In summary, these two spontaneous brand-switching studies indicated that when smokers choose to switch to low-yield cigarettes, their intake of nicotine and CO (and presumably other smoke

constituents) per cigarette does not significantly change. Thus, for spontaneous brand switchers, there appears to be a complete compensation for each cigarette smoked, reflecting more intensive smoking. These observations suggest, at least when considering modern cigarettes, that switching from higher to lower yield cigarettes per se is not likely to reduce disease risk.

SUMMARY

Studies of subjects who smoked cigarettes with lower machine-determined yields support the idea that smokers regulate their intake of nicotine to take in the amount of nicotine that they need to sustain their addiction. Experimental switching studies show varying degrees of compensation. Variability from study to study probably reflects the characteristics of the smokers and the types of cigarettes to which they were switched. Experimental studies in which smokers were switched from regular to ultra-

Figure 3-5
Spontaneous Brand Switching Study: Expired Air CO Concentration and CO Concentration Normalized for Cigarettes Smoked per Day



Note: B indicates baseline and S indicates follow-up study.
Symbols: Triangles=subjects who did not switch brands (n=109); solid squares=decreasers (n=82); solid circles=increasers (n=32); asterisks indicate significant change from baseline to follow up study (from Lynch and Benowitz, 1987).

low-yield cigarettes suggest a significant but modest reduction in nicotine exposure. Spontaneous brand-switching studies suggest that there is no reduction in smoke intake per cigarette, and that any reductions that were seen in brand switchers depended upon whether or not those individuals—also cut down their cigarette consumption.

Studies of smokers smoking self-selected brands assessed exposure in individuals who smoked as many of their cigarettes as they wish. These studies convincingly showed a weak relationship between nicotine yield and nicotine, CO, or thiocyanate exposure. An exception may be smokers of ultra-low-yield cigarettes, for whom in some studies there was

an approximately 30 percent reduction of cotinine levels. However, the market share for ultra-low-yield cigarettes is extremely small.

Considering the overall exposure data in individuals selecting their own brands, there is little reason to expect that smokers of low-yield cigarettes will have a lower risk of disease than those smoking higher yield cigarettes. Lower tar-to-nicotine ratios could result in reduced risk, in theory, even if there is full compensation for nicotine, but the few human exposure data available to date suggest that exposure to tar compared to nicotine is not different in smokers smoking low-yield cigarettes.

The majority of smokers appear to compensate by smoking their cigarettes more intensively and/or by blocking ventilation holes. Some studies show that smokers of low-yield cigarettes smoke more cigarettes per day. Other studies indicate that occasional smokers are more likely to be in the low-yield category, which may result in estimates of smoking similar or even fewer cigarettes in the low-yield group compared to higher yield groups. Recent data from California suggest that if one looks at addicted smokers who have been smoking at a stable level for some time, smokers of low-yield cigarettes do smoke more cigarettes. This type of analysis has not been performed on other data sets, where cigarette consumption was simply taken for all smokers of a particular yield regardless of level of dependence or the stability of smoking behavior.

CONCLUSIONS

1. Smokers regulate their intake of nicotine to obtain the amount of nicotine that they need to sustain their addiction.

2. Spontaneous brand-switching studies suggest that there is no reduction in smoke intake per cigarette, and that any reductions that are seen in brand switchers depend upon whether or not those individuals also reduce their cigarette consumption.

3. Studies of smokers smoking self-selected brands showed a weak relationship between machine-measured nicotine yield and a smoker's nicotine, CO, or thiocyanate exposure.

4. Considering the overall exposure data for individuals selecting their own brands, there is little reason to expect that smokers of low-yield cigarettes will have a lower risk of disease than those who smoke higher yield cigarettes.

* * *

Public Understanding of Risk and Reasons for Smoking Low-Yield Products

Neil D. Weinstein

INTRODUCTION

Few members of the public understand the probabilities and odds that form the vocabulary scientists use to discuss risk (Weinstein, 1999). Thus, lay people rely upon other cues, such as the cigarette labels 'Light' and 'Ultra Light', to help them make decisions about smoking and other hazards (see Chapter 7). This chapter examines public perceptions of Light cigarettes, reasons for smoking Lights, and the relationship between smoking Lights and quitting.

PERCEPTIONS OF LIGHT CIGARETTES

The labels 'Light' and 'Ultra Light', when applied to cigarettes, imply a variety of benefits.

These include lower levels of tar and nicotine, less risk to health, and milder taste. Cigarette advertising, including the way in which these labels are used in the advertising, further modifies and shapes public perceptions of these products. What 'Light' and 'Ultra Light' come to mean to members of the public is an empirical question that can be revealed by careful survey research.

A substantial portion of smokers believe that low-tar cigarettes are less risky than Regular cigarettes. For example, a nationwide 1987 survey (Giovino *et al.*, 1996, p. 49) found that 45.7 percent of Ultra-Light smokers, 32.2 percent of Light smokers, and 29.4 percent of Regular smokers said that low-tar cigarettes reduce the risk of cancer. Nevertheless, smokers' knowledge about low-tar cigarettes is quite limited.

In 1995, a random sample of 12,371 Canadians adults were asked by telephone interviewers what the word "light" means in relation to cigarettes (Health Canada, 1995). The most frequently mentioned topics were: "less tar" (20.1 percent), "less nicotine" (36.2 percent), "safer" or "less addictive" (3.2 percent), "milder taste" (6.7 percent), "different filter" (2.3 percent), arid "nothing" or "ad gimmick" (14.1 percent). A further 21.2 percent had no idea what the term meant. The meanings ascribed to "light" were generally similar among various subgroups of smokers, although former and never smokers were more likely than current smokers to-say that they had no idea what the term meant (17.8 percent and 28.7 percent versus 12.2 percent, respectively), and former smokers were more likely than current and never smokers to state that "light"

was a meaningless advertising term (22.2 percent versus 16.0 percent and 10.6 percent, respectively).

A 1994 national random telephone survey found that 95% of regular smokers could identify that they were "somewhat certain" or "very certain" that they smoked a Regular, Light, or Ultra-Light cigarette (Kozlowski *et al.*, 1998a & b). However, when asked how much tar their cigarettes contained, few smokers knew the answer to this question. For example, Cohen (1996a, p. 128) reported that 79% of smokers answered that they did not know the answer to the question. Comparing the estimates given by smokers to the actual figures for their brands, Kozlowski and colleagues (1998b) found that only 3% of smokers could correctly state (within 2 mg) the amount of tar in their cigarettes. In fact, few knew where to look to learn the tar content (Kozlowski *et al.*, 1998b). Although 67% of smokers said that they would look on their cigarette package to find the tar content, only 6.3% of cigarettes sold have this information on the package. When asked how many Light cigarettes someone would have to smoke to get the same amount of tar as from one Regular cigarette, the most common response from about half of those surveyed was, "don't know"; about 40 percent said two cigarettes or more and less than 10 percent said one cigarette (Kozlowski *et al.*, 1998a).

There are significant differences in knowledge and reported use of tar numbers among different types of smokers. For example, when Ultra-Light, Light, and Regular cigarettes were compared, the members of the first group were found to be somewhat more accurate about their cigarette's tar number (Kozlowski *et al.*, 1998b). Accuracy was

shown by 17% of Ultra-Light smokers, 2% of Light smokers, and 1% of Regular smokers. Ultra-Light smokers were also much more likely to say they used this number in making judgments about cigarette safety (Cohen, 1996a, p. 132). Thus, although only 14% of Cohen's overall sample said that they used tar numbers to make such judgments, 56% of the smokers of 1- to 5-mg tar cigarettes said that they determined safety from advertised tar values. Ultra-Light smokers also saw a much bigger difference between the risk of Regular and Light cigarettes than did other smokers (Cohen, 1996a, p. 130). A large majority (83%) of Ultra-Light smokers said that switching from a 20-mg to a 5-mg tar cigarette would significantly reduce health risks, whereas only about 50% of other smokers shared this belief.

Clearly, knowledge about the reported tar values of their chosen brands, about where these values can be found, and about vent holes in cigarettes is largely absent among smokers. Of particular importance is the finding that a large proportion of smokers believe that switching to a lower tar cigarette reduces one's health risks, and since most smokers are only aware of a cigarette's advertised type—'Regular', 'Light', or 'Ultra Light'—and not its tar number, this classification is used as a surrogate to indicate risk. Attention to tar numbers is particularly true among Ultra-Light smokers, a majority of whom say they use these numbers to judge a cigarette's safety.

REASON FOR SMOKING OR SWITCHING TO LIGHT CIGARETTES

A variety of studies have asked smokers about their reasons for choosing to smoke Light or Ultra Light cigarettes or their reasons for switching to

such cigarettes. The results show that the desire to reduce disease risk is one of the main factors guiding these choices. Although it would be desirable to distinguish in this section between initial cigarette choices, switching as a prelude to quitting, switching as a substitute for quitting, and switching following an unsuccessful quit attempt, the available data do not permit such a fine-grained analysis. In the 1987 National Health Interview Survey (Giovino *et al.*, 1996, p. 45), 44 percent of current smokers said that they had at some time switched to a low-tar/low-nicotine cigarette in order to reduce their health risk. Similarly, a national survey found that about 60 percent of Ultra-Light smokers and approximately 40 percent of Light smokers said that they smoked reduced-tar cigarettes "to reduce the risks of smoking without having to give up smoking" (Kozlowski *et al.*, 1998a)

In this same national telephone survey, the reasons given by current daily smokers for why they chose to smoke Ultra-Light/Light cigarettes were: step toward quitting (49/30 percent), reduce risk (58/39 percent), reduce tar (73/57 percent), reduce nicotine (72/50 percent), and prefer the taste (69/80 percent) (Kozlowski *et al.*, 1998a). Very similar figures were obtained in telephone interviews of 266 randomly selected Massachusetts smokers (Kozlowski *et al.*, 1998a). In a recent experiment involving a randomly selected sample of 568 smokers of Light cigarettes, the reasons given for smoking Light cigarettes by people in the control or delayed intervention groups were: step toward quitting (25 percent), reduce risk (43 percent), reduce tar or nicotine (70 percent), and prefer taste (81 percent) (Kozlowski *et al.*, 1999). In these same groups, 39

percent said that Light cigarettes decreased their risk of having health problems.

A national survey of adolescents and young adults in 1993 found somewhat less of an emphasis on health issues, with smokers of Light or Ultra-Light cigarettes saying that they chose their brand because of taste (33 percent), because they were less irritating (29 percent), because they were healthier than other brands (21 percent), and because they "just liked them" (19 percent) (Giovino *et al.*, 1996, p. 49).

Not surprisingly, national survey of adults in 1986 showed that those who have ever switched in order to reduce tar or nicotine are more likely than those who never switched to believe that some brands are more hazardous than others (54 percent versus 40 percent, respectively) and to believe that their current brand is less hazardous than other brands (33 percent versus 16 percent, respectively) (Giovino *et al.*, 1996, p. 50). Although most smokers recognize that smoking is risky to one's health, those who chose Light and Ultra-Light cigarettes are more likely to acknowledge the risk than smokers of Regular cigarettes. For example, 85 percent of those who had switched to lower tar/nicotine brands said they were concerned about the health effects of smoking, compared to 70 percent of those who had never made this switch (Giovino *et al.*, 1996, p. 50). People who had switched were also more likely to say that their health had been affected by smoking and that a doctor had advised them to quit (Giovino *et al.*, 1996, p. 48).

Similarly, when the previously mentioned Canadian smokers were asked about the likelihood of developing health problems such as emphysema,

asthma, lung cancer, or stroke from smoking for many years, those who had switched from Regular to Light cigarettes cited more problems as very likely than those who started and continued smoking Regular cigarettes (2.13 v. 1.94 problems, respectively) (data from Health Canada, 1995).

Overall, the data are consistent in showing that smokers of Light and Ultra-Light cigarettes are especially concerned about protecting their health. The majority of these smokers choose Light or Ultra-Light cigarettes in the belief that this will reduce their health risks and/or make it easier to quit.

THE RELATIONSHIP OF SWITCHING TO QUITTING

Smokers of low-yield cigarettes not only express greater concern about the risks of smoking, but they also show more interest in quitting. In fact, 38 percent of the smoker respondents to the 1987 National Health Interview Survey who switched to Light cigarettes saw this change as a step toward quitting (Giovino *et al.*, 1996, p. 49), and people who smoked Light or Ultra-Light cigarettes tended to have tried more quitting strategies than those who smoked Regular cigarettes (Giovino *et al.*, 1996, p. 51). Among those smokers who had never attempted to quit, smokers of low-tar cigarettes were more likely to say that they had considered quitting.

Similar interest in both quitting and healthy behavior comes from a study of U.S. Air Force trainees (Haddock *et al.*, 1999). These researchers reported that individuals who said that they had "switched to a lower tar/nicotine cigarette just to reduce their health risk" were more likely to have experienced a successful 24-hour quit attempt in the past, had more healthy diets, and were less likely to

take other kinds of risks. These switchers were also less likely to say that they were addicted to cigarettes.

However, there are no data that show switching to reduced-tar cigarettes increases the likelihood of quitting. In fact, given the perceived reduction in risk from smoking Light cigarettes, a switch to such brands may well weaken the motivation to quit. In the Health Canada survey, 32.0 percent of those who started with, and continued to, smoke Light cigarettes made a quit attempt in the previous 3 months, compared to 15.1 percent of those who started with, and continued to, smoke Regular cigarettes. But of those who started with Regular cigarettes and were currently Light cigarette smokers, only 16.7 percent had tried to quit recently (data from Health Canada, 1995).

A large 1986 national study of adults in the United States who had ever smoked found that those who smoked low-yield cigarettes, regardless of whether they had ever switched to lower yield cigarettes, were less likely to have quit than those who smoked high-yield brands (Giovino *et al.*, 1996, p. 49). Persons who had ever switched brands to reduce their level of tar -and nicotine also were less likely to have quit than those who had never switched brands to reduce their level of tar and nicotine.

When Air Force trainee smokers—who had been required to abstain from smoking throughout their basic military training—were contacted 12 months later, only 12.5 percent of switchers and 11.1 percent of nonswitchers were still abstinent (Haddock *et al.*, 1999). Controlling for demographic factors and smoking history, this difference was not

statistically significant (odds ratio = 1.04, $p > .5$). Among Air Force trainees, switchers did report smoking fewer cigarettes than nonswitchers. However, in the 1995 Health Canada survey, people who had started smoking Regular cigarettes and currently smoked Light cigarettes did not smoke fewer cigarettes per day than those who stayed with Regular cigarettes.

Thus, even among individuals who had switched specifically because they were concerned about health risks, who had been assisted in long-term quitting by a mandatory abstinence period, or who said they were less addicted to cigarettes than did the nonswitchers, the switch to Light cigarettes prior to the abstinence period did not help them stay abstinent. Switching to Light cigarettes does not seem to be any more of a route toward quitting than simply staying with Regular cigarettes.

Thus, no data exist that indicate switching to Light or Ultra-Light cigarettes actually assists smokers in quitting.

SUMMARY

Overall, the accumulated data are quite consistent. They show that many consumers use the terms 'Light' and 'Ultra Light' as a guide to the riskiness of particular brands of cigarettes. To a considerable extent, smokers choose Light and Ultra-Light brands because they think that these cigarettes are not as harmful and cause fewer health problems. Particularly, individuals who are most concerned about smoking risks and most interested in quitting adopt low-yield brands.

To determine whether switching helps people to smoke less or to quit, one would ideally examine two

groups with the same interest in quitting and the same smoking history. One would compare the group that switched with the group that did not, looking at both cessation and smoking rates over time. In reality, however, those who switch are different from nonswitchers in numerous ways, all of which should facilitate their quitting and reduce the amount that they smoke. Despite these facilitating factors, the data show that switchers to a Light or Ultra-Light cigarette are not more likely to become nonsmokers than are nonswitchers.

Surveys indicate that switching to low-yield cigarettes is viewed by many smokers as a healthier choice. Given the interest in quitting among those who make this choice, their failure to quit at rates any higher than those who do not switch suggests that switching reduces the motivation to stop smoking. Thus, the advertising of brands designated as 'Light' or 'Ultra Light' misleads smokers as to the benefits these brands offer.

The data collected since publication of the 1996 NCI monograph only reinforce the conclusion reached by Giovino and colleagues (1996) in that volume that the existence of so called 'Light' and 'Ultra Light' cigarettes has kept many smokers interested in protecting their health from quitting. "The net effect of the introduction and mass marketing of these brands, then, may have been and may continue to be an increased number of smoking-attributable deaths." (Giovino *et al.*, 1996.)

CONCLUSIONS

1. Many consumers use the terms 'Light' and 'Ultra-Light' as a guide to the riskiness of particular brands of cigarettes.

2. Many smokers choose Light and Ultra-Light brands because they believe that such cigarettes are less likely to cause health problems.

3. Individuals who are most concerned about smoking risks and most interested in quitting adopt low-yield brands.

* * *

Marketing Cigarettes With Low Machine-Measured Yields

Richard W. Pollay, Timothy Dewhirst

INTRODUCTION

During the early 1950s, scientific and popular articles that presented lung cancer research findings initiated what the tobacco industry termed the "health scare," as consumers became increasingly concerned about the potential health risks incurred from smoking. Companies initially responded to this health scare by introducing filtered products that were accompanied by advertisements with explicit health-related statements. For example, Viceroy® maintained that it provided "Double-Barreled Health Protection" and also claimed that it was "Better for Your Health" in ad copy.

In time, the industry became aware that explicit health claims had the undesirable effects of making health concerns salient or predominant in the minds of consumers, and encouraged consumers to use "healthfulness" as the criterion by which they judged cigarettes. Motivation researchers and other trade analysts advised the industry to shift from explicit verbal assertions of health toward implied healthfulness, an approach that incorporated the use of visual imagery (Pollay, 1989a).

January of 1964 marked the release of the first Surgeon General's Report on smoking, and this event reawakened public concerns about the potential health consequences of smoking. Tobacco manufacturers needed to reduce consumer concerns and the ensuing anxious feelings. Quitting was not an easy option for smokers because nicotine is highly addictive. Switching to a lower (tar and nicotine) yield cigarette became an attractive alternative for many smokers once they were convinced by advertising that this would be a meaningful step toward health and away from risk. Thus, there was a ready market for "new and improved" cigarettes, or at least for those that seemed to be that way.

This chapter will review recently released documents from the tobacco industry and its consultants, produced during litigation, as well as excerpts from the relevant trade press, for insights into the firms' intentions and actions in marketing their products. Particular attention will be paid to the period of the mid-1970s, the launch period for most of the new generation of low-yield products. It will be shown that advertising for reduced-yield products led consumers to perceive filtered and low-tar delivery products as safer alternatives to regular cigarettes.

THE 1950s

Filters Debut as Health Protection

Advertising during the 1950s promoted filters as the technological fix to the health scare. Filters were heralded with various dramatic announcements featuring 'news' about: scientific discoveries; modern pure materials; research and development breakthroughs; certification by the United States Testing Company; implied endorsement by the

American Medical Association (see Figure 7-1); "miracle tip" filters; and descriptions of "20,000 filter traps" or filters made of activated charcoal, "selectrate," "millecel," "cellulose acetate" or "micronite" that were variously described as effective, complete, superior, and producing mildness, gentleness, smoothness, etc.

In 1958, for example, a press conference was held at New York's Plaza Hotel to launch Parliament® and its new filter, called "Hi-Fi" ("high filtration," as in high-fidelity state-of-the-art sound reproduction of the 1950s).

> "In the foyers, test tubes bubbled and glassed-in machines smoked cigarettes by means of tubes. Men and women in long white laboratory coats bustled about and stood ready to answer any questions. Inside, a Philip Morris executive told the audience of reporters that the new Hi-Fi filter was an event of 'irrevocable significance'. The new filter was described as 'hospital white'." (See Whelan, 1984, p. 90)

The purported product benefit of this new filtration was obviously the perceived reduction, if not elimination, of cancer and other health risks. Health benefits were implied through various slogans, such as "Just What the Dr. Ordered" (L&M®), "Inhale to your Heart's Content" (Embassy®), "The Secret to Life is in the Filter" (Life®), "Extra Margin" (of safety protection; analogy to helmets, seat belts, and other safety gear—Parliament®), and "Thinking Man's Filter" (Viceroy®). Other slogans were more implicit, but still provided health inferences to consumers (See Pollay, 1989b).

If nothing else, the high technology attributes of filtration, and its ability to produce healthful conditions in other media such as water, were communicated (see Figure 7-2).

> "The speed with which charcoal filters penetrated the health cigarette market shows the effectiveness of a new concept. The public had been conditioned to accept the filtering effects of charcoal in other fields, and when charcoal was added to cigarette filters it proved to be an effective advertising gimmick." (See Johnston, 1966, p. 16)

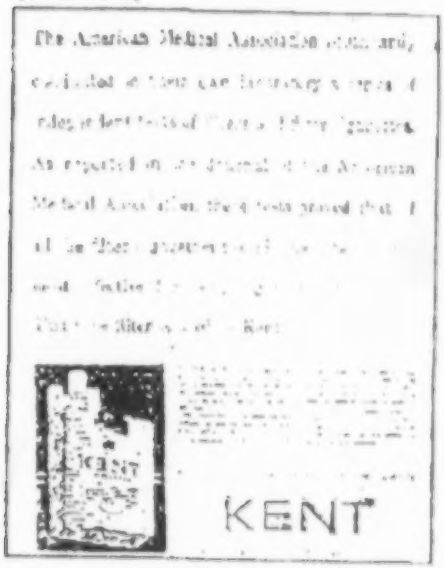
> "Claims or assurances related to health are prominent in the (cigarette) advertising. These claims and assurances vary in their explicitness, but they are sufficiently patent to compel the conclusion that much filter and menthol-filter advertising seeks to persuade smokers and potential smokers that smoking cigarettes is safe or not unhealthful." (See the Federal Trade Commission, 1964, p. 72)

The result in the marketplace was a dramatic conversion from 'regular' (short length; unfiltered) products to new product forms (filtered; king sized; 100 mm). Spending on advertising nearly tripled from 1952 to 1959, largely through promoting the virtues of the new filtered products, thereby enticing smokers to switch from their regular unfiltered products to filtered and, presumably, safer brands or product-line variants.

> "He had abandoned the regular cigarette, however, on the ground of reduced risk to health. . . . A further consequence of the 'tar

derby' was the rapid increase in advertising expenditures during this period. Advertising expenditures in selected media jumped from over $55 million in 1952 to approximately $150 million in 1959." (See Pepples, 1976, p. 1)

Figure 7-1
Kent—Implied AMA Endorsement (Circa 1953)



Females and Older Smokers as Early Filter Smokers

Gender and age were predictors of who adopted the new filtered products. Females converted more readily than males, and older concerned smokers adapted more readily than young starters (O'Keefe and Pollay, 1996). Thus, Philip Morris anticipated that females would be the largest potential market for a "health cigarette" following the release of the 1964 Surgeon General's Report:

"Women, and particularly young women, would constitute the greatest potential

> market for a health cigarette." (See Johnston, 1966, p. 1)

Psychology-based consumer research conducted for Brown & Williamson implied that the females who smoked filters were normal, whereas the males seemed unusually anxious. In 1967, this research described women who smoked filter cigarettes as "neither rebels (like women who smoke plain cigarettes), nor insecure (like females who smoke menthols)." The males who smoked filter cigarettes were described as ". . . apprehensive and depressive. They think about death, worry over possible troubles, are uneasy if inactive, don't trust others." (See Oxtoby-Smith, Inc., 1967, pp. 24-25.)

Filter Cigarette Marketing to Males

Once the public accepted filters as an adequate response to at least assuage their worst fears, there was a market opportunity in providing males with filtered products that delivered 'full flavor':

Figure 7-2
Tareyton—Charcoal Filter (1972)

> ". . . [O]nce the consumer had been sufficiently educated on the virtues of filters, a vacuum was created for a filter with taste; this vacuum was filled by Winston and Marlboro." (See Latimer, 1976, p. 5.)

Some internal industry documents from the 1970s portray the filters of the 1950s and the associated risk reduction as essentially 'cosmetic':

> ". . . [T]he public began to accept filters as a way to reduce the cosmetic risks of smoking and the attendant 'ego-status' risk of appearing to have an immoral, unclean habit." [Emphasis added.] (See Latimer, 1976, p. 3.)

The Early Tar Wars

The period from the mid-1950s until the mid-1960s was tumultuous for the industry. Various new filter products were launched, many competitive advertising claims used different standards of measurement, and the Federal Trade Commission (FTC) guidelines concerning what was permissible in cigarette advertising changed as well. Episodes of intense competitive rivalry of claims and, counter-claims about cigarette yields were dubbed the "tar derby" or "tar wars" within the trade, and the ensuing publicity in the popular press affected the marketplace. Some manufacturers took advantage of these dynamics to present their cigarettes as "healthy" to the public during a period of intense advertising claims, then capitalized on such reputations while selling products that were actually quite high in tar and nicotine yields.

> "In 1955, the FTC, reacting to conflicting claims as to tar and filtration, has imposed 'Cigarette Advertising Guides' banning all mention of tar, nicotine and filtration 'when not established by competent scientific proof'. This put a stop to such claims in advertising. In July and August of 1957, the Reader's Digest published two articles with figures on tar and nicotine mentioning Kent by name. The August article, written with Kent's assistance was practically an ad for Kent. In 90 days, Kent's sales leaped from 300 million to 3 billion per month. This article broke the dike and set off the famous Tar Derby. Over the next 4 years, tar levels were drastically cut. Marlboro dropped from 34 mg. tar in 1957 to 25 mg.

> in 1958 and 19 mg. in 1961." (See Cunningham and Walsh, 1980, p. 11)

Kent®, whose advertising of its asbestos-based "Micronite" filter had been very effective, engaged in a series of product revisions in the 1950s. With each iteration, the Kent® product yielded more and more tar and nicotine, and this pattern continued into the 1960s. Similar filter "loosening" was the subject of U.S. Congressional inquiry (Blatnik, 1958).

> "In mid 1960, the FTC called off the Tar Derby, rigidly prohibiting tar and nicotine claims. Some of the new low tar brands disappeared. Soon thereafter, the brands stopped reducing tar levels and, indeed, began to raise them. Kent, for example, went from 14 mg. in 1961 to 16 mg. in 1963 and 19 mg. in 1966. The FTC prohibition ended March 25, 1966 initiating a new phase in Hi-Fi development. Lorrillard [sic] decided not to reduce Kent's tar level again. Instead it put out True." (See Cunningham and Walsh, 1980, p.12.)

Medicinal Menthol

During this tar derby period, new menthol-filtered products were introduced, such as Salem®, Newport®, and Oasis®. Manufacturers of these new products capitalized on the reputation that menthol already had, due to its use in cold remedies and related medicinal applications, and the history of "pseudo-health" claims made in earlier menthol cigarette advertising. The Kool® brand had long been promoted as a medicinal product with would-be remedial properties that could make the cigarette suitable when smokers were suffering from coughs, colds, sore throats, etc.:

"Kool not only remained, but was actively positioned as a remedial/medicinal type product throughout the 1950's." (See Cunningham and Walsh, 1980, p. 9.)

Salem® was introduced in 1956 as the "first truly new smoking advance" (see Figure 7-3).

"Salem created a whole new meaning for menthol. From the heritage of solves-the-negative-problems-of-smoking, menthol almost instantly became a positive smoking sensation. Menthol in

Figure 7-3
Salem—First Truly New Smoking Advance (1956)

the filter form in the Salem advertising was a 'refreshing' taste experience. It can be viewed as very 'reassuring' in a personal concern climate. Undoubtedly, the medicinal menthol connotation carried forward in a therapeutic fashion, but as a positive taste benefit." (See Cunningham and Walsh, 1980; p. 9.)

"During the 'tar derby', menthol styles were perceived as healthier, low 'tar'

> smokes due to the quasi-medical health claims in menthol advertising . . . the first true menthol hi-fi was True Green, introduced in 1967. . . By 1974, menthol hi-fi styles had a 27% share of the hi-fi category—close to the proportion of menthols to all styles." (See Chambers, 1979.)

THE 1960s

Implications of the 1964 Surgeon General's Report

The first Surgeon General's Report on smoking and health in 1964 established cigarette smoking as a cause of lung cancer, at least in males. Philip Morris expressed some regret that the 1964 report did not strongly endorse the filtered products that had been sold to the public as a technological fix:

> "The health value of filters is undersold in the report and is the industry's best extant answer to its problem. The Tobacco Institute obviously should foster the communication of the filter message by all effective means." (See Wakeham, 1964, p. 8.)

Consumer Guilt and Anxiety

Brown & Williamson's advertising agency and market research contractors recognized consumers' mass sense of being addicted, as well as the ensuing conflict, guilt, anxieties, and need for reassurance:

> "Most smokers see themselves as addicts . . . the typical smoker feels guilty and anxious about smoking but impotent to

control it." (See Oxtoby-Smith, Inc., 1967, p. 6.)

"Psychologically, most smokers feel trapped. They *are* concerned about health and addiction. Smokers care about what commercials say about them. Advertising may help to reduce anxiety and guilt... Brand user image may be critical in influencing shifts in brand loyalty." [Emphasis in original.] (See Oxtoby-Smith, Inc., 1967, p. 14.)

[People who smoke filter cigarettes] "... may be receptive to advertising which helps them escape from their inner conflicts about smoking." (See Oxtoby-Smith, Inc., 1967, p. 23.)

"While unquestionably smokers are concerned about the tar and nicotine contents and the filtration effectiveness of their brands, nevertheless, both on the surface and even to some extent unconsciously, they appear to be resisting open involvement with this 'frightening' element of smoking."(See Alex Gochfeld Associates, Inc., 1969, p. 9.)

Some brands were less successful than others when trying to directly address consumer conflicts. Kent®, for example, used a visual portrayal of a smoker's conscience, and risked their ad being experienced as a nagging message (see Figure 7-4).

"... [T]he psychological blinders that smokers have donned, consciously or unconsciously . . . advertising which stresses tar and nicotine content was

> received less enthusiastically . . . even in the Silva Thins commercial where this theme was the major aspect of the spoken message, a large number of people effectually [sic] blocked it out of their consciousness retaining only the total image of the story shown on the screen." (See Alex Gochfeld Associates, Inc., 1969, pp. 72-73.)

Segments of Concerned Consumers

In order to provide a "foundation upon which marketing and advertising executions can be built," Lorillard did a market segmentation analysis.

> *"One of the most important revelations of the resent study was the identification of four market segments in the smoker market who are distinct in terms of their desires in cigarettes and their psychological profile.*
>
> The fundamental basis upon which the market segments were divided was their desires in the 'ideal cigarette'. After the market segments were divided in terms of their smoking needs, they were then further analyzed in terms of their demography, smoking behavior, and their personality profile." [Emphasis in original.] (See Kieling, 1964, p. 2.)

The consumer segment most appropriate for Kent® was described in substantial psychological detail. Despite the label of "social conformist," of central concern to these smokers were health consequences:

> "*Segment B, the social conformists, represents the prime potential market for development of Kent's share.*
>
> Compared with the rest of the market, Segment B is less concerned about smoking enjoyment and more concerned about the health aspect of cigarettes. He cares particularly about a cigarette's filter, its king size, and its association with health.
>
> Type B is a self-controlled person who is willing to compromise and give up immediate physical gratification for longer range objectives; he is a thinking person who acts deliberately, and is most likely to sacrifice some of the enjoyment of smoking in the interest of health, about which he is highly concerned. . . These requirements appear to be compatible with Kent's current image.
>
> The other psychological requirement of Type B is the need for social benefits through association with 'educated moderns'. . . 'educated moderns' include the active, modern people, college graduates, and professionals such as lawyers, doctors, etc." [Emphasis in original.] (See Kieling, 1964, pp. 3-5.)

Given that Kent® had a long-established association with 'health' from more than a decade's worth of health-themed advertising, the advertising deliberately offered reassurances to targeted consumers of being seen as "educated moderns," with the health promises subtly made:

> *"In the present climate of opinion after the Surgeon General's Report, it may be desirable to offer reassurance on 'association with health' in Kent's advertising."* [Emphasis in original.] (See Kieling, 1964, p. 14.)

Figure 7-4
Kent—Voice of Wisdom (1955)

The "Illusion of Filtration"

In their 1966 analysis of the market potential for a 'health' cigarette, Philip Morris recognized that while a large proportion of smokers had health concerns, they could be assuaged by products with largely illusory filtration systems. This was helpful since Philip Morris also knew that they had to keep delivering nicotine to those already addicted, as well as to those that they hoped would become addicted. The report's conclusions include the following:

"1. A large proportion of smokers are concerned about the relationship of cigarette smoking to health. . .

9. Mere reduction in nicotine and TPM [total particulate matter] deliveries by conventional methods of filtration would not be a sufficient basis for launching a new cigarette.

10. The illusion of filtration is as important as the fact of filtration.

11. Therefore any entry should be by a radically different method of filtration but need not be any more effective." (See Johnston, 1966, pp. 1-2.)

Within this report, Philip Morris' analyst captured the dilemma between health concerns and nicotine delivery felt by both smokers and manufacturers:

". . . [A]ny health cigarette must compromise between health implications on the one hand and flavor and nicotine on the other . . . flavor and nicotine are both necessary to sell a cigarette. A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation, and would therefore almost certainly fail." (See Johnston, 1966, p. 5.)

Many early brands had been sold with filters that were essentially cosmetic, without meaningful filtration. U.S. Congressional investigations in 1958 found reversals in which some firms' filtered products delivered even more tar and nicotine than their unfiltered traditional products. Reversals occurred even within brand families, with Brand X

filtered versions yielding higher tar and nicotine than the unfiltered Brand X products that they ostensibly improved upon (Blatnik, 1958, pp. 45-49).

Fear that Low-Yield Cigarettes Would Allow the Consumer to Wean from Nicotine

In 1969, R. J. Reynolds articulated concerns about reducing nicotine delivery and also maintaining a continuing profitable enterprise. The company saw nicotine as the *sine qua non* of smoking satisfaction and worried that reducing the delivery of nicotine to consumers might have the "self-defeating consequences" of weaning them away from smoking and letting them off the nicotine hook:

> "In its search for 'safer' cigarettes, the tobacco industry has, in essentially every case, simply reduced the amount of nicotine . . . perhaps weaning the smoker away from nicotine habituation and depriving him of parts of the gratification desired or expected. . . Thus, unless some miraculous solution to the smoking-health problem is found, the present 'safer' cigarette strategy, while prudent and fruitful for the short term, may be equivalent to long term liquidation of the cigarette industry." (See Teague, 1969, pp. 9-10.)

This concern with possible 'weaning' was still being expressed later by the British American Tobacco Co. when looking ahead to the 1980s:

> "Taking a long-term view, there is a danger in the current trend of lower and lower cigarette deliveries—*i.e.*, the smoker will be weaned away from the habit. . . Nicotine is an important aspect of

'satisfaction', and if the nicotine delivery is reduced below a threshold 'satisfaction' level, then surely smokers will question more readily why they are indulging in an expensive habit." (See British American Tobacco Company, 1976, p. 2)

THE 1970s

Early High-Filtration (Hi-Fi) Brands

"Carlton and True appeared in the mid 1960's, and Doral and Vantage followed shortly after. . . Lights and milds [sic] versions of full-taste brands proliferated in the early '70's, accounting for 31.6% of hi-fi business by 1975." (See Chambers, 1979.)

By 1973, it was clear to industry participants that a significant number of brands shared certain characteristics that led them to be described as a "new low-delivery segment." Precise relevance to tar and nicotine levels was elusive, in part because some brands like Kent® and Parliament® were perceived by consumers as being low in delivery due to their product and advertising histories, even though they were no longer in fact low in delivery. Listed below are some of the guidelines used by Philip Morris to define low-delivery brands for that company's internal purposes:

"2. All brands in the segment have advertising, if any, focussed on low delivery. No other brand has advertising focused on low delivery.

3. Some brands in the segment have tar and nicotine numbers on their packs. No brand not in the segment has tar and nicotine numbers on its pack.

4. Some brands in the segment have unusual construction filters or dilution holes. No brand not in the segment has either of these characteristics. . .

6. Brands in the segment which are extensions of 'flavor' brands have names which imply low delivery: Marlboro *Light*, Kool Mild, Pall Mall *Extra Mild*, Lucky *Ten*, etc.

Note that Kent and Parliament do not qualify for this new low delivery segment on any of the criteria above. One can still argue, however, that in the minds of consumers Kent and Parliament are low delivery cigarettes . . . consumer opinion should be the ultimate criterion for market segmentation." [Emphasis in original.] (See Tindall, 1973, p. 16.)

Nicotine as a Product Design Feature

During the early 1970s, Philip Morris was internally expressing confidence in its ability to selectively reduce tar yield while continuing to deliver the all-important nicotine:

". . . [T]he tar deliveries of the currently best selling cigarettes might be reduced somewhat, leaving nicotine as it is, without any significant overall decrease in the cigarettes' acceptability." (See Scholl, 1971, p. 1.)

R. J. Reynolds was following a similar line of thought in focussing its product development on nicotine delivery:

> "If nicotine is the *sine qua non* of tobacco products and tobacco products are recognized as being attractive dosage forms of nicotine, then it is logical to design our products—and where possible, our advertising—around nicotine delivery rather than 'tar' delivery or flavor." [Emphasis in original.] (See Teague, 1972b, p. 3.)

> "In today's market it is reasonable to believe that, given the choice, the typical smoker will chose [sic] and use the cigarette which delivers the desired, required amount of nicotine, with satisfactory flavor, mildness and other attributes, accompanied by the *least* amount of 'tar'." [Emphasis in original.] (See Teague, 1972a, p. 4.)

By 1976, the R. J. Reynolds Market Research Department (MRD) had joined the research and development (R&D) effort with a clear statement of their intent to maximize the nicotine satisfaction while maintaining high profitability by using conventional filters and packaging:

> "MRD and R&D have been working on a sophisticated consumer product testing program to help us ensure that we select the best blend alternative for our brands to optimize physiological satisfaction." (See Fitzgerald *et al.*, 1976, p. 1.)

> "Our top priority is to develop and market low 'tar' brands (12 mg. 'tar' and under)

> that: Maximize the physiological satisfaction per puff—the single most important need of smokers. . . [and] yield higher profitability which means conventional filters and soft packaging for high speed production efficiencies." (See Fitzgerald *et al.*, 1976, p. 38.)

A few years later in 1981, British American Tobacco, the parent company of Brown & Williamson, maintained that, ". . . effort should not be spent on designing a cigarette which, through its construction, denied the smoker the opportunity to compensate or oversmoke [sic] to any significant degree." [Emphasis added.] (See Oldman, 1981, p. 2.)

Consumer Reactions and Behavior

Consumer Ignorance and Confusion

During the 1970s, additional evidence of consumer confusion, misinformation, rationalizations, and the corresponding role played by advertising was gathered by multiple firms. Market researchers for industry members and their advertising agencies were not even confident that consumers knew what they were talking about when referring to the 'taste' of a cigarette:

> ". . . [I]t is almost impossible to know if the taste smokers talk about is something which they, themselves attribute to a cigarette or just a 'play-back' of some advertising messages." (See Marketing and Research Counselors, Inc., 1975, p. 2.)

Apparently, even the so-called 'taste' of a product is greatly influenced by the brand and its

reputation. Merit®, as a free-standing brand, had difficulties in being perceived as flavorful, whereas in contrast, product line extensions like Marlboro Light® had the advantage of being perceived as more flavorful due to the taste reputation of the 'parent' brand:

> ". . . [W]e talked to consumers about Merit's image and advertising. They told us that Merit, like other free standing low tar brands such as Kent, Vantage, Carlton, etc., were perceived to be weaker and have less taste than the line extension low tars: like Marlboro Lights, Winston Lights, Camel Lights. Apparently, these line extension low tars share the taste heritage of their parent full flavor brands." (See Philip Morris, 1990, pp. 13-14.)

In 1974, Kenyon & Eckhardt Advertising studied "recently starting smokers" for Brown & Williamson:

> "The purpose of this research was to gain insight into the perceptions, attitudes and behavior of younger, recently starting smokers regarding initial product usage, current smoking and health concerns. In addition, an effort was made to determine reactions to alternative product positionings [sic]." (See Kenyon & Eckhardt, 1974, p. 1).

> "Health concerns exist among younger smokers. . . One type of smoker rationalized smoking as a pleasure that outweighed the risks. Another felt that they didn't smoke enough to be dangerous. A third type rationalized his use of

> cigarettes by feeling he would quit before it was 'too late'. A final smoker group said that science would come to his rescue." (See Kenyon & Eckhardt, 1974, p. 2).
>
> "In talking to these young smokers about the different brands of cigarettes they have smoked, we found that they have little knowledge and, in fact, a great deal of misinformation on brand yields. In all of the sessions, not a single respondent know [sic] the tar and nicotine level of the cigarette he or she smoked." (See Kenyon & Eckhardt, 1974, p. 7).

Lorillard and their ad agency had the same experience when studying consumers for Kent®. Lorillard, along with Foote, Cone & Belding, encouraged scores of targeted smokers to talk about their lives, their cigarettes, their perceptions, and their feelings about tar content for Kent Golden Light®. They, like Brown & Williamson, found that "practically no one knew" the tar content of their own regularly smoked brands. This implied to these firms the need for ads showing comparative packages and data (O'Toole, 1981, pp. 94-95).

Philip Morris also knew about smokers' ignorance of yield levels in the 1970s. Most consumers were not only ignorant of the facts, but even their general impressions were "not too accurate," despite their faith in the technology of filters as displayed by shifts to filters and hi-fi products:

> "As yet, there is low awareness among smokers of the tar content of their brand. When asked if they knew the specific milligram tar content of their brand, the

> vast majority (89%) said they didn't know. . . smokers' *impressions* of whether their brand has high, moderate or low tar content is more on the mark—although still not too accurate." [Emphasis in original.] (See The Roper Organization, Inc., 1976, p. 14.)

Filters Are Still Perceived as Feminine

As in the 1950s and 1960s, females and older, health-concerned smokers most readily adopted the new, seemingly low-yield products of the 1970s:

> "The modern low 'tar' market began in the 1960's with such brands as True, Carlton, and Doral . . . initial gains were from females and older smokers." (See Brown & Williamson, circa 1977, p. 4.)

> "The hi-fi smoker demographics tend to be female, older, and have switched from a full flavor style to its counterpart in the hi-fi segment." (See Brown & Williamson, circa 1977, p. 13.)

This was so much the case that the males who smoked these products were suspected of being 'weak' and somehow wimpish or unmasculine in the eyes of consumers who were studied for Brown & Williamson:

> "Only women and weak men smoke True or any of those low tar and nicotine cigarettes." (See Marketing and Research Counselors, Inc., 1975, p. 9.)

In 1974, advertising agency advisors to Lorillard tried to counter this problem with a style of

advertising for the True® brand that they felt was more masculine in its tonality (see Figure 7-5).

> "In order to obtain a greater share of males . . . logical, rational approaches . . . a 'reasoning' empathetic approach . . . masculine, 'macho' tonality and appeal. Vantage's tonality can be described as 'laying it on the line' in an aggressive, possibly masculine, open fashion." (See DeGarmo, Inc., 1974.)

This problem of low-yield products being perceived as highly feminine seems to have led R. J. Reynolds to design a marketing strategy that attracted males to a low-yield cigarette that they were developing in 1976:

> "What we want is to portray the feeling and Image projected by Marlboro and Kool advertising on a Vantage/Merit type of cigarette. In other words, put 'balls' (two of them) on a low 'tar' and nicotine cigarette and position." [Parenthetical clarification of the male genitalia meaning of "balls" as in original.] (See Hind *et al.*, 1976, p. 63.)

While young male consumers understood that filters seemingly offered improved health prospects, this was in conflict with their desires to appear bold and daring:

> "In discussing how a smoker can limit the risks of serious disease without actually giving up smoking, the respondents clearly recognized the role of high filtration cigarettes . . . the underlying mechanism working against acceptance of high filtration brands in this age group is that

> the image of these cigarettes is contrary to one of the initial motivations for smoking—to look manly and strong." (See Kenyon & Eckhardt Advertising, 1974, p. 10.)

Continuing Consumer Conflicts

Consumers' conflicted feelings about smoking cigarettes were such that they became poor respondents to Brown & Williamson's research efforts:

> ". . . [S]mokers themselves falter badly when asked to comment on the rewards accruing to them from smoking. . . Smokers are so overwhelmed by the addictive properties of cigarettes and the potential health hazard that they wax virtually inarticulate when asked to present a case for the other side. They become guilty and shame-faced." (See Kalhok and Short, 1976, p. 8.)

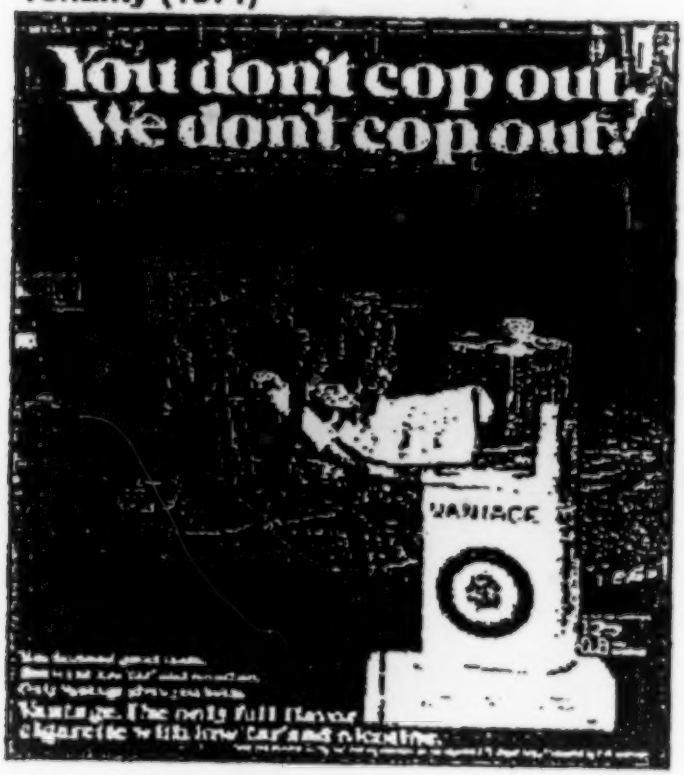
Smokers were not even aware and/or willing to admit how much they smoked:

> "Smokers' own estimates of their daily consumption levels are extremely unreliable. Many smokers underestimate their actual consumption and certain segments of many populations, notably young people and women, are often reluctant to admit they smoke." (See British American Tobacco Co., 1979, p. 1.)

Brown & Williamson blamed consumer confusion on advertising, in part. When contemplating a possible "index of safety" for cigarettes, Brown & Williamson commented that:

"Such an index would

Figure 7-5
Vantage "Don't Cop Out"—Macho Tonality (1971)



have merit for the health-conscious smoker, who otherwise may well become confused and increasingly dismayed if one alleged hazard follows another, coupled with the manufacturers' 'prescription for health' through advertising." (See Kalhok and Short, 1976, p. 11.)

Additional market research conducted for Brown & Williamson and its advertising agency, Ted Bates, indicated that ads needed to be carefully

designed, lest they challenge consumer denials and rationalizations and trigger consumer defensiveness:

> ". . . [S]mokers have to face the fact that they are illogical, irrational and stupid . . . *while an ad that depicts an exciting, invigorating situation could be interesting to the smoke-viewer, the very thin line separating positive excitement from negative-creating situation should never be crossed.*" [Emphasis in original.] (See Marketing and Research Counselors, Inc., 1975, pp. 1-2.)

> ". . . [C]ommunication with the smoker that either directly or indirectly violates and belittles this rationalized need will meet smoker's objection—it destroys the rationalization and the smoker would feel naked and rather stupid." (See Marketing and Research Counselors, Inc., 1975, p. 5.)

One of the problems that advertising could address was the declining social esteem of smokers, helping them to avoid shame and guilt:

> "Over the period of 20 years, the public and the private image of the smoker (though exceptions may be found among teenagers starting to smoke) has changed from being one of an individual exulting in his positive strength, masculinity and acceptance in the community, to that of a weak and dependent slave, with prospects of illness, however distant these may be, unnerved by his children's forebodings [sic], and without strength to quit." (See Kalhok and Short, 1976, p. 14.)

In discussing the "elements of good cigarette advertising or how to reduce objections to a cigarette," this point was reiterated while stating that "there are not any real, absolute, positive qualities and attributes in a cigarette," as noted in the following:

> "Most advertising for other products presents real, or at least accepted, benefits, values, attributes, end-results, etc., of the product it 'pushes,' sells. Cigarette advertising can not do the same. There are not any real, absolute, positive qualities and attributes in a cigarette and no one, even the most devout smokers, could believe any glorification or lies about it. . . The more a cigarette ad is disbelieved, the more it 'fights' the defense mechanism of the smoker—the more the smoker feels challenged. . . The picture, situation presented and the copy should be ambiguous enough to allow the reader to fill-in his/her illogical-logic which are the results of each individual defense-mechanism." (See Marketing and Research Counselors, Inc., 1975, pp. 12-13.)

Image of Health

It was important to the industry that certain cigarette brands continued to appear to be 'healthy', even if this was an image or illusion, and even if the manufacturing technology did not yet allow for the control of smoke toxicity:

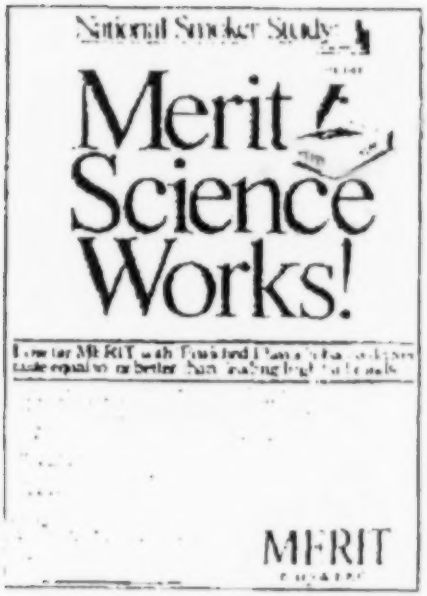
> "Looking further down the road, the possibility exists that . . . filters might offer a selective means of controlling smoke toxicity. Well before that date, however,

> opportunities exist for filter and cigarette designs which offer the image of 'health reassurance'." [Emphases added.] (See British American Tobacco Co., 1976, p. 6.)

New Product Activity

Philip Morris had seen the competitive value of a so-called "health cigarette" following the first Surgeon General's Report on cigarettes in 1964. Over the course of the next 12 years, Philip Morris worked on such a product, culminating in the 1976 product launch of the Merit® brand. Just as with Philip Morris' earlier efforts in the 1950s to develop and consumer-test the Marlboro® product, packaging, and promotion, the product development process for Merit® was as much focused on consumer and market testing as on product technologies, per se. The final market launch strategies used in 1976 gave particular emphasis to the choice of the name Merit®, obviously communicating apparent virtue, and used an advertising style that made this product development seem eminently scientific and newsworthy and less like an ad (see Figure 7-6). The product launch strategy included a very high level of advertising investment ($45 million in 1976) to support a "multi-media blitz."

> "The objective of the advertising campaign was to establish enough credibility to overcome smoker skepticism towards low-tar good taste claims. The name 'MERIT' was chosen because it was short, to the point, and it reflected the consumer appeal of good taste at low tar." (See John and Wakeham, 1977, p. 13.)



"Merit was the primary focus of the sales force for a full year . . . We spent $45 million on advertising—remember $45 million in 1976! This was the record amount for a new brand introduction . . . Creatively, we used provocative headlines and important looking copy which looked like it had real news value. *Tar/taste theory exploded!—Smoke cracked!—Taste barrier broken!*" (Emphasis in original.) (See Philip Morris, 1990, p. 4.)

This Merit® launch effort, and its stunning success, led to a rash of similar competitive efforts:

"Merit's introduction gave birth to a series of me-too's. . . 'Fact' was introduced in 1976. . . RJR tried to counter Merit's technological enriched flavor story with their all natural 'Real' launched in mid 1976. . . 'Decade', which was launched on the platform of 'the cigarette that took 10

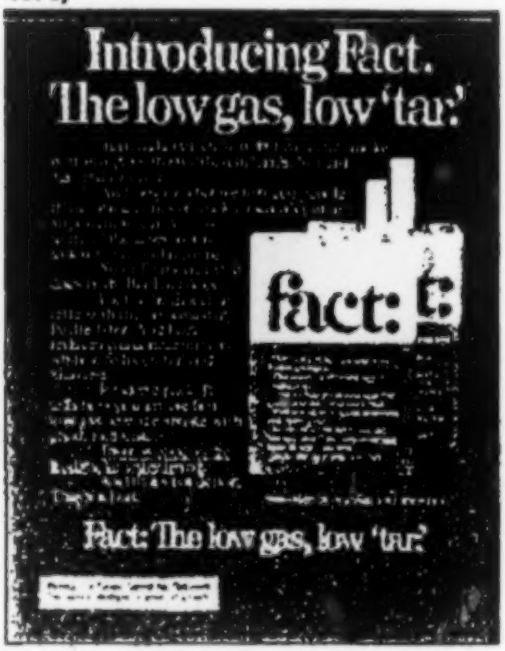
> years to create'. . . Later, Barclay was introduced." (See Philip Morris, 1990, p. 5.)

Marketing of Reduced Gas Phase Cigarettes

Brown & Williamson's introduction of the Fact® brand was described by a company spokesman as "a typical new product introduction as compared to Philip Morris' sudden national blitz for Merit . . . Fact is directed to the educated, concerned smoker. Our copy is straightforward and direct, and there is no gender differentiation or symbolism." (See Brand Report 12, 1976, p. 146.) Fact® was using the "Purite" filter to filter gases, but needed to first inform consumers that gases were an issue. Their initial effort (see Figure 7-7) was test-marketed in New England and the North Central States, but did not perform well in the marketplace, despite advertising support of about $30 million over 1976-1977. The senior brand manager of Brown & Williamson explained:

> "The low gas benefit of the product wasn't of interest to the public, and wasn't understood. The advertising and packaging failed to reinforce the flavor aspect of the brand. . . The package was perceived by customers as medicinal, like a prescription bottle of Geritol. The tar level wasn't low enough by mid-1976 to allow it to be a talking point in advertising." (See Brand Report 23, 1977, p. 152.)

Figure 7-7
Introducing Fact—Low Gas (Before—1976)



Brown & Williamson's reconsideration of its Purite gas filter showed a recognition that in having to educate consumers about gas in smoke, they might raise more anxiety than they could resolve with this type of product:

> "While low gas does offer the opportunity to make positive health statements to active and passive smokers alike, it does run the category risk of raising another health issue and perceptively offering lower taste/satisfaction. . . past experiences with Lark and FACT (*i.e.*, good taste and greater health reassurance via a new method) demonstrate the inability to immediately proceed with either of these options." (Brown & Williamson, circa 1977, p. 1.)

Marketing Cigarettes Without Additives

R. J. Reynolds' 1976 assessment for their 3-year action plan acknowledged that they were not yet technologically capable of producing products that had reduced tar without the undesirable effect of also having reduced nicotine:

> "In general, methods used to reduce 'tar' delivery in cigarettes lead to a proportionate reduction in nicotine. . . It would be more desirable from our standpoint, *i.e.*, providing satisfaction to the smoker and maintaining his allegiance to smoking if we could reduce 'tar' to whatever target we choose without a proportionate drop in nicotine. . . It will take some time to get there by the approaches we visualize." (See Fitzgerald *et al.*, 1976, p. 91.)

Nonetheless, R. J. Reynolds wanted to participate in the rapidly expanding category of concerned consumers, referred to as "worriers" by the company:

> "[The] . . . 'worrier' segment of the market (17% of smokers are so classified). . . 'Numbers' products have a growing appeal to these smokers. Products in the 1-6 mg. 'tar' range will continue to build successful long-term franchises (*e.g.*, Carlton's growth rate, NOW's immediate acceptance—fostered by the intense industry commitment in 1976 to hi-fi brands)." (See Fitzgerald *et al.*, 1976.)

Figure 7-8
Real Natural (1977)

R.J. Reynolds' product offering was the Real® brand, with a "natural-no additives: claim (see Figure 7-8). This 'natural' position was thought to convey positive features to both full-flavor smokers and those seeking effective filtration and health protection. The Real® concept was described as having, "Broad appeal based primarily on 'natural'/no additives claim. Connotes taste to full flavor smokers, low numbers to hi-fi smokers. No significant negatives." (See Fitzgerald *et al.*, 1976.)

When the Real® brand was launched by R. J. Reynolds in 1977, it had a budget of $40 million for "boxcar loads of display materials, more than 25 million sample packages, the biggest billboard overlooking Time Square, the summer long services of 2,000 salesmen . . . and advertising, according to the agency running the campaign, on everything but painted rocks." (See Crittenden, 1977, p. 1ff.)

That same year, Brown & Williamson was scheduled to spend $50 million through the Ted Bates advertising agency on just the product-line extension of Kool Super Light® campaign was to appear "in every conceivable non-broadcast medium, and even an inconceivable one"—1,500 Beetleboards, *i.e.*, painted up Volkswagen Beetle® cars (Dougherty, 1977).

Promotional Patterns

The enormous advertising budgets used to launch the new low-yield products commanded a very disproportionate share of the firms' total advertising budgets (share of voice, or SOV), and were seen as creating marketplace demand for low-yield products. The advertising spending for new products in 1976-1978 was awesome. New brands and product-line extensions (variations on familiar brands) were introduced with major budgets as follows (Source: Lorillard, Inc., 1980):

Product	Budget	Year
Merit®	$44 million	(1976)
Now®	$23 million	(1976)
Fact®	$20 million	(1976)
Real®	$29 million	(1977)
Decade®	$24 million	(1977)
Camel Light®	$25.3 million	(1978)
Carlton®	$15.3 million	(1976)
Vantage®	$20.6 million	(1978/1977)
Kent Golden Light®	$21.0 million	(1976-1978)
Marlboro Light®	$20.1 million	(1976-1978)

> "The phenomenal growth of hi-fi brands is, in part, a self-fulfilling prophecy. Hi-fi expenditures have grown from 7% SOV in

> 1972 to 45% in 1977, much faster than actual segment growth. Spending per share point now equals $8.3MM." (See Brown & Williamson, circa 1977, p. 14.)

> "[The]. . . low tar revolution [of 1976ff] is not ignited by a particular event, such as a Reader's Digest article, a Surgeon General's Report, etc.; it happens quietly based on technologically improved products and consumers' desire for a reasonable compromise and the industry's massive advertising support leading category development." (See Cunningham and Walsh, 1980, p. 55.)

> "Lo Fi advertising now (Feb 1980) accounts for only 21% of total—less than a third of 1974's share of voice. Reduced tar brands have increased to 79% share of voice—with ULT's (Ultra Low Tar's) now accounting for 19% of the total. ULT advertising is growing at a faster rate than any other category." (See Lorillard, Inc., 1980.)

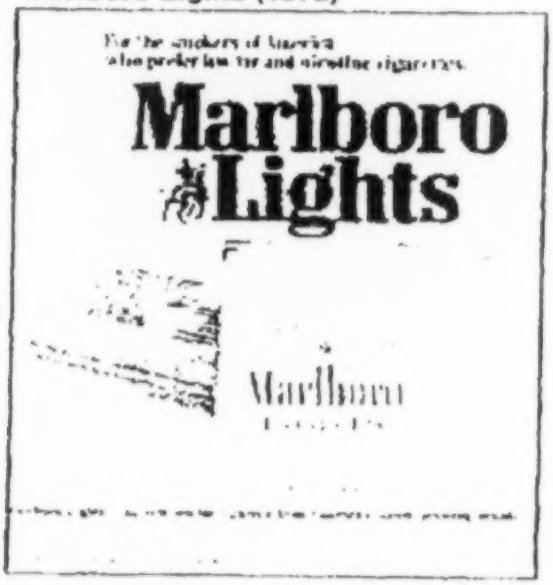
Executional Aspects

The advertising executions that communicated the "lightness" theme were 'light' in many dimensions:

> "'Light-lighter-lightest' were achieved by insistance [sic] on lighter presentations—product story imagery—white packs—pale colours—mildness dominated copy." (See British American Tobacco Company, circa 1985, p. 13.)

This tactic of using color imagery to connote product 'lightness' had been used earlier with the introduction of Marlboro Light® in 1971 (see Figure 7-9).

Figure 7-9
Marlboro Lights (1972)



> "... [W]hen Marlboro Lights was first introduced in 1971... the advertising was dramatically different... first using water color executions, then, big pack shots, a lot of white space and a small cowboy visual." (See Philip Morris, 1990, p. 6.)

This means of communicating 'lightness' with white or pale-colored props, settings, and pristine environments wasn't new with Marlboro Light®, and has proven to be a durable execution tactic. For example, Kent® in the early 1960s showed models all dressed in white, with both white props and in a pure white, interior studio environment (see Figure 7-10).

Figure 7-10
Kent—Black Smokers In Pure White Environment (1964)

Through most of the 1990s, the Parliament® campaign consistently used models dressed all in white placed in white environments as well as in outside pristine environments (see Figure 7-11).

Artwork for Marlboro Ultra Light® has featured a pristine environment dominated by fresh air and water, with only minimally sized cowboys or horses (see Figure 7-12).

Even the packaging design is important in affecting perceptions of relative safety, as well as taste:

> "Red packs connote strong flavor, green packs connote coolness or menthol and white packs suggest that a cigaret [sic] is low-tar. White means sanitary and safe. And if you put a low-tar cigaret [sic] in a red package, people say it tastes stronger

> than the same cigaret [sic] packaged in white." (See Koten, 1980, p. 22)

Because of its importance, Brown & Williamson tested 33 packages before choosing the blue, gold, and red design used for its Viceroy Rich Light® brand. Philip Morris heightened the social status appeal of its Benson & Hedges® brand by printing the company's Park Avenue address on the front and back of each pack. R. J. Reynolds gave Now® a "modern, chrome-and-glass look designed to appeal to upscale city and suburban dwellers." Philip Morris' successful Merit® connotes a "flamboyant, young-in-spirit image" (to offset low tar's dull image) with big yellow, brown, and orange racing stripes (Koten, 1980). Most "Light" and "Ultra Light" cigarettes are presented in pure white packaging with minimal adornments.

To supplement and reinforce their advertising efforts, Brown & Williamson conceived of public relations and political activities that encouraged consumers to perceive apparently independent endorsements of low-yield products. This would reinforce advertising impressions about the virtues of low-tar products with seemingly independent "news" from credible sources.

> "B&W will undertake activities designed to generate statements by public health opinion leaders which will indicate tolerance for smoking and improve the consumer's perception of ultra low 'tar' cigarettes (5 mg. or less)... Through political and scientific friends, B&W will attempt to elicit... statements sympathetic to the concept that generally less health

risk is associated with ultra low delivery cigarette consumption. . .

Figure 7-11
Parliament Lights White on White In Pristine Environment (1998)

B&W would seek to generate spontaneous mainstream media articles dealing with component deliveries, much as the old *Readers Digest* [sic] articles." (What are the obstacles/enemies of a swing to low "tar" and what action should we take? Minnesota Trial Exhibit 26,185, 1982.)

Capturing Consumer Concerns

The continuation of intensive promotion into 1977 involved "a numbers game that boggles the mind while promising to relieve the lungs" (Brand Report 23, 1977, p. 150). Competition was intense, due in part to the high stakes and the relatively few number of switchers. Said Lorillard's Tom Mau several years later:

> "The vast majority of the cigarette consumers are brand loyal. . . Only somewhere around 10% of people switch brands annually. That's not a lot of people. . . To come out with something new and successful is difficult." (See Gardener, 1984, p. 176.)

It was clear to industry observers that the pace of new product launches in the mid-1970s was seeking to capitalize on the health concerns of smokers:

> "The current duel between True and Vantage and between Carlton and Now are other examples of competitive efforts to capitalize on the smoking/health controversy." (See Pepples, 1976, p. 9.)

When the motivations for smoking ultra-low-tar cigarettes were studied by Philip Morris' contractors in 1978, representatives of the Brand Management Group, Marketing Research Department, and the advertising agency all observed the discussion groups from behind a two-way viewing mirror and tape recordings were made available. The discussions were guided by a detailed outline with extensive probing. The findings were that all of the reasons for selecting this product form were health-related:

> ". . . [W]ith respect to ultra low tar brands there appear to be particular additional motivations for smoking this type of cigarette. These include:
>
> A - Voluntary desire for a safer cigarette.
>
> B - Increasing awareness and concern about possible hazards of smoking.

C - Health problem forcing a change to a safer cigarette (as an alternative to not being able to quit).

D - Peer and family pressure to smoke a safer cigarette (as an alternative to not being able to stop smoking).

E - Mental commitment to do something about smoking habits." (See Goldstein/Krall Marketing Resources, Inc., 1979.)

Many consumers considered, tried, and even switched to the nominally lower yield products, and did so primarily in pursuit of better health:

"More people have switched brands in the past year, and the largest group of switchers have gone to low tars. Even among those who have not switched to a low tar brand, there is fairly high disposition among smokers to consider switching to one. This is probably attributable to the continuing concern over smoking and health." (See The Roper Organization, Inc., 1976, p. 3.)

"Results show that almost two-thirds of smokers are 'impressed' by the talk of how cigarettes can seriously affect their health.. Women are more concerned about smoking and health than men, young people more than older people, whites more than blacks, and the college educated more than those less well educated." [The growth among low tar brands was] "... particularly strong among two groups who have traditionally been trend setters in the

cigarette market—women and the college educated." (See The Roper Organization, Inc., 1976, pp. 8, 12.)

When asked if and why some brands were thought to be better for health, smokers had believed the idea

Figure 7-12
Marlboro Ultra Light Pristine Environment (1998)

that the nominally low yields were meaningful:

"The low tar brands have cornered opinion that to the extent any brands are better for your health, they are. All smokers were asked whether they thought any particular brands were better for your health than others, and if so, which brands. Three in ten of all smokers said some brands were better for health than others, and almost half of the low tar brand smokers said this. The brands named were almost exclusively low tar brands, with the older low tar brands (Vantage, True and Carlton) getting most mentions. Considering the short length of time they have been on the market, both Merit and Now had

comparatively good mention." (See The Roper Organization, Inc., 1976, p. 19.)

". . . [I]t is the lower tar content of these brands that make people say they are better for health. When asked why the brands they named were better for your health, answers overwhelmingly were concerned with lower tar content." (See The Roper Organization, Inc., 1976, p. 20.)

The reassurance of apparent low yields led many smokers to switch rather than quit:

"Smokers *needed* light brands for tangible, practical, understandable reasons. . . It is useful to consider lights more as a third alternative to quitting and cutting down—a branded hybrid of smokers' unsuccessful attempts to modify their habit on their own." [Emphasis in original.] (See British American Tobacco Co., circa 1985, pp. 9, 13.)

[Many said] ". . . they had tried to quit smoking at some point in time, they do not appear to have cut down the number of cigarettes they are smoking. The only concession that has been made is the switch to an ultra low tar brand. These smokers seemed to be either resigned to the fact or satisfied that they will probably never quit smoking. In point of fact, smoking an ultra low tar cigarette seems to relieve some of the guilt of smoking and provide an excuse not to quit." (See Goldstein/Krall Marketing Resources, Inc., 1979, p. 12.)

The True® campaign in the 1970s spoke directly to the desire to quit, portraying quitting and smoking True® as equivalent alternatives (see Figure 7-13).

An important strategic reason for adding low-yield products to a product line, also known as a brand family, was to retain the patronage of consumers as they aged and became more concerned about their health:

> [Developing] ". . . new products in the higher end of the reduced tar category. . . is especially important for Lorillard's long term growth. Younger smokers (less than 35) are smoking products in the higher end of the reduced tar segment and lo-fi. These consumers will move down the tar spectrum, as they get older, with the probability of staying with the line extensions of products consumed in their youth." (See Mau, 1981, p. 7.)

Figure 7-13
Quit or Smoke True as Equivalent Options (1976)

Lessons Learned About Advertising

Tobacco manufacturers saw advertising, and marketing efforts more generally, as vital to how consumers perceived the products and themselves; these efforts ultimately determined how well various firms succeeded. Lorillard listed marketing's psychological import right alongside of the product's capacity to deliver the physiological stimulation of nicotine.

> ". . . [L]et me try to define the elements of product acceptance (given sales distribution and trial) as they relate to tobacco products. . . The value or price of the product is a factor. . . The second element in acceptance is psychological. One principle component of this element arises from our marketing effort. . . The third element in acceptance is physiological, being comprised largely of the nicotine-

induced stimulation." (See Spears, 1973, pp. 2-3.)

With experience, members of the industry realized that the best advertising gave filter smokers ego reinforcement, and didn't focus solely on nominal filter effectiveness. This might be appropriate when introducing new product concepts (*e.g.*, filters), but once the concept was understood, it was better to avoid any direct addressing of health aspects.

> "*1964-1972—The beginning of the high filtration derby*. . . In this type of environment, good new product copy directly addressed the health arguments by focusing on lowered tar and nicotine while also claiming to retain real tobacco taste." [Emphasis in original.] (See Latimer, 1976, p. 4.)

> "Less effective copy during this period continued to focus on the filtration process (*e.g.*, selectrate filter, charcoal filters, accuray, etc.) or vacillated between emphasis on taste and emphasis on filter." (See Latimer, 1976, p. 3.)

Brown & Williamson articulated the dual objectives of good advertising—providing reassurance about healthfulness (without, of course, doing so in a heavy-handed way to induce defensiveness) and also providing a socially attractive brand image that the smoker could acquire when buying and displaying the package:

> ". . . [T]he average smoker often seeks self-justification for smoking. Good cigarette advertising in the past has given the average smoker a means of justification on

> the two dimensions typically used in anti-smoking arguments: 1. *High performance risk dimension.* . . . 2. *Ego/status risk dimension.*
>
> *Cigarette advertising. . .provides only justification/rationalization for those who already smoke. . .* The smoker's cigarette brand choice process is largely an exercise In risk reduction. For some smokers reduction in physical performance risk is paramount, for others reduction in 'ego/status' risk comes first. . . All good cigarette advertising has either directly addressed the anti-smoking arguments prevalent at the time or has created a strong, attractive image into which the besieged smoker could withdraw." [Emphasis in original.] (See Latimer, 1976, pp. 1-2.)

The international headquarters of Brown & Williamson's parent firm, the British American Tobacco Co., counseled that new marketing approaches should:

> ". . . [C]reate brands and products which reassure consumers, by answering to their needs. Overall marketing policy will be such that we maintain faith and confidence in the smoking habit." (See Short, 1977, p. 1.)

The advertising campaigns and related communications were central to how this was to be done:

> "All work in this area [communications] should be directed towards providing

> *consumer reassurance* about cigarettes and the smoking habit. . . by claimed low deliveries, by the perception of low deliveries and by the perception of 'mildness'. Furthermore, advertising for low delivery or traditional brands should be constructed in ways so as not to provoke anxiety about health, but to alleviate it, and enable the smoker to feel assured about the habit and confident in maintaining it over time." [Emphasis in original.] (See Short, 1977, p. 3.)

This attempt to reassure, but not so bluntly as to raise defensiveness, and to simultaneously offer positive, ego-satisfying, brand imagery, seems to have been a key to the success of some of the pioneering filter products. Even the firms being dominated by the more successful marketing efforts of other firms recognized this. In 1969, American Tobacco noted that:

> ". . . [T]hose ads which make a special point of stressing low tar and nicotine appear to enjoy less attention and seem to have less positive impact than those whose advertising has an enjoyment, fun, or 'story' orientation." (See Alex Gochfeld Associates, Inc., 1969, p. 18.)

THE 1980s

Policing Deceptive Advertising

Carlton®

Some very deceptive practices went totally unchecked. Carlton® had the technology for delivering very low machine-measured tar yields, and used these low-yield test results in its

advertising. A very desirable brand image was created while promoting Carlton® in a hard box, emphasizing its very low numbers (see Figure 7-14). Unfortunately, the boxed product seems to have been a "phantom brand" and consumers who bought Carlton® in the store got soft packs. Although consumers might well have expected that they were getting the same product in a different box, it was in fact a very different product—one that at times was delivering many, many more times the tar and nicotine than indicated in the ads.

> "FTC's present system further contributes to consumer deception because it allows some cigarette companies to promote heavily a 'box' brand, *without adequately distinguishing it from the soft pack of the same brand name*, which delivers considerably more 'tar'. In fact, however, the companies produce such a small volume of the box brand as to make it a phantom brand that is rarely found in the marketplace. On the other hand, the soft-pack version bearing the identical brand name and package design but testing at a considerably higher 'tar' level, is the version readily available to the consumer." [Emphasis in original.] (See Pepples, 1982, p. 4.)

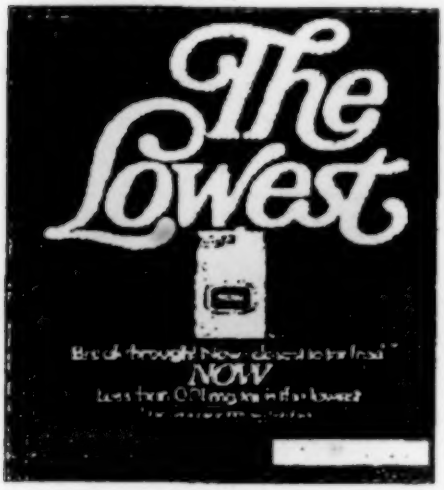
> Now®, like Carlton®, also featured its very low-yield hard box product in the advertising, while its other product forms delivered many, many more times higher yield rates (see Figure 7-15).

Figure 7-14
Carlton Box "Phantom Brand" (1985)

The only effective policing of deceptive advertising of low-tar products came from competitors, rather than the FTC or any other agency. In one case, Lorillard used their data from a taste comparison test to imply a consumer preference for its Triumph® brand over Merit® (see Figure 7-16) and other brands. Both Philip Morris and R. J. Reynolds objected, and had data of their own to support their claims. In the court proceedings, it was learned that Lorillard survey showed 36 percent favored Triumph® over Merit®, 24 percent rated them even and 40 percent favored Merit®; these preferences were obtained after subjects had been informed of the products' tar level. Although nearly a quarter of the subjects had no preference, the enjoined statement took advantage of this and stated, "An amazing 60% said 3 mg

Triumph tastes as good or better than 8 mg Merit." (See Philip Morris, Inc., v. Loew's Theatres, Inc., 1980, p. 1.)

Figure 7-15
Now Box with Substantially Lower Yield Than Soft Pack (1980)



Barclay®

With the FTC yield data providing an apparent accreditation, consumers were likely to perceive these yield numbers as valid and meaningful. When Brown & Williamson brought the Barclay® product to market in 1981, it did so with an ad campaign that called the product 99 percent tar free (see Figure 7-17). The product's structure, which was described as "extremely easy to design and produce," allowed for so much dilution of the smoke column when tested on machines that it generated phenomenally low-yield data in the FTC test. This caused alarm among Brown & Williamson's competitors, who petitioned the FTC for help. Because of the competitive threat posed by Barclay®, its competitors disclosed to authorities their awareness that the FTC testing

procedure was flawed and that the yield data were invalid for human smokers.

> "The next generation of 'Barclay competitors' will be spawned (indeed has already been spawned) in the minds of R&D and marketing people throughout the industry and its suppliers. This generation of products, or the next, could easily be products which will deliver *NO* 'tar' or nicotine when smoked by the FTC method, and yet when smoked by humans essentially be unfiltered cigarettes. Such products could (and would) be advertized [sic] as 'tar-free', 'zero milligrams FTC tar', or the 'ultimate low-tar cigarette', while actually delivering 20-, 30-, 40-mg or more 'tar' when used by a human smoker! They will be extremely easy to design and produce. . . . Such cigarettes, while deceptive in the extreme, would be very difficult for the consumer to resist, since they would provide everything that we presently believe makes for desirable products: taste, 'punch', ease of draw and 'low FTC tar'." [Emphasis in original.] (See Reynolds *et al.*, 1982, p. 1.)

[As to the threat Barclay repre-

Figure 7-16
Triumph Beats Merit with Deceptive Data (1980)

sented:] "Here was a 1 mg. tar product that delivered the taste of a much stronger cigarette. Of course we know how they did it, but to consumers the 99% tar free claim was intriguing. . . Merit responded by supporting Merit Ultra Lights with an $80 million media budget." (See Philip Morris, 1990, p. 8.)

Important Imagery

Once the product concept of low-yield filtration had been communicated, and the previously discussed brands had established some corresponding reputation, their advertising strategies tended toward more visual, image-oriented forms, as these could convey enviable lifestyles, healthy behavior, rewarded risk-taking, and the social class and 'intelligence' of brand users.

When Merit Ultra Light® was introduced in 1983, the advertising program had an $80 million media budget, which did not account for retail promotional efforts. This advertising series featured imagery of large sailing ships in what was termed the "sea" campaign (see Figure 7-18). The executions not only showed young people in an enviable, carefree, affluent lifestyle amidst a pristine environment, they also were careful to avoid any suggestions of danger.

Vantage®—An Intelligent Choice

Images and ad copy had to be carefully selected, lest the ads reinforce fears rather than offer reassurance. In 1980, one Vantage® ad made direct reference to "what you may not want" from a cigarette, only to discover that it alarmed some readers about cancer:

> "The fact that a Vantage ad dares to raise the issue of 'what you may not want' generates defensiveness toward smoking in general, and a feeling of discomfort. The reference to the taste of Vantage is lost; overpowered by the implications of tar, nicotine and cancer." (See R. J. Reynolds-MacDonald, 1980.)

The target Vantage® smoker was "female, white collar, extremely concerned about their health, and would like to quit smoking." A Vantage® ad headlined "To Smoke or Not to Smoke" (see Figure 7-19) ran in both the United States and Canada. It stated that, "Vantage is the cigarette for people who may have second thoughts about smoking and are looking for a way to do something about it." According to an R. J. Reynolds operational plan (1983) and strategic plan (1983-1987), the basic

strategy was to present Vantage® as an intelligent choice, "positioning Vantage as the only contemporary choice for intelligent smokers." (See Pollay, 2000.) The tactic was to influence consumer perceptions. A 1983 R. J. Reynolds media plan sought "to establish a consumer perception that Vantage is a contemporary cigarette for intelligent smokers." (See Pollay, 2000.) Apparently, this aim was accomplished because, in 1987, an R. J. Reynolds media plan briefing document stated that the goal for a target audience with a "high amount of quitters" was "to maintain consumer perception that Vantage is a contemporary cigarette for intelligent smokers." (See Pollay, 2000.)

Figure 7-17
Barclay—99% Tar Free (1981)

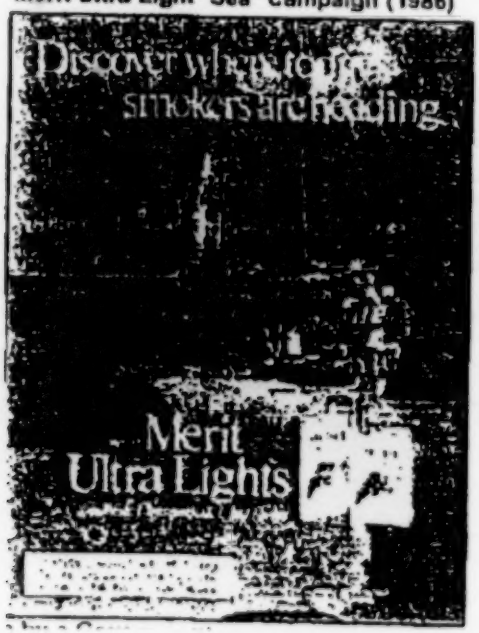
Psychoanalyzing Merit® and Vantage® Smokers

No doubt envious of the success of Merit® among "concerned smokers," as well as that of Marlboro® among starters, R. J. Reynolds commissioned in-depth psychological research from Social Research, Inc., in 1982. The purpose of the survey was to compare the smokers of Vantage® and Merit® based on their smoking histories, their beliefs about the filter and other responses to advertising, and their personalities. In-depth interviews elicited insights into some of the psychological subtleties of respondents from Atlanta, Indianapolis, Denver, Phoenix, and San Francisco. R. J. Reynolds gleaned some useful information from the research:

> "*Both Vantage and Merit smokers have similar early smoking histories*. . . moving from non-filters to filters, switching to lighter cigarettes to relieve physical symptoms and as an acknowledgement of increased concerns about alleged health hazards." [Emphasis in original.] (See Levy and Robles, 1982, p. 5.)
>
> "Vantage smokers believe that the filter itself is strong enough to catch these impurities and that the hole structure is such that they will not see so much of the resulting discoloration. These ideas make them think the end product is a milder and more 'healthful' smoke." (See Levy and Robles, 1982, p. 16.)
>
> "Merit smokers. . . have been influenced by Merit advertising which so single-mindedly proclaims the brand's lowered tar and nicotine. . . Vantage smokers. . .the

advertising influenced them by promising real smoking satis-

Figure 7-18
Merit Ultra Light "Sea" Campaign (1986)



faction from a cigarette, by not focusing so much on the low tar aspect." (See Levy and Robles, 1982, p. 89.)

DISCUSSION

The Value of Official Government Ratings

Some member of the industry have long found the appearance of Federal Government vetting to be a desirable factor usable in advertising. For example, the 1958 advertising for Parliament® boasted that it was "the first filter cigarette in the world that meets the standards of the United States Testing Co." (see Figure 7-20). The ad showed the organization's official seal, which included a microscope, and although the ad was generated by a

private firm, the seal was readily perceived as acceptance by a Government agency.

Note, too, the Carlton® use of a headline stating that the "Latest U.S. Gov't [sic] Laboratory test confirms... Carlton is lowest" in 1985, as seen earlier in Figure 7-14.

The Federal Government's adoption of a "uniform and reliable testing procedure" consistent with the methodology of Philip Morris also seemed beneficial to that corporation. Philip Morris foresaw in 1964 that such test results could be used in advertising copy, as they could communicate that an official Government agency had vetted the products, as well as the possibility that data with a competitive advantage angle could be provided:

> "Apart from possible legal requirements, such a policy would enhance advertising opportunities." (See Wakeham, 1964, p. 6.)

Later, Brown & Williamson saw the benefit to them, even if not to the public, in using Government evaluations and rating procedures. While the industry preferred to go unregulated, regulation offered some benefits, namely prospects for greater stability and the appearance of Government approval of their products by official testing procedures.

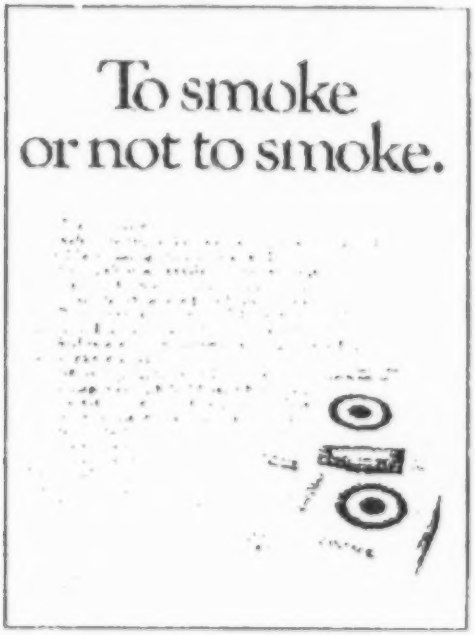
> "The tobacco industry, of course, would prefer no regulation at all. If there must be regulation, the industry is probably better off to have it at the federal level... Even expanded regulatory efforts may be shared by the industry to [illegible word] stability in the market or by individual manufacturers to bolster market positions- for example, by capitalizing on official tar

and nicotine ratings in cigarette advertising." (See Pepples, 1976, p. 8.)

The promotional value of the FTC data meant that the industry recognized protecting the credibility of the FTC procedure was in its own interests:

> "Inherent limitations of the FTC cigarette testing program, and borderline low-'tar' advertising practices resulting from the way the test results are reported have contributed to substantial consumer confusion and misunderstanding. This situation threatens to erode public confidence in both the FTC's test reports and the industry's advertising claims." (See Pepples, 1982, p. 1.)

Vantage "To Smoke or Not To Smoke" (1974)



Poor Information, But Cigarette Rich Imagery

Cigarette advertising is notoriously uninformative, with characteristic forms using veiled health implications and pictures of 'health' along with vague promises of taste and satisfaction (Pollay, 1994, pp. 179-184). Occasionally, ads for new technological developments in filter design called attention to the filter, with allusions to filter effectiveness, but almost always without being specific about what constituents of tobacco or its smoke were being filtered, what degree of filtration effectiveness was being realized, or what health or safety consequences were warranted. Only the tar and nicotine information—as mandated by regulation and generated by conventional test methods—is given, without interpretation. For example, Carlton® now encourages smokers to start "thinking about number 1" and smoke its "Ultra Ultra Light" cigarette (see Figure 7-21).

Many cigarette ads contain no information whatsoever, save for the implicit reminder that a brand exists, e.g., many Marlboro ads. Some contemporary ads, like a recent campaign for Merit Ultra Light®, take a humorous visual approach to convey that it might be lighter than expected (see Figure 7-22).

Consumer Information

The cigarette industry has not voluntarily employed its advertising to inform consumers in a consistent and meaningful way about any of the following: 1) the technologies employed in fabricating the products, 2) the constituents added in the manufacturing processes, 3) the residues and contaminants that may be present

Figure 7-20
Parliament—Endorsement of United States Testing Co. (1958)

in the combustible column, 4) the constituents of smoke that may be hazardous, 5) the addictiveness of nicotine, or 6) the health risks to which its regular consumers and their families are inevitably exposed. Instead, their advertising for low-yield products has relied on pictures of health and images of intelligence, and has misled consumers into believing filtered products in general, and low-tar products in specific, to be safe or safer than other forms without explaining exactly why.

Marketing/Advertising Gives Cigarettes Vitality

While the technological means to produce low-yield products might seem important, to industry insiders it was the marketing sophistication that was even more crucial in determining the relative success of various firms:

> [In contrast to the import of marketing] ". . . technology in the tobacco industry has had virtually no effect on the relative success of the six companies. .. the industry has *become so sophisticated* in marketing

> that nontechnical developments, while they might have a large influence on the industry in terms of the types of cigarettes available, would probably do little to shift shares from one company to another." [Emphasis added.] (See Ennis *et al.*, 1984.)

Michael Miles, Chairman and Chief Executive Officer of Philip Morris, defended advertising eloquently in a trade ad:

> "Those of us in the business of building brands don't have to be sold on the importance of advertising or on the necessity for advertising. For me, there is still nothing more exciting in business than to watch effective advertising work its magic in the marketplace. For when a brand is acknowledged and accepted by the consumer, it becomes something much more than what it really is. . . we invest $2 billion annually in advertising. It's worth every penny. For we believe that a strong brand gives the consumer another whole set of reasons—emotional and personal—to act." (See Miles, 1992, p. 16.)

SUMMARY

This chapter has reviewed many tobacco industry documents and marketing trade sources. The review revealed the importance of marketing and advertising to the vitality of this industry, and the many means used to create an appearance of healthfulness for various cigarette products, especially

Figure 7-21
Carlton—"Isn't It Time You Started Thinking About Number One?" (1999)

those with nominally low yields. Several tactics were employed by the tobacco industry that misled consumers to perceive filtered and low-tar delivery products as safe or safer and as a viable alternative to quitting.

Nicotine delivery is a design feature of cigarette products, and an essential part of the design. Tobacco company documents reflect a fear of consumers becoming weaned from smoking if they are not maintained with sufficient nicotine. Consumer acceptance of products that fail to deliver adequate nicotine satisfaction is also difficult to maintain.

Health concerns of a serious nature have been present among some smokers since at least the 1950s. Females, older, and more highly educated smokers have long been more likely to manifest

health concerns. The ramifications of these health concerns are anxieties, conflicts, shame, and guilt, leading to a need for reassurance from advertising. In the 1950s, the promotion of filters provided this reassurance with very explicit verbal representations about the health protection that they offered. Once the nominal purpose of filtration was well understood by the consuming public, the healthfulness of filters was represented by more implicit means. For example, thinly veiled language ("hospital white" filters; "Alive with Pleasure") and visual "pictures of health" images were used, displaying bold and robust behavior in pristine environments.

The image or illusion of filtration is essential to the selling of cigarettes, whereas the fact of filtration is not. Consumer (smoker) opinion and perceptions, are what governs their behavior, not the medical or technological facts known to manufacturers and experts.

Many deceptive practices have been employed over the years (some continue to this date) that foster and perpetuate the illusion that various cigarette brands and product forms are relatively healthy. These tactics include:

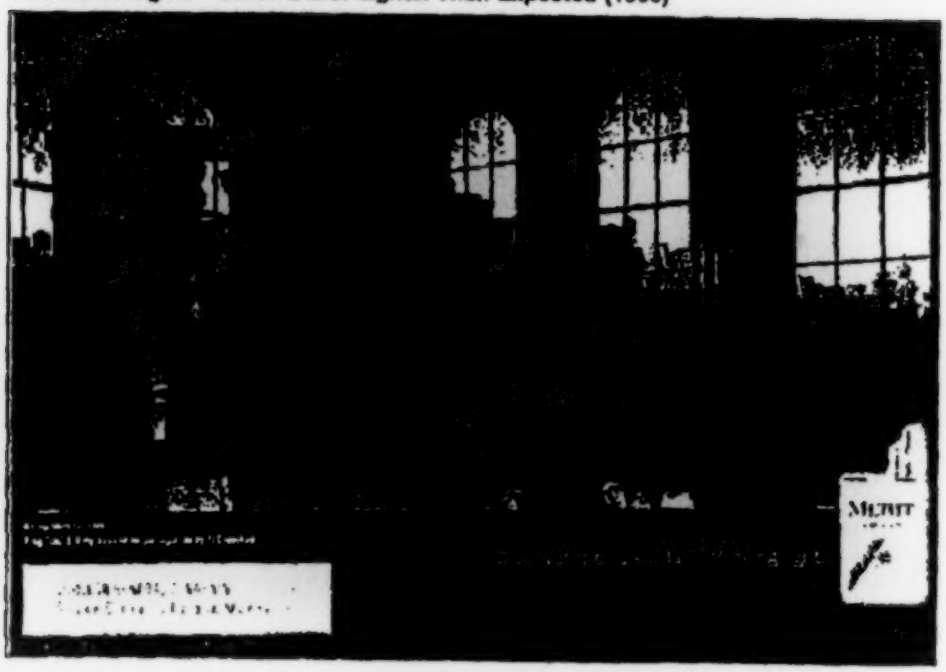
- Using Medicinal Menthol. Menthol was introduced into some products capitalizing on its "pseudo-health" benefit, a consumer perception derived from experiencing menthol elsewhere in the medicinal context of cough and cold remedies.

- Loosening Filters. Once established in the public's mind as having effective filtration, Kent® offered several successive generations of product in the 1950s and

1960s that were heralded as "new and improved," but in fact contained ever more tar and nicotine.

- Using High-Tech Imagery. New filters were offered that seemed to be the fruits of scientific research and to have meaningful technological innovations, such as charcoal filters, dual filters, chambered filters, recessed "safety zoned" filters, gas trap filters, etc. Almost none of these specified the hazardous elements being filtered.
- Using Virtuous Brand Names and Descriptors. Brands were given names to imply state-of-the-art technology and/or a virtuous product, *e.g.*, Life®, Merit®, Now®, True®, or Vantage®. Product variations are described in technically meaningless, but seemingly quantitative, descriptors like "Mild," "Ultra," "Light," or "Super-Light."
- Adding a Very Low-Yield Product to a Product Line. Some product lines had wide-ranging tar and nicotine deliveries in the same brand family. The best of these levels was used for adver-

Figure 7-22
Merit Ultra Lights—Sumo Ballet Lighter Than Expected (1999)



tising purposes to reassure consumers while selling other product varieties. In some cases, the best product variant was rarely sold and was known as a phantom brand.

- Fooling the Machines and Using the Data to Fool Smokers. Filters and cigarette papers were developed starting in the 1950s that "air-conditioned" the smoke by diluting the smoke column with side-stream air. When smoked by machines as in the FTC tests, low-tar and low-nicotine numbers resulted, a desirable outcome for promotional purposes—but higher yields were ingested by real smokers, a desirable outcome for maintaining nicotine addiction.

Low-yield cigarettes were heavily promoted. Promotional programs for cigarettes have been lavishly funded in general, with advertising in multiple media. A disproportionate amount of this funding promoted low-yield products when they were introduced in the 1970s.

Little or no meaningful information is contained in promotions for a given cigarette, such as its ingredients and additives, the technology of filtration, the hazardous constituents of smoke, or the health consequences of smoking. Consumer ignorance and confusion has been persistent over many decades. While smokers who switch to low-yield brands manifest faith in their relative healthfulness, few consumers know the true delivery characteristics of the brands that they smoke, and even their general impressions are not very accurate.

Finally, testing of products by official Government agencies, such as the FTC, imbues the industry with a certain level of credibility, while providing Government-rated data that can be used for promotional purposes.

CONCLUSIONS

1. Advertisements of filtered and low-tar cigarettes were intended to reassure smokers (who were worried about the health risks of smoking) and were meant to prevent smokers from quitting based on those same concerns.

2. Advertising and promotional efforts were successful in getting smokers to use filtered and low-yield cigarette brands.

3. Internal tobacco company documents demonstrate that the cigarette manufacturers recognized the inherent deception of advertising that

offered cigarettes as "Light" or "Ultra-Light," or as having the lowest tar and nicotine yields.

* * *

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296-8434

Horace R. Kornegay
President & Executive Director December 17, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter, which constitutes a revision of the letter and memorandum forwarded to the Commission on October 23, 1970, signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., trading as The House of Edgeworth; Liggett & Myers Incorporated, Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco -Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and published, constitutes a violation of law.

I understand that Liggett & Myers Incorporated is writing a separate letter to the Commission explaining the basis upon which it is a signatory to the voluntary proposal submitted.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

December 17, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade Commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, and advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States, and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all advertising in those issues of newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which is reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less

than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

___ mg. "tar", ___ mg. nicotine
av. per cigarette, FTC Report ___

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

___ mg. "tar", ___ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal

Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines from test data that the "tar" or nicotine values of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain from Western Union a similar market pick-up of the variety. If within forty-five working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within forty-five working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such time as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin thirty

working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC.,
TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED

By /s/_____
Milton E. Harrington, President

LORILLARD, a Division of Loew's Theatres, Inc.

By /s/_____
Curtis H. Judge, President

PHILIP MORRIS USA

By /s/_____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/ _____
Colin Stokes, Chairman of the Board

STEPHANO BROTHERS

By /s/ _____
Constantine Stephano

UNITED STATES TOBACCO COMPANY

By /s/ _____
L.A. Bantle,
President

Chart 1

SOME UNEXPECTED OBSERVATIONS ON TAR AND NICOTINE AND SMOKER BEHAVIOR

March 1, 1974

Chart 2

INTRODUCTION

We have long assumed:

1. Tar = Taste
2. Taste patterns are changing in direction of low delivery cigarettes
3. FTC test results indicate what people are getting from their cigarets
4. People smoke to get nicotine; more nicotine will compensate for less tar.

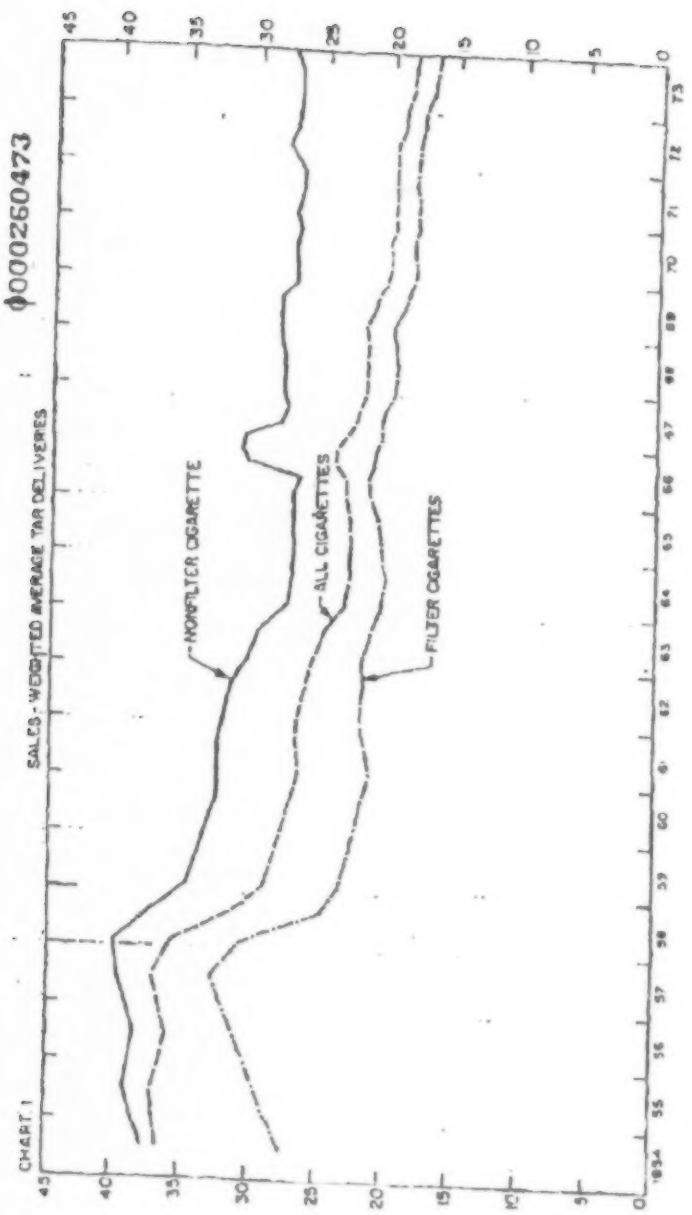
CHART 1
SALES - WEIGHTED AVERAGE TAR DELIVERIES
NONFILTER CIGARETTE
ALL CIGARETTES
FILTER CIGARETTES
1954
55
56
57
58
59
60
61
62
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65
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35
40
45

0002260473

Chart 3

SOME CONTRARY OBSERVATIONS

1. In many blind panel tests smokers appear to be relatively insensitive to differences in FTC tar and nicotine ratings.

June, 1972 Test TNT-1

340 filter smokers found

A. 8 mg cigarets stronger than 18 mg. cigarets

B. Low tar, low nicotine cigarets more acceptable than low tar, high nicotine cigarets.

August, 1972 Test JND-1

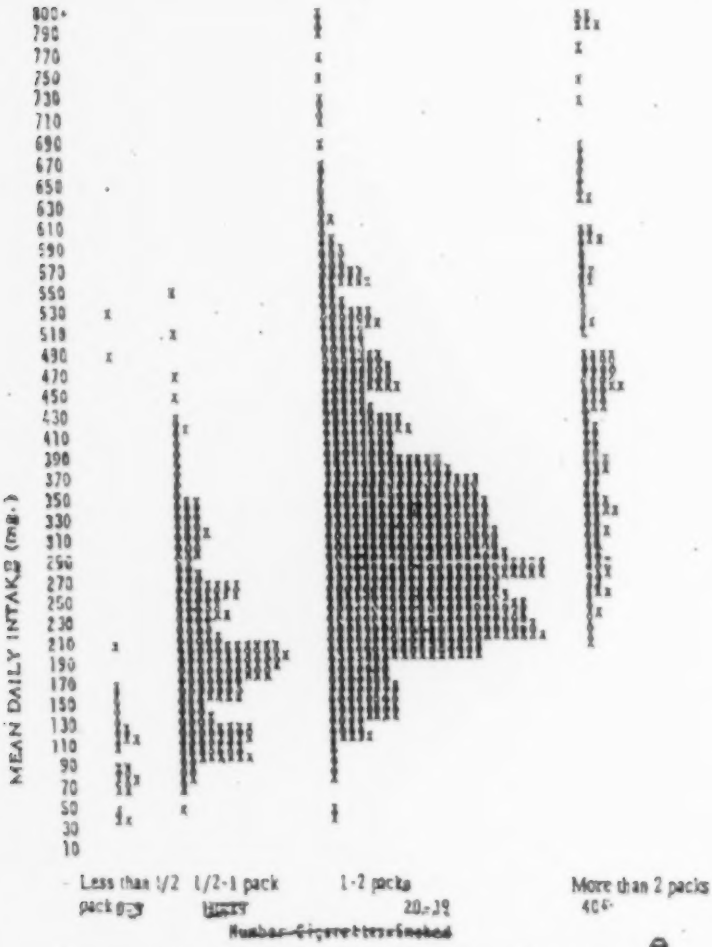
268 filter smokers found 18 mg. cigarets equally acceptable as 24 mg. cigarets.

March, 1973 Test JND-2

200 filter smokers could not distinguish between 21 mg. and 14 mg. cigarets.

Chart 4

DISTRIBUTION OF MEAN DAILY INTAKE FOR SIMILAR NUMBER OF CIGARETS SMOKED



~~Fig. 4. A SCATTERGRAM SHOWING THE DISTRIBUTION IN MEAN DAILY INTAKE FOR EACH OF THE FOUR SMOKER ESTIMATED CONSUMPTION RATE INTERVALS.~~ (Grate)

0000260475

Chart 5

A study of 1,235 smokers in 1968 and again in 1972 showed them to have increased the daily number of cigarets they smoke and, where possible the length smoked.

Smokers of	FTC Tar		Number	
	1968	1972	1968	1972
Marlboro 85	20.9	18.2	20.1	21.3
Winston 85	21.7	20.0	21.4	21.6
Viceroy	18.9	16.8	19.6	22.2
Salem	20.8	18.8	18.8	20.2
Kool	18.1	16.8	23.1	21.9
Marlboro 100	19.6	19.4	20.3	24.5
B & H 100	20.8	17.5	23.6	24.4
Winston 100	21.4	18.8	20.4	22.9
Salem 100	21.4	19.4	19.5	17.3
Pall Mall	18.3	16.7	25.6	21.6

On a long-term basis, smokers seem to be adjusting to lower delivery.

Length	
1968	1972
51.9	50.7
52.6	50.3
51.1	50.8
52.0	50.9
50.6	50.7
48.9	60.7
47.8	63.4
47.4	61.3
50.3	62.2
49.5	63.9

Chart 6

In a controlled study, 72 filter smokers were given either higher or lower delivery cigarets for four weeks.

A. Their measured intake changed less than predicted from FTC tar and nicotine ratings.

	Daily Intake (mg) FTC Tar		
	Before Shift	Observed	Expected
Change from 19.0 mg. to 24.4 mg.	240	266	308
Change from 19.0 mg. to 15.2 mg.	207	169	165

B. They adjusted by changing the number of cigarets and/or lengths smoked to come more closely to their previous smoke intakes.

Bt there was great variation among smokers in adjusting. Some did not change at all. Others changed drastically.

Chart 7

From the foregoing observations it became clear that we needed to know more about how the smoker puffs today.

The FTC Tar and Nicotine Test and the Philip Morris 20-Port Smoking Machine parameters are:

Puff Volume	35 ml.
Puff Duration	2 seconds
Puff Flow Rate (Est.)	1050 ml./min.
Puff Interval	58 seconds
(One puff per minute)	
Butt length	23 mm or tipping +5 mm

These conditions were established more than twenty years ago for nonfilter smokers.

Chart 8

The Puff Recorder

Cigaret holder director

Transducer

Cassette tape
recorder

Tape is analyzed by computer which calculates the puff parameters and plots the puff profile.

The Smoker Simulator

The cassette tape impulses an electronic smoking machine which duplicates exactly the smoking behavior of a given individual with a given cigaret. Delivery of tar, nicotine, and other smoke components can then be determined at the same conditions.

Chart 9

Observation 1

Puff profiles vary from smoker to smoker.

And differ greatly from the standard smoking machine.

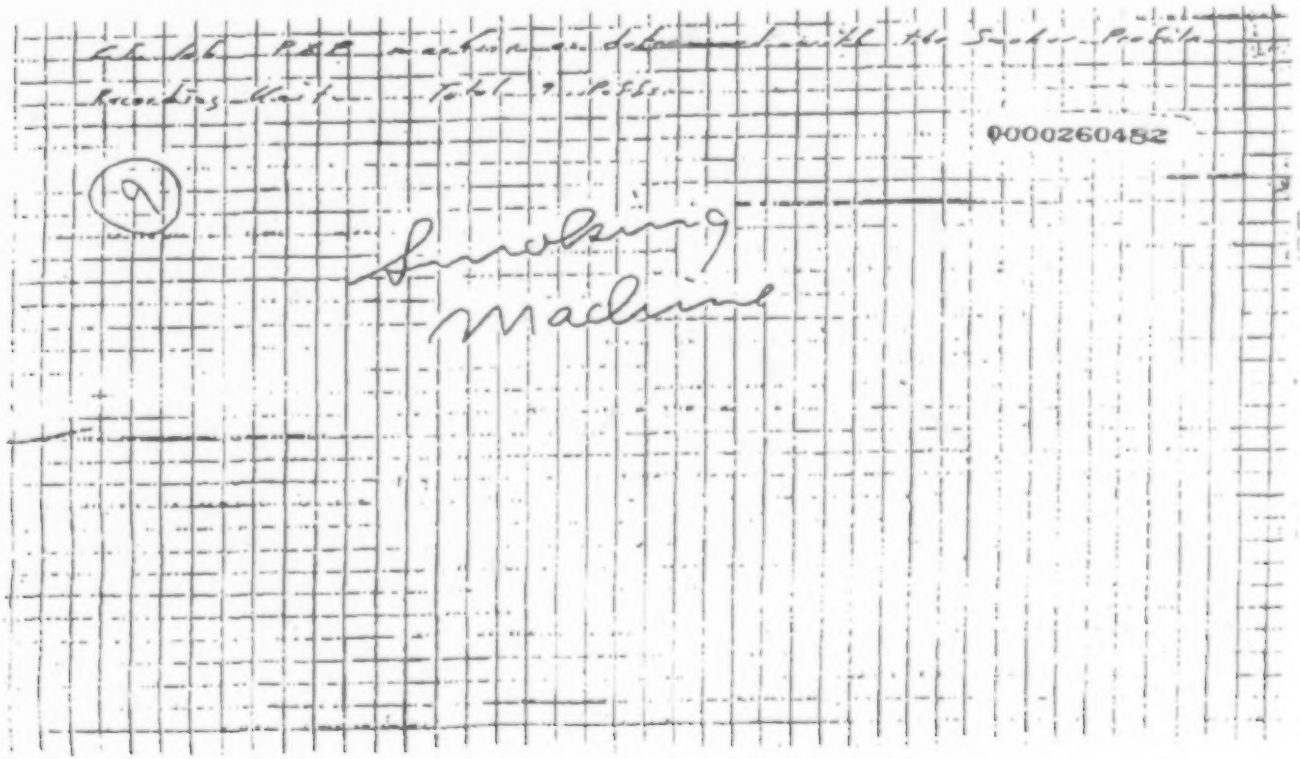

Recording Unit Total 9 Pass
0000260482
9
Smoking
Machine

Chart 10

Observation 2

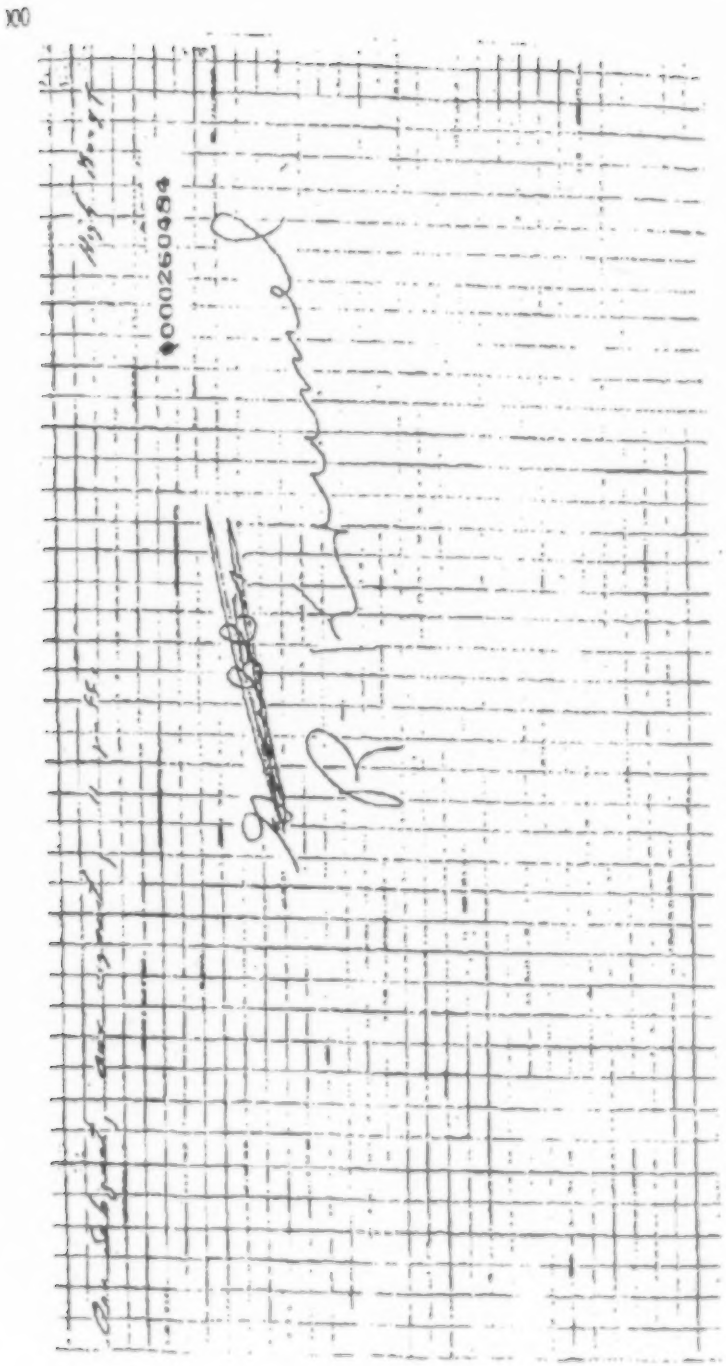
Each smoker follows his own characteristic puff profile throughout a given cigaret.

Smoker: K. Burns

Smoker: Grubbs

Smoker: Krumel (KRUMMEL)

Smoker: Martin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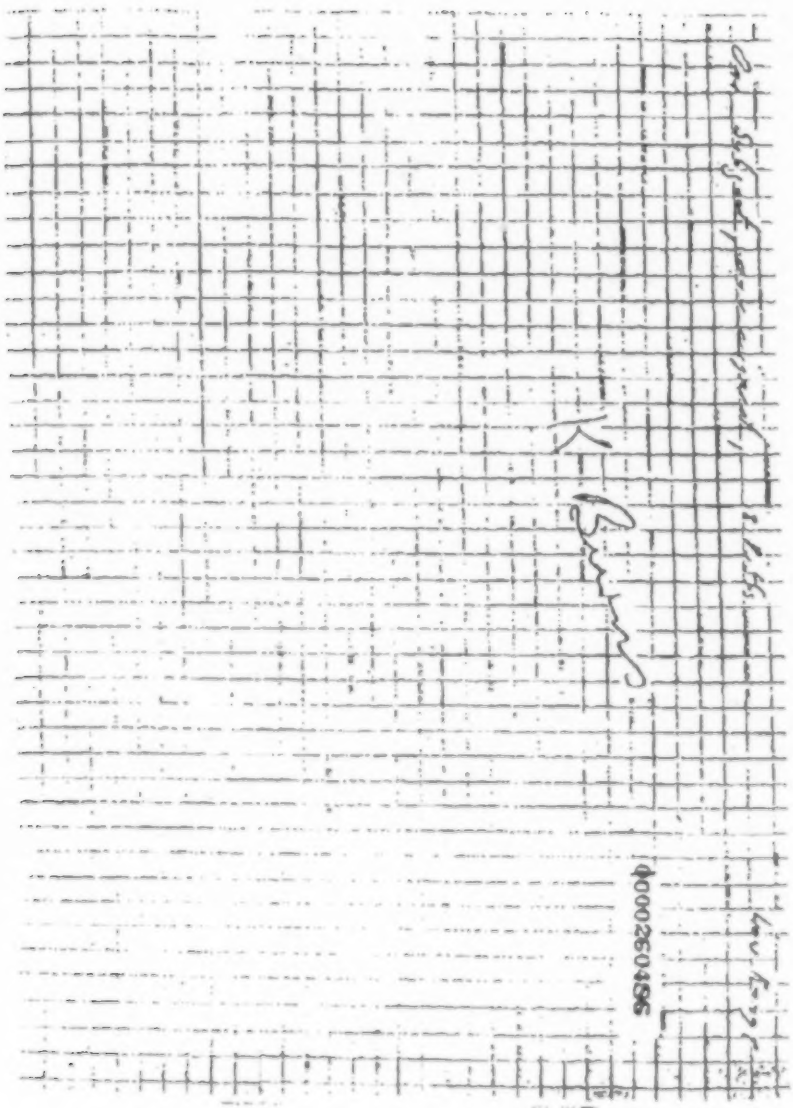
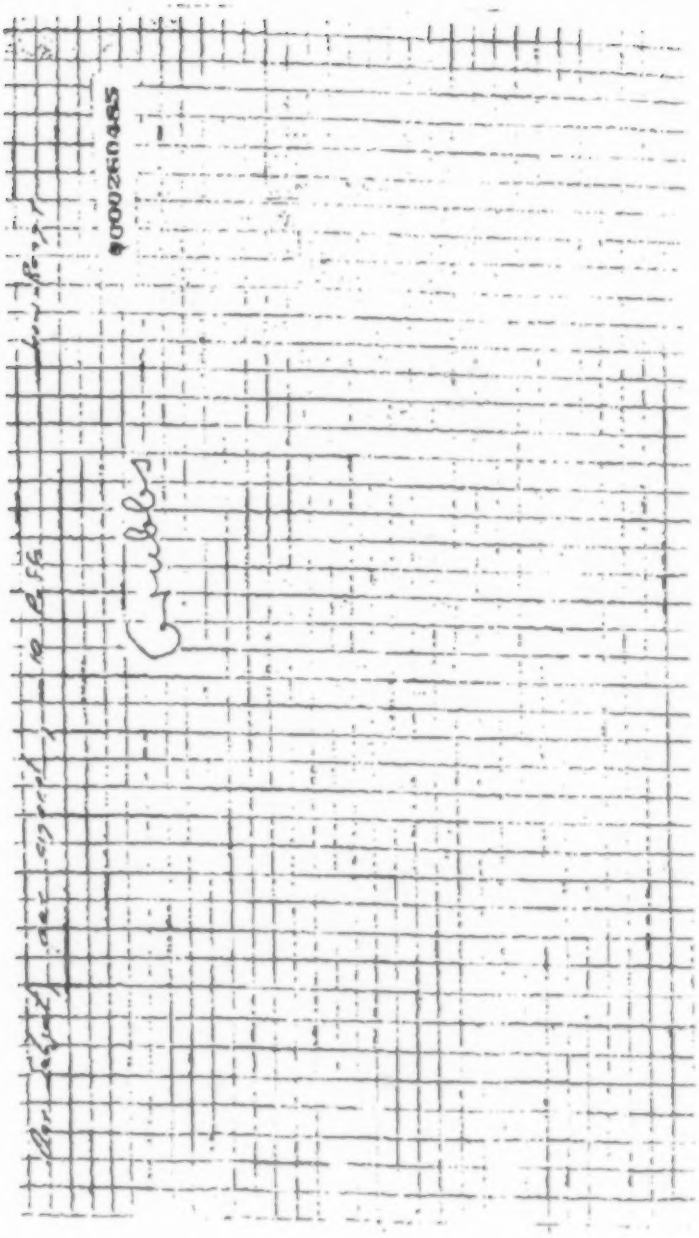




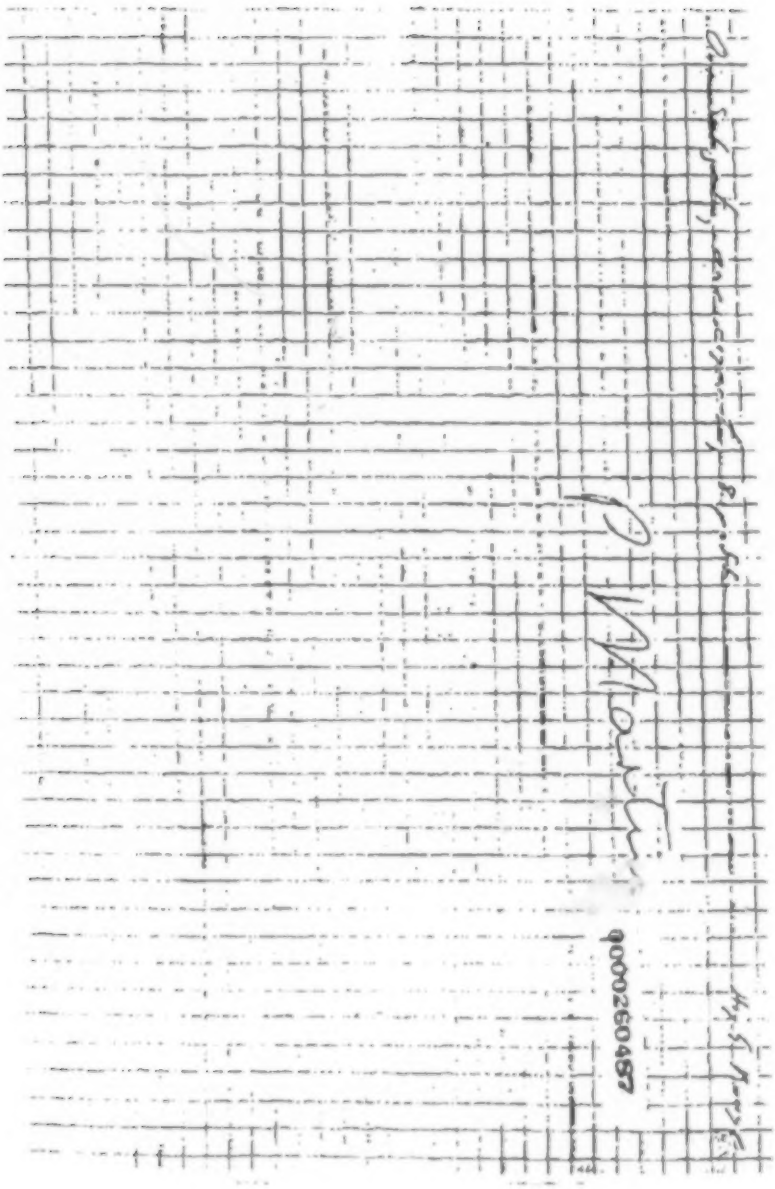


Chart 11

Observation 3

VOLUME OF SMOKE TAKEN IN BY FOUR STUDENT SMOKERS ON THREE DIFFERENT BRANDS

Smoker	Carlton	Multifilter	Marlboro 85
#3	1397	618	479
#23	744	427	391
#1	693	527	378
#18	301	222	161
Machine	315	290	329

Chart 12

Observation 4

Four Cigarets with Different Filter Systems

Gave Rise to Different Smoker Responses

(Nineteen Smokers)

Filter Type	Cigt. RTD	Puff		
		Flow	Volume	Count
CA	6.9	1300	50	9
CA + Paper	4.7	1500	52	8
25% Dilution	4.4	1600	57	9
51% Dilution	1.6	2000	72	10

Chart 13

Observation 5

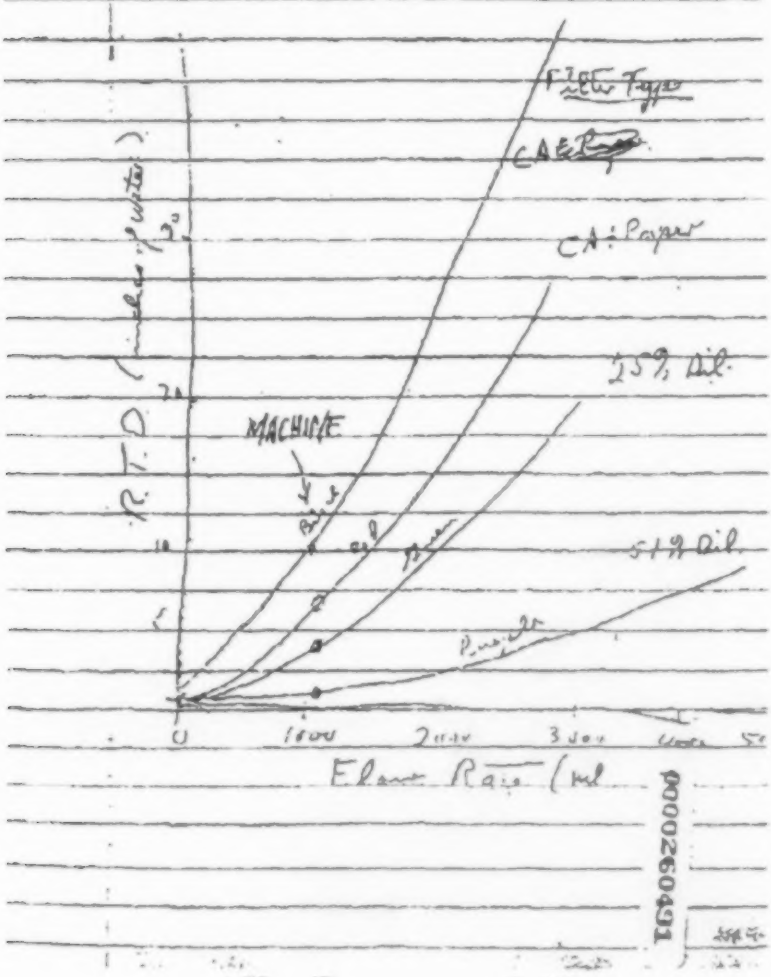
Estimated average tar and nicotine intakes for twenty-four male students who smoked six brands of cigarets with the puff recorder while performing psychological tasks.

Brand	Smoke Machine Volume	Observed Smokers Volume	FTC Tar Machine	FTC Tar Smokers
Carlton	315	71.3	3.7	8.3
Multifilter	290	475	11.7	19.1
True	266	405	10.9	16.6
Marlboro 85	329	418	18.2	23.1
Winston 85	326	436	19.9	26.6
Kool	287	352	16.2	19.9

Smokers are taking in more than FTC ratings.

Chart 14

Resistance to Draw
Depends on Flow Rate
and Cigaret Construction



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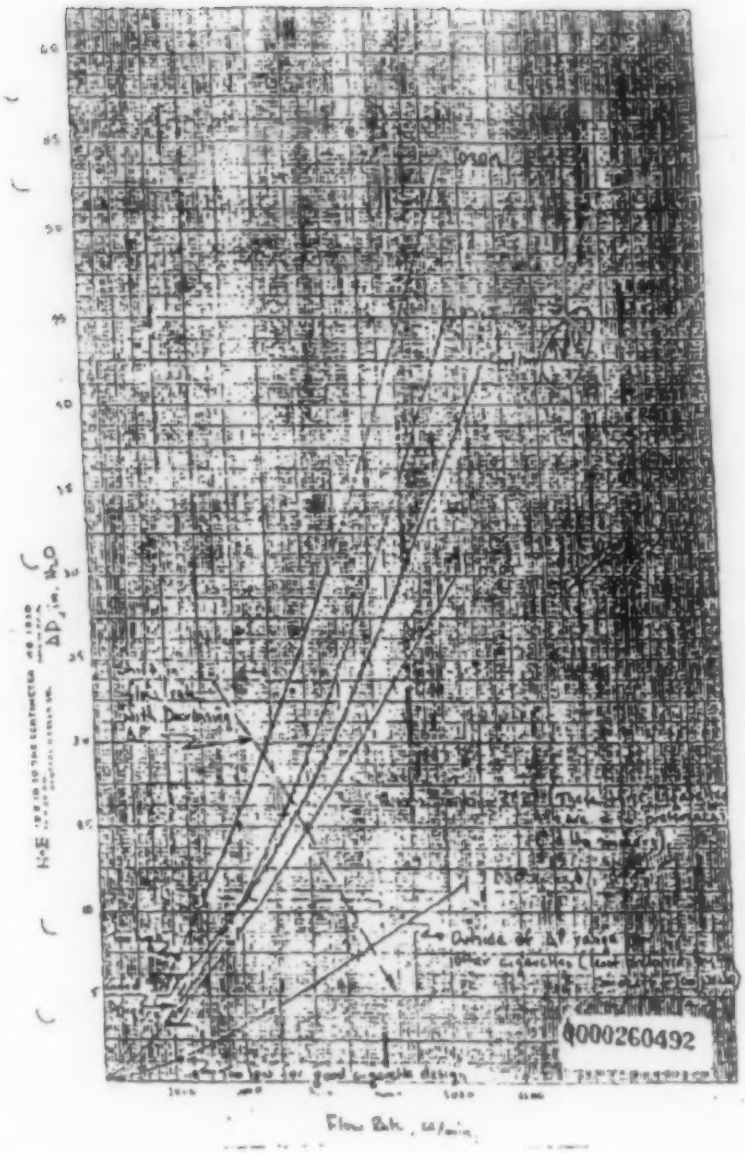

4000260492
Flow Rate, cc/min

Chart 15

THE COMPOSITION OF SMOKE DEPENDS ON THE SMOKER

Puff Volume	20	35	45
Flow Rate	600	1050	1350
Composition/100 ml. of Smoke			
Water (mg.)	0.74	1.01	1.70
Nicotine (mg.)	0.42	0.38	0.35
CO (mg.)	4.30	4.30	4.00
HCN (mg.)	45	55	63

Chart 16

SUMMARY

1) People do not smoke like the machine.

2) People smoke cigarets differently.

3) People vary greatly with respect to smoke intake into the mouth.

4) Number of cigarets smoked is very unreliable measure of intake.

5) Generally people smoke in such a way that they get much more than predicted by machine. This is especially true for dilution cigarets.

6) Measured RTD on unlit cigarets is far from what the smoker experiences as he puffs.

7) The composition of smoke varies with smoking conditions.

Chart 17

CONCLUSION

The FTC standardized test should be retained:

1) It gives low numbers.

2) It permits comparisons between brands.

Meanwhile, we are reviewing our own program in the light of these observations to design cigarets for improved product acceptance.

PHILIP MORRIS
U.S.A.

INTER-OFFICE CORRESPONDENCE

Richmond, Virginia

March 7, 1974

To: H. Wakeham

From: R. Fagan

Subject: Moral Issue on FTC Tar

1. Some concern has been expressed concerning the moral obligation of Philip Morris (and perhaps the tobacco industry) to reveal to the FTC the fact that some cigarette smokers may be getting more tar than the FTC rating of that cigarette. You mentioned in your presentation at the Center on Tuesday, March 5, that such concern was voiced in N.Y. at your talk there. And it was expressed again by some individuals who heard you in Richmond.

2. I believe that there need be no such concern, at least from a position of morality. It is obvious that HEW knows that smokers can vary their intake. Otherwise they would not urge smokers to take fewer puffs. there are published papers which show that different puffing patterns on the same cigarette will yield different amounts of tar.

3. The FTC tar and nicotine rating is an indicator of the delivery. The assumption upon which the number is based is that the smoker's puffing habits will not change. There is no assumption that the number of cigarettes or that the number of puffs will change. Granting that

puffing behavior (puff volume, puff duration, puff interval) remain constant then the cigarette with a lower FTC tar will deliver to the smoker less tar than a cigarette with a higher FTC rating. And that is all the FTC and HEW are trying to do with the publicized numbers.

4. If one accepts a dose relation between tar and some indicator of pathology then what the FTC and HEW is trying to accomplish is to get the smoker to reduce his dose. Obviously there are essentially two ways to do this: a) present the smoker with cigarettes which deliver less tar and b) teach the smokers to smoke in a manner which gives him less tar. FTC and HEW (including NCI and NIHL) are concentrating on "a." Your presentation and work at the Center are showing how "b" can be accomplished.

5. In public health work the two modes mentioned in the previous paragraphs have always been considered in most problems — modification of the agent and environment or changing the behavior (or life-style) of the host. In general the modification of agent or environment has been more successful (chlorination of water, pasteurization of milk) than changing behavior (overcoming obesity, increasing physical exercise).

/s/
R. Fagan

MEMORANDUM

June 9, 1982

Re: *Low-'Tar" Cigarette Advertising and the FTC Cigarette Testing Program: A Time for Re-examination*

Inherent limitations of the FTC cigarette testing program, and borderline low-"tar" advertising practices resulting from the way the test results are reported have contributed to substantial consumer confusion and misunderstanding. This situation threatens to erode public confidence in both the FTC's test reports and the industry's advertising claims. However, both the tests and the advertising disclosure of the test results are important elements of a program to encourage the development and promotion of lower "tar" cigarettes. Therefore, steps ought to be taken now to make those changes in the way the testing and advertising program is carried out which will preserve its integrity and effectiveness and shore-up public confidence in it.

FTC's testing program rests on an informal basis; with no specific authority or directive in statute or regulation. The advertising disclosures are based on a voluntary industry agreement with FTC, and are not governed by any agency regulation or order. The informality and voluntariness of the program give it a unique flexibility and amenability to appropriate reform through cooperative efforts of the parties. The Commission and its staff could perform a useful role by taking a fresh look at the entire program and in calling upon the industry to cooperate in the endeavor.

Testing Limitations

The present FTC test methodology is sound. The limitations are inherent in the nature of the task and the difficulty of conveying the test results to the public in clear, understandable and meaningful terms. The tests do not measure the tar and nicotine *content* of the cigarettes. Rather, they measure the *delivery* of tar and nicotine through the filter and ventilation system when the cigarettes are smoked by the smoking machine in accordance with the standard test protocol specifying puff rate, butt length, etc. The standardized machine tests represent a reasonable norm which establishes comparability of measured results among different brands of cigarettes. Since the smoking habits of individuals differ widely, the measured test results do not necessarily represent the precise tar and nicotine yield that any particular smoker will experience when he or she smokes one of the tested brands. The circumstance is analogous to EPA's gasoline mileage test results, which are disclosed in auto advertising with a disclaimer: "Use estimated MPG for comparison. Your mileage may differ depending on speed, distance, weather. Actual highway mileage lower."

It has been theorized by some that smokers of low-"tar" cigarettes may automatically compensate for the reduced delivery of "tar" and nicotine by oversmoking, *e.g.*, by puffing more often or more deeply, by smoking each cigarette closer to the filter, or by smoking more cigarettes. The FTC staff made special note of this so-called "compensation" theory in its May 1981 Report on the Cigarette Advertising Investigation.

More recently, following Brown & Williamson's successful introduction if its BARCLAY brand, a new entrant into the ultra-low "tar" market segment which quickly became an effective competitor in that segment, some of Brown & Williamson's competitors retaliated by complaining to FTC about an alleged disparity between machine-test results and human-smoking results with BARCLAY. Both Dr. Fred G. Bock and Dr. Lynn T. Koslowski, two of the private consultants retained by FTC to review those complaints about BARCLAY, made references to the "compensation" theory and recommended that the entire testing program be reviewed and re-evaluated. They believe the test results as currently reported may bear no real relation to what any given smoker of a low-"tar" brand gets from his or her cigarette.

Furthermore, the FTC test reports themselves contribute to consumer confusion because of the way they list the test results. The FTC reports highlight minute differences in "tar" delivery among different ultra-low brands. The FTC presentation of the test results implies that differences of 1 mg or less in "tar" delivery have meaningful health consequences, an unsupportable implication. This lends itself to misleading exploitation in some cigarette advertising.

Advertising Excesses

Current advertisements for CARLTON, CAMBRIDGE and NOW cigarettes, *all* of which claim to be "the lowest" in "tar" (examples attached), are clearly confusing and misleading. Both CARLTON and NOW have used the lead, "latest U.S. Gov't report". This kind of advertising exploits the FTC testing program to gain a competitive edge and to mislead consumers into believing that: (1) there is

a measurable difference between cigarettes of .01 and .5 mg "tar" when, in fact, differences so small cannot be accurately measured by the test machine; and (2) "tar" differences of 1 mg or less have meaningful health effects, when there is no evidence that this is true.

FTC's present system further contributes to consumer deception because it allows some cigarette companies to promote heavily a "box" brand, *without adequately distinguishing it from the soft pack of the same brand name*, which delivers considerably more "tar". In fact, however, the companies produce such a small volume of the box brand as to make it a phantom brand that is rarely found in the marketplace. On the other hand, the soft-pack version bearing the identical brand name and package design but testing at a considerably higher "tar" level, is the version readily available to the consumer. This "bait-and-switch" advertising is encouraged by the FTC's emphasis of minute, insignificant differences in smoke deliveries in its current reporting format.

A Proposal For Change

A simple common sense change in the way the FTC's testing and reporting is done will preserve its integrity and effectiveness and shore-up public confidence in the program.

The present standardized test procedure, which treats all cigarettes the same, is not in need of change. No machine testing program can duplicate all the varied smoking habits of the entire smoking population. The sensible step to take is to continue the present test methodology, but change the reporting format. This might be done by reporting all cigarette yields in one of four categories, *e.g.*,

ultra-low "tar" (below 6 mg), low "tar" (6 to 10 mg.), medium "tar" (11 to 15 mg), and high "tar" (above 15 mg).

In addition, an EPA-type disclaimer might be adopted to warn that the FTC figures are standardized measurements derived by laboratory tests; any smoker may get more or less smoke depending on the way he or she smokes the brand in question. The Commission should also monitor misleading "lowest" advertisements and police "bait-and-switch" packaging scams.

/s/

FTC Nicotine Program: Hearing Before the Subcommittee on Transportation, Tourism and Hazardous Materials of the Committee on Energy & Commerce, House of Representatives

100th Cong.

First Session

May 7, 1987

Serial No. 100-42

Printed for the use of the Committee on Energy and Commerce

U.S. Government Printing Office

* * *

Testimony of FTC Chairman D. Oliver

STATEMENT OF HON. DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY WILLIAM C. MacLEOD, DIRECTOR, BUREAU OF CONSUMER PROTECTION

Mr. Oliver. Thank you, Mr. Chairman, members of the committee. We were originally asked to be here today to discuss authorization of the Federal Trade Commission. I think it is unfortunate that consideration of authorization has been postponed in order to discuss the unanimous decision the commission made almost 3 months ago to close the cigarette laboratory.

The commission has provided the subcommittee with a statement on this subject. In addition, we have provided both responsive documents and written answers to the questions presented to us as late as last Friday.

The commission saw no benefit to consumers in continuing to expend taxpayer dollars on the laboratory. Those taxpayer dollars can be deployed more effectively in other law enforcement activities.

The FTC notified the appropriate committees and Members of the Congress after the commission's decision was made, and the House and Senate Appropriation Committees approved the commission's action. The cigarette laboratory has since been closed.

As I have already said, I regret that this small matter, undertaken without controversy and without objection has displaced discussion of the FTC's authorization, which was supposed to take place today.

Mr. William MacLEOD, on my left, the Director of the Bureau of Consumer Protection, is very familiar with the details of the former laboratory's operation. If there are any questions, we will attempt to answer them.

[The prepared statement of Mr. Oliver follows:]

STATEMENT OF FEDERAL TRADE COMMISSION

I am happy to be here today to present the commission's statement regarding its decision to terminate its in-house cigarette' program. The commission staffs review of the continuing need for our facilities began in 1982. During its review, staff consulted with representatives from the Surgeon General's Office, the Office of Smoking and Health, the National Cancer Institute, the major health groups, the tobacco industry and Congressional staff members.

The commission unanimously voted to close the Cigarette Testing Laboratory on February 13, 1987. That decision was based not only on the present costs of running the laboratory and the additional funds that would be required in order to update and maintain the laboratory, but on the fact that those costs would be incurred even though the same information is currently being generated by the cigarette industry and can be obtained from it at little additional cost to the government On February 19, the commission sent letters to the Chairmen of the Senate and House Appropriations Committees notifying them of its decision. On March 27, the Senate Appropriations Committee orally notified the commission that it had no objections to the closing of the laboratory. By letter of April 9, the Chairman of the House Appropriations Committee notified the Commission that he also had no objections. After receiving these approvals, the commission formally announced the closing of the laboratory on April 15, 1987.

In 1966, the commission initiated several actions for the purpose of encouraging cigarette manufacturers to provide consumers with accurate comparative information concerning the tar and nicotine content of the cigarettes that they smoke. In that year, the commission ended a 6 year ban on tar and nicotine advertising, adopted a uniform testing system measuring tar and nicotine content, and sent a letter to the domestic manufacturers approving their dissemination of tar and nicotine claims, if such claims were supported by tests conducted in accordance with the approved method. In 1966, the commission also created the Cigarette Testing Laboratory to facilitate the dissemination of tar and nicotine information pursuant to this

uniform testing standard, and begin to provide the results of its testing periodically to Congress. Since 1971, the cigarette industry has included tar and nicotine ratings in all advertising companies. The current voluntary agreement among the companies requires the companies to test new and reformulated cigarettes for tar and nicotine between commission testing periods using the Commission standards. In addition, the companies often test each others brands for accuracy.

Each of the major cigarette companies either has a laboratory of its own or has access to a laboratory to do tar and nicotine assays. In addition, the Tobacco Institute Testing Laboratory (TITL), a private laboratory run by the cigarette industry, does tar and nicotine testing. The methodology, procedures and processes that the companies and TITL use are identical to those that the commission has followed. The equipment used by TITL is practically identical to the equipment that the commission has used, except that in many cases the equipment is newer or is automated.

I wish to emphasize that the closing of our in-house facilities will not significantly affect our ability to ensure the accuracy of tar and nicotine claims. Indeed, the commission has only recently completed a vigorously contested litigation involving the accuracy of tar and nicotine claims made by a major manufacturer. Importantly, that case arose not as a result of commission testing or monitoring but because of a competitor's complaint The commission will continue to monitor advertising for deceptive tar and nicotine claims and bring appropriate enforcement actions. Because tar and nicotine ratings are an area of intense competition within the

industry, we expect that if a company were to publish incorrect ratings, we will hear quickly from its competitors. In addition, we will continue in the future to collect tar and nicotine ratings from the companies and report that information to Congress. As with all data that we collect from the cigarette companies, we will scrutinize the ratings for accuracy and reliability. If we should have a question about any individual rating, we have access to testing facilities at Oak Ridge National Laboratory.

In sum, the commission established its laboratory in order to facilitate the use of a standardized methodology for the testing of the tar and nicotine content of cigarettes. In this regard, we have been highly successful, for the procedure followed by all the companies is the one used by the commission and is in fact called the "FTC method." Having established the commission's methodology as a uniform testing standard, the commission concluded that there was no longer a need for the Federal Government to duplicate the testing program already being conducted in the private sector, which provides the same information. We have every expectation that accurate tar and nicotine information will continue to be provided to consumers without the unnecessary expense of governmentally supported testing. If for any reason that expectation proves incorrect, we are pre w-W to take vigorous corrective action.

Thank you.

Mr. LUKEN. Mr. Oliver and Mr. MacLEOD, would you say that the FTC method for testing, that is a term of art now, the FTC method, isn't that right?

Mr. OLIVER. That's correct.

Mr. LUKEN. I believe you have said before this is one of the principal missions of the lab, to develop a method of testing cigarettes; is that right?

Mr. OLIVER. That is correct.

Mr. LUKEN. Is that the only purpose of the lab, testing a method? It was also the purpose of the lab to actually test the cigarettes; isn't that right?

Mr OLIVER. Yes. Obviously, we tested the cigarettes. The lab tested the cigarettes after the method was established. Since that time, the method has become the standard method and it is used both by the cigarette companies themselves and by the government facility in Oak Ridge, TN.

Mr. LUKEN. That method is a very useful tool that we now have for protecting the consuming public, the public consuming cigarettes; is that right?

Mr. OLIVER. That's correct.

Mr. LUKEN. Therefore, the laboratory, the facility has been very instrumental in developing a method. If we cancel the laboratory, if the laboratory is history, we would be denied the benefit of possibly a new method being developed, such as the method which this laboratory has developed. Would you agree?

Mr. MACLEOD. Mr. Chairman, if I may, I would like to address that question. The laboratory itself was established as you asked, to try to establish a standardized methodology for testing cigarettes. Indeed, the lab accomplished that. The method that the lab is using today is not significantly different from the method that was established in 1966.

The individuals using the lab are primarily or were primarily operating simply the testing function. The kind of scientific research that would go into developing new and improved methodologies is the kind of research that is beyond the capability of the employees we have at the Federal Trade Commission.

Mr. LUKEN. Shouldn't we be working to develop the abilities of the employees that you have at the Federal Trade Commission rather than consigning the operation which has been very beneficial to the ash can?

Mr. MACLEOD. Mr. Chairman-

Mr. LUKEN. I don't think you have stated before that is the case, that you had the choice of either improving the lab, making it more effective or of closing it. Now you have been saying that you closed it because the work can be done by other agencies or private agencies.

Mr. MACLEOD. The Federal Trade Commission is virtually entirely an agency of economists and lawyers. We are not an agency of scientists. We do not do general testing of various products. We cannot pretend to have the expertise to improve or come up with a state-of-the-art testing on any of the advertising that we regulate in the course of our enforcement priorities.

What we have done and what we continue to do is examine the scientific community and seek comments and advice on whether the method that we are using can be improved, whether it should be improved, whether we can agree upon better methodology to test cigarettes. I suspect that research will never end, but we certainly do not have

the capability at the Federal Trade Commission. This is a very sophisticated and very expensive scientific process and the kind of process I would expect would be better undertaken either by private researchers or government facilities that have much better scientific abilities than we at FTC.

Mr. LUKEN. We have just established that this lab has developed the FTC method, which the FTC has taken credit in the past for and it has been generally recognized that the FTC method of testing cigarettes is the one that is used universally now; isn't that right?

Mr. MACLEOD. The lab established for the purposes of the Federal Trade Commission the methodology which itself was not developed by the Federal Trade Commission. We implemented a development, the Cambridge testing method, which was a product of the scientific community generally. As any research product, it is a culmination of many efforts by many scientists around the country to determine the precise and best means of testing a cigarette. That was done over 20 years ago. So far, that is the methodology that we are still using at the Federal Trade Commission.

Mr. LUKEN. These companies are not required by law or regulation to use this FTC method; are they?

Mr. MACLEOD. No, they are not. If they advertise that they use the FTC method, of course the laws of deception would require they actually use the FTC method.

Mr. LUKEN. What if a company wanted to change its testing procedures? Would it have to obtain approval from the commission or at least

demonstrate that its method is equivalent to the commission's testing method?

Mr. MACLEOD. In the litigation that arose from the Barclay cigarette issue of a few years ago, in which there was a question as to whether the FTC testing methodology accurately tested the tar and nicotine delivery of Barclay cigarettes, that issue was addressed by the courts. The answer that the courts gave was we cannot force a company to use nor can we approve in advance the kind of testing a company uses. We can make sure that the testing a company uses is an accurate test, especially as that accuracy relates to the FTC method. The court decided the company could not simply indicate

Mr. LUKEN. Hasn't there practically been an uniformity in using the FTC method?

Mr. MACLEOD. There has practically been uniformity but we recognized in the Barclay case that the FTC methodology does not accurately measure the tar and nicotine delivery of that particular cigarette..

Mr. LUKEN. That particular cigarette, because of other reasons. If one of the tobacco companies developed an improved testing procedure, which provided more accurate information, wouldn't this destroy that uniformity? Now that we don't have a laboratory that is the standard.

Mr. MACLEOD. I would fully suspect that, perhaps by the year 2000, there will be a methodology in the U.S. that is an improvement on the methodology that we use at the FTC.

Mr. LUKEN. Leaving it up to the tobacco companies to do the testing, leaving this health procedure to the tobacco companies which deny

basically there are any health considerations in smoking cigarettes, the tobacco companies are going to come up with a new methodology? Is that what you are saying?

Mr. MACLEOD. There is intense competition to measure this kind of information and measure it accurately.

Mr. LUKEN. Intense, competition in the tobacco industry; is that right?

Mr. MACLEOD. There is no question about that.

Mr. LUKEN. That has been historically true; right? If we look at the point in history of where tobacco companies are today, they are under seize, are they not? If tobacco companies are under seize from the public and by Government, they just might have a tendency to ban together, to conspire, to collude, to be concerned more about the industry which is in danger of being wiped out, than to be worrying about their petty differences in competition with other companies. Might that not be the case?

Mr. MACLEOD. As it has been said in other contexts, I would be glad to see that. They could go ahead and make my day. I have a number of lawyers who enforce advertising law and we have a bureau that enforces the competition laws of the United States, and if that kind of activity were undertaken, they would be subject to prosecution by the Federal Trade Commission.

We have relied on complaints from the industry in the past and it has worked.

Mr. LUKEN. Why don't you depend upon cigarette industry lawyers, if you want to depend on

cigarette company laboratories, rather than your own lawyers? I might be making a rather broad comparison or analogy. You are saying we should depend upon cigarette company laboratories and their testing methodology and the forces of competition. Why don't you depend upon their lawyers? Why should we pay lawyers for the FTC? Why shouldn't we depend upon the lawyers of Brown and Williamson to contend with the lawyers of the other companies and go ahead and fight it out in civil court? Why should we even sustain the FTC, according to your theory that we ought to allow the laboratory studies to be made by the companies and on the theory of competition?

Mr. MACLEOD. There are several answers to that, Mr. Chairman. I would like to elaborate first of all on the answer that I gave. We do have in place the measures that will allow us to check, to find out whether the truth is being told. Those measures are the same kinds of measures that are used by the FDA, and the Department of Transportation, in checking the accuracy of measurements of constituents, and the performance of products those agencies regulate.

It is generally the case in the regulation of measurements of performance and constituent standards that the Government leaves it to the industry with appropriate checks and balances upon the performance that the industry reports.

We would have a multi-billion budget if we had to test independently the substantiation for the advertising of every product we regulate.

Once again on the competition issue, I think it is important. We are not relying upon the lawyers. We are not relying upon the companies. We are

relying upon the forces of competition that will make sure that one company will not try to get a leg up on another company with a false or deceptive claim of tar and nicotine delivery. That is precisely the way the Barclay litigation resulted.

Our machines were fooled by the Barclay measurements. We did not know, even though we were testing the cigarettes, that the cigarettes delivered a different measure of tar and nicotine until competitors came in and told the Federal Trade Commission there was a problem. That is how that case began.

Mr. LUKEN. Does every tobacco company have a laboratory?

Mr. MACLEOD. Every tobacco company either has a laboratory or has access to laboratories that it uses on a regular basis.

Mr. LUKEN. Those might be considered weasel words, "or has access to," like the Tobacco Institute?

Mr. MACLEOD. The Tobacco Institute does have a laboratory as well.

Mr. LUKEN. The companies that have access to laboratories, one of those laboratories they have access to is the Tobacco Institute. Isn't it your anticipation the Tobacco Institute laboratory will be utilized by the companies?

Mr. MACLEOD. Yes, indeed, we expect it to. We expect to pay regular visits to the Tobacco Institute laboratory.

Mr. LUKEN. The Tobacco Institute doesn't foster competition between companies within the tobacco industry. It is an institute which is an industry facility; is it not?

Mr. MACLEOD. Yes; it is.

Mr. LUKEN. You are relying upon the Tobacco Institute facility to replace at least in part the FTC laboratory? The Tobacco Institute represents the tobacco industry, which we could hardly rely upon to give us trustworthy information about the health effects of tar and nicotine in cigarettes; isn't that right? Would you rely upon the Tobacco Institute to give you accurate information? Would you trust it?

Would you trust the Tobacco Institute's laboratory to give you reliable information on the health effects of tar and nicotine in cigarettes? Is that a fair question?

Mr. MACLEOD. Yes; that's a fair question and I will be glad to answer it. If the Tobacco Institute were the only alternative to the FTC testing laboratory, we would not have recommended closing the laboratory and I suspect the commission would not have voted to do so. The Tobacco Institute's laboratory is only a small part of the mechanism that we can rely upon to ensure that there is accurate reporting of tar and nicotine numbers to the public.

Furthermore, we will be paying visits, as I indicated earlier, to the Tobacco Institute, just as our fellow regulatory agencies pay regular visits to the testing facilities of other companies in other industries to make sure that the FTC methodology is being used. With this methodology, which itself is very standardized—there is not much room for cheating. It is a very mechanical, a very routine and a very certain process.

Mr. LUKEN. You are going to be making visits and you have described your FTC as lawyers and accountants and other kinds of specialists, but not

laboratory technicians or scientists, but you are going to be making visits to make determinations on these scientific issues, without the assistance of a laboratory to back you up, without the scientists to back you up; is that right?

Mr. MACLEOD. No. The scientists that I mentioned, that the FTC does not have in abundance, are the kind of scientists that we can expect to engage in the sort of original research that would develop improved methodologies and find the next generation of accurate testing, if anyone were to find that generation.

We do have in our employ the individual who ran the testing laboratory and while that individual is about to retire, we can use him until then and we do have access to independent scientists that we use on a contract basis.

As a matter of fact, Mr. Chairman, in the Barclay litigation, the Federal Trade Commission relied upon experts, independent experts that we found, as we often find in any kind of litigation, who could verify the testing that was being done for that litigation and make sure that the testing being done and the numbers being reported in the course of that litigation were accurate. We definitely have access to the kind of expertise that we can use to ensure accuracy.

We don't have the kind of budget to hire these people and have them as full time employees.

Mr. LUKEN. It seems to me that what you are saying is you are depending on the present picture, the present structure in the industry, but once you disband or you have disbanded and if you don't reinstitute the laboratory, you are not going to have

the scientists to back you up, you are not going to have the procedures, you are not going to have the ability to make these tests, and in the future the tobacco industry is going to govern. They can develop the Tobacco Institute laboratory, the tobacco companies can decide to use the Tobacco Institute, and all you can do is come in and monitor because you can't administer any competing tests or develop any competing methodology.

But let me ask you one more question. I don't want to take up all the time here. I would like your comments. I refer to a Consumer Reports of January 1983, and would you comment on this statement? In reporting on the controversy of the Barclay case in Advertising Age, a top tobacco executive commented, "Every company in the cigarette business knew how to make a product that would fool the FTC machine. None of us had the nerve to take the chance B&W has taken. So far the Barclay filter has been a very successful marketing tool."

Mr. MACLEOD. I have two comments on that, Mr. Chairman. My first comment is Barclay tried and the FTC caught them. My second comment is that to the extent Barclay is successful, it is now being advertised with accurate tar and nicotine figures, and it could well be that at those advertised figures, the Barclay product is a product that still generates consumer demand.

I would like to respond to your last question because I would not want to leave a misunderstanding as to our access to facilities. There is a government testing facility at Oak Ridge, TN with which we can generate competing information and which we can use and have used in the past to generate accurate technical information

regarding tar and nicotine figures. That equipment, in fact, is more modern than the equipment we have at the Federal Trade Commission, so we do have the backup capability to generate competing data.

Mr. LUKEN. Are nonmembers allowed to use the Tobacco Institute's testing facilities, do you know?

Mr. MACLEOD. Yes, they are.

Mr. LUKEN. So the whole industry could use it?

Mr. MACLEOD. Yes, as far as I am aware.

Mr. LUKEN. From this testimony, my preliminary observation is that we might consider the alternative that you had, which is to improve the laboratory, improve the facility rather than consigning it to history.

I have utilized my time and I will yield to the gentleman from Kansas.

Mr. WHITTAKER. Thank you, Mr. Chairman.

I would hope that in the course of this morning's hearings we might even have a chance for a second round because I think you are pursuing an excellent line of questioning.

Mr. OLIVER, I would like to direct my first question to you. One of the main objectives of today's hearings is, of course, to review the FTC's enforcement of the prohibition against false advertising as it relates to cigarette advertising and unfair methods of competition as that prohibition relates to the cigarette industry. Earlier this year, you testified before this subcommittee on legislation that would ban all cigarette advertising. At that

hearing, it was alleged that large, diversified companies which owned tobacco companies are using their ability to purchase a great number of advertisements to pressure newspapers and magazines not to run public health advertisements about the health risks of cigarettes. It was even suggested that these companies discouraged the placement of cigarette ads in certain sections of the newspaper, such as up next to obituaries or up next to other health-related stories.

Has the FTC ever looked into such allegations as an unfair method of competition?

Mr. OLIVER. I am not aware of any. It is possible they have before I got there, but I am certainly not aware of any. To the extent that what is involved is editorial judgment of the paper in question, I doubt that we would have jurisdiction.

Mr. WHITTAKER. I would have to question your logic on that, Commissioner, because if anything, when tobacco companies buy up Nabisco and General Foods and other consumer products unrelated to tobacco, and then, from the collective purchasing power of their advertising, tell the newspaper up front that they cannot run health stories or place those ads up next to health stories, or up next to obituaries, or they will have those ads cut, I would see that as unfairly competing with the public's right to information.

Mr. OLIVER. That could be. We have received no complaints on that score, and my guess would be that if that were a standard practice going on for any length of time, the commission would have received some kind of complaint on it. Anything is possible, but it is hard to think that that kind of activity could be kept secret. It is hard to think anything can be

kept secret over any considerable period of time, and I would suppose that by now the Federal Trade Commission would have received some kind of complaint on that score. To my knowledge, we have not.

Mr. WHITTAKER. Could I assume, then, that you are leaving the door open for someone to bring this information to you, to file a complaint, and that the Commission will then conduct an investigation?

Mr. OLIVER. I would think so, yes.

Mr. WHITTAKER. We all know that cigarettes as well as many other products have very negative health effects. Does the FTC view its role as determining or informing the public about those health effects?

Mr. OLIVER. Our role is to make sure that such advertising as is done is truthful. Of course, as we know, the Surgeon General's warning which is on all cigarette ads and cigarette packages has penetrated to something like 90 percent of the community. Polls show that 90 percent of the people understand that smoking is, in fact, hazardous to your health. Our job is not to present the information; our job is to make sure that such advertising as takes place is accurate.

Mr. WHITTAKER. Is truthful.

Mr. OLIVER. Yes.

Mr. WHITTAKER. So you do not see your role as that of warning the public about the health effects of cigarettes. If that be the case, then, isn't it the role or wouldn't it more appropriately be the role of agencies such as the Food and Drug Administration or commissions such as the Consumer Product Safety

Commission to warn the public about the dire health and safety dangers?

Mr. OLIVER. I think the Department of Health and Human Services has that jurisdiction, not the FTC.

Mr. WHITTAKER. Please respond to my question. Do you see a role for the FDA and, for that matter, the Consumer Product Safety Commission? If they are concerned about something that could take 20 lives in a year, here is an issue that takes 350,000 lives a year.

Mr. OLIVER. Mr. Whittaker, that could certainly be true. I haven't thought about the matter, so I really couldn't give you a definitive answer, but that could certainly be true.

Mr. WIIITTAKER. I am just curious. When the Commission began to consider shutting down the testing program, did you explore, the possibility of some other Federal agencies taking over this role?

I think there is a legitimate concern, and the Chairman expressed it, too, about putting the fox in charge of the chicken house, of letting just the tobacco companies themselves monitor their own progress. Did you explore with the Food and Drug Administration or the Consumer Products Safety Commission the possibility of their taking over cigarette testing?

Mr. OLIVER. Let me say first of all that I will let Mr. MacLeod answer that. I think we did not, but he may know better than I do. But I want to go back, if I may, and respond to something else you said. I don't see in any way that we are abandoning the field to the nefarious cigarette companies to distort the data. I think there is a misimpression that that is

the result of or will be the result of the FTC's decision to close down the laboratory. I think that is incorrect, and I think it certainly misreads the material that we have sent to the Congress.

Our point is that testing will continue, it will continue both by the industry itself—which does not test as an industry but as individual rivals within a particular industry testing both their own and their rivals products—and in addition to that, we always have the option of going down to the government facility in Oak Ridge, TN and checking up, on any kind of basis we like, on the information that has been provided by the cigarette companies.

So we are not simply abandoning the field. We are trusting to some extent to competitive forces in the marketplace, rivals making sure that their rivals' product testing has been done accurately, and then we also have the ability to spot check at Oak Ridge, TN, a Government facility.

I think that the idea that somehow we are simply abandoning this to the industry, which will instantly collude to produce joint numbers, is very mistaken. I think the $200,000 we have can be deployed more effectively in other law enforcement activities.

Mr. WHITTAKER. I appreciate your comments but I would still like a response to my question. Did you contact either the Food and Drug Administration or the Consumer Products Safety Commission to see if they could take over the testing program?

Mr. MacLEOD. Thank you, Mr. Whittaker. Yes, indeed, we have talked with a number of other Government agencies over the years.

Mr. WHITTAKER. Please identify them.

Mr. MACLEOD. We have spoken with FDA, we have spoken with BATF, and----

Mr. WHITTAKER. How about the Consumer Product Safety Commission?

Mr. MACLEOD. The Consumer Products Safety Commission has no legal jurisdiction over cigarettes now, so for them to have an interest in the matter would probably require some kind of legislation.

Mr. WHITTAKER. Do you assume, then, that the BATF and the FDA currently have jurisdiction?

Mr. MACLEOD. Pursuant to a liaison agreement with the FDA, the FTC has primary jurisdiction over advertising. There is an interest in those agencies. As a matter of fact, the FDA has expressed the desire and has agreed to take some of the equipment that we have in the cigarette lab. They do have some uses for

Mr. WHITTAKER. Recently they have done that?

Mr. MACLEOD. Yes, indeed, since we have closed the lab. Our responsibility now is to find the proper disposition for the laboratory equipment, and the FDA has agreed to take that equipment, some of the equipment from us.

Mr. WHITTAKER. Have you had any communication from FDA that they consider it within their purview to begin assuming some of this responsibility? I find that encouraging.

Mr. MACLEOD. No, we do not have that now. There are a number of Government agencies over the years that have expended a tremendous amount of resources in educating consumers. The Surgeon

General, of course, comes to mind, and there are a number of other Government agencies. As a matter of fact, the Federal Trade Commission in its involvement with the advertising—the rotational warnings of cigarettes today, and the earlier Surgeon General's warning on cigarettes, were all matters that had the deep involvement of the Federal Trade Commission, and this is now an education program that is going on with every single advertisement that is run in the media every day. So there is a great deal of consumer education that is actually going on now. It is largely embodied in the legislation governing the cigarette industry.

Mr. WHITTAKER. Do you recall offhand who it was within the FDA that you had your initial contact, with or did they contact you?

Mr. MACLEOD. No. We don't have an expression from the FDA that they are expressly interested, and I cannot answer right now whether they have jurisdiction precisely over the issue. Our reading of some of the law—and as I say, we are not FDA experts here—is that their jurisdiction would not extend to smoking. Their interest in some of our equipment has applications beyond that of smoking, and they could easily use the equipment for their other scientific methods.

So I am not sure whether there would need—I would be glad to provide an answer to the committee for the record, but I am not sure right now precisely the extent of their jurisdiction and whether it would allow them to take up the responsibilities.

Mr. WHITTAKER. Mr. MacLeod, I must confess that I am aware that through, either historical accident or very devious design, the FDA and the Consumer Product Safety Commission have

been prohibited from addressing one of the greatest health risks this Nation has ever faced, tobacco products. It is ironic that the tobacco lobby and its forces were so successful in the early years in removing these products from the logical jurisdiction of those Federal agencies who are empowered to protect human health and well being.

I was in a sense hoping that you would share your insight as to whether you thought that was truly appropriate and if you would lend your support to the FDA or the Consumer Products Safety Commission being given jurisdiction over tobacco products—even though we may have to legislate it from this level.

Mr. MACLEOD. The Agency with which we have had the most conversations has been the BATF. They have been the ones who have expressed interest in the past. However, our most recent conversations with BATF have indicated that they are not interested in assuming these functions. I would hesitate to give you a legislative recommendation on behalf of the Federal Trade Commission.

Mr. WHITTAKER. I think that many on this panel acknowledge, and for that matter, the American public, that tobacco consumption and addiction is a very, very, serious problem. Tobacco is a drug and it is only logical that as we proceed through our hearing, that we begin to consider allowing the FDA to have jurisdiction over these products.

Mr. FLORIO [presiding]. The time of the gentleman has expired.

Let me, Mr. Chairman and Mr. MacLeod, make two observations and then ask a couple of questions. One observation follows up on the gentleman from Kansas' observation. I know of my own knowledge that there are Members, particularly on my subcommittee that has jurisdiction over the Consumer Products Safety Commission, that are pointing to this action that the commission is taking—that is, the FTC is taking—so as to justify, if there was a need for justification—to introduce legislation to modify the Consumer Products Safety Commission jurisdiction so as to specifically give that commission authority to deal with tobacco and tobacco products.

So it may very well be that your action is going to fuel the interest in providing at least some Agency. As the gentleman, Mr. Whittaker, stated, there is virtually no Agency that has any jurisdiction over this area.

The second observation would be that your line of explanation as to why you feel comfortable with competitors out there in a sense being counted upon to tattle on someone that goes and does something inappropriate in terms of advertising may not be appropriate in the tobacco field. I suspect there is no problem with one cleaning product telling on somebody else, saying that the "whiter than white" is really not justified, but when you talk about tobacco products, potentially you can have one company telling on another company in a way that goes to the very viability of the industry. That is clearly not the case with toys, that is not the case with regard to cleaning products.

So I think the analogy and the free marketplace theory breaks down when you are talking about the

whole question of cigarettes and health impacts that may not be reported correctly between the various competitors.

Mr. OLIVER. May I respond to that? Just recently we had a case in which precisely what you are saying is unlikely to happen did happen. One cigarette company came in and tattled on another cigarette company. The product in question had, if you like, fooled the FTC's testing machine and fooled the FTC. A rival company came in, told us about it, and we brought an action against the company that produced the cigarette that had fooled the machine.

Mr. FLORIO. The nature of the deficiency was what? The effect that was tattled upon.

Mr. OLIVER. The way the filter had been constructed produced a result in the machine which was different from the result that you actually got from smoking. So one company came in and tattled on another one. That is competition.

Mr. FLORIO. If deficiencies in the product and the advertising go to the question of, in a sense, advertising that there is a basic health problem associated with any of the brands, do you really expect somebody else to be in saying that cigarettes, in accordance with this degree of advertising, this particular brand is going to cause a serious health problem?

Mr. OLIVER. But that is not what the cigarette testing lab does. The cigarette testing lab tests the tar and nicotine content of cigarettes. It doesn't test the general health of cigarettes or measure whether smoking is dangerous to your health. The Surgeon General has said that. So the cigarette lab has nothing, it seems to me, whatsoever to do with what

your concern is. In terms of competition, competition did come in and tattle on the competition that their cigarette product was not as advertised.

So we brought a successful case precisely on the information brought to us by a rival company.

Mr. FLORIO. Let me shift very briefly to get the commission's position with regard to the provision in the Senate authorization that will eliminate the commissions authority to deal with unfair advertising. Is the commission supporting that?

Mr. OLIVER. The commission has supported that as a way, we hope, of increasing the speed with which authorization legislation could get through Congress.

Mr. FLORIO. That is the justification?

Mr. OLIVER. Well, and also we---

Mr. FLORIO. How about the merits? Do you feel comfortable not having unfair advertising jurisdiction?

Mr. OLIVER. Yes, although I might not have thought myself to put that limitation in, but the commission has discovered over the years that conforms rulemaking has not been an efficient way to regulate advertising. This restriction goes to rulemaking, not to bringing individual cases. Because rulemaking has proved, I think, to be little used and not terribly successful, it is the Commission's feeling that very little is given up by this restriction.

Mr. FLORIO. Let me make two observations. One, I am intrigued I by your thought that you can expedite the process by supporting the exemption of

unfair advertising inasmuch as that was the single item that held up the conference report being approved, the conference report being formulated in the last session of the Congress. Everything else was resolved. That one issue was the issue that stopped the reauthorization for the first time. So I am not sure your premise is correct, if that is your premise.

More importantly, we will be left with no authority for the FTC to take action in those instances that are not overtly deceptive and yet tradition has regarded as sufficiently offensive to be acted upon under unfairness jurisdiction. For example, your staff prior to your coming into office has in the past suggested that there be rulemaking when there was a conscious determination that some advertisers were targeting youth groups for alcohol consumption. There have been recent suggestions and I have a quote in the paper about recent cigarette advertising is seen as targeting young people.

This whole idea of something less than a fraudulent, deceptive representation, that nevertheless is regarded as unfair. If there is a basketball player standing there smoking saying, "I've been smoking since I was 17 years old and I've got 30,000 points that I've scored," that would be something that would not be deceptive and yet the sense is that that is the type of activity that you ought to have jurisdiction to deal with.

Mr. OLIVER. But we do have jurisdiction to deal with that in an individual case, and if we haven't even brought an individual case on it, then we would say that the activity is not prevalent in the industry.

Mr. FLORIO. How do you deal with it if it is prevalent, though?

Mr. OLIVER. The FTC would not go into rulemaking unless it discovered that the activity in question was prevalent. In the case of the activity you mentioned, if the FTC has not even brought a single case, it seems to me fair to say that at least in the Firms judgment, that action is not prevalent in the industry.

Mr. FLORIO. What you are advocating is that even if it is prevalent—

Mr. OLIVER. If I may finish.

Mr. FLORIO. No, let me just stay with that point. We have a time limitation. If the practice is prevalent—and of course, we are inclined to change the law so as to include prevalency as a test for rulemaking—if the practice is prevalent, you are saying that you still don't want rulemaking capability, rulemaking authority in unfair advertising instances.

Mr. OLIVER. No, that is not what I am saying.

Mr. FLORIO. Then tell me what you are saying.

Mr. OLIVER. What I am saying is that if the FTC has not brought a single case of the kind that you are talking about, then the FTC's judgment is that there is not even a single case out there, and if there is not a single case out there, then it is obviously not prevalent in the industry.

Mr. FLORIO. You are not responding to my question, though. My question is let's assume that there is a prevalent practice of unfair advertising, as your staff suggested to you, with regard to targeting

college campuses for chug-a-lug contests. Let's assume that there is this prevalent practice. You are suggesting that if we eliminate rulemaking capability for unfair advertising, you will not have any ability to do anything, and I assume you are saying that is good.

Accept my premise. Prevalent practice of unfair advertising. You are exempting the advertising industry. What do you do?

Mr. OLIVER. Let me say two things, if I may. The first is that even if we had jurisdiction, and we do now, even given having that jurisdiction, the FTC has discovered that rulemaking takes a very long time, and I think, therefore, it is more efficient to bring a single case against the first offender in order to stop the practice before we go to rulemaking.

It is interesting, perhaps, that the staff, while it may have suggested a rule, apparently never was able to bring a successful case against one of these offenders that it discovered. So if the staff felt that enthusiastic about a rule, why didn't the staff also bring sufficient activity to the Commission's attention so that a single case could be brought? If they didn't bring that, it suggests that there was not enough activity for a rulemaking.

Mr. FLORIO. Let me ask this, and I'll conclude and yield to someone else.

But I mean it's fairly clear that your bottomline conclusion is that even if you find a pattern of activity that constitutes unfair advertising, your position, as I understand you've just suggested it to us, in supported the exemption that's being advocated is that the process takes too long, and

therefore you don't want any authority to deal with a pattern of unfair advertising practices.

Mr. OLIVER. The relinquishing or the idea to relinquish the unfairness authority in rulemaking was the result of a compromise in dealing with the authorization process.

Mr. FLORIO. I don't know what that means. What do you mean? Whose compromise?

It has not been the law. You still have--

Mr. OLIVER. Oh, yes, indeed, we have it, and we will bring it, if we found a practice that was prevalent in an industry today; we could start a rulemaking it we had the authority. But the point is, if you find a case--in order to find something that's prevalent, you have to find at least more than one; you have to find more than one activity.

Mr. FLORIO. Fine.

Mr. OLIVER. And if you do—

Mr. FLORIO. What I'm suggesting is that you ought to have the authority to be able to go publish a rule prohibiting a pattern of unfair advertising.

Mr. OLIVER. What I am saying is, it is faster—everything the Commission has done has shown that it is faster to bring a single case than to go through rulemaking. Rulemaking-

Mr. FLORIO. Well, we're arguing in circles. But I think it's fairly clear—I think it's fairly clear that the policy that you're advocating is to totally take away

Mr. OLIVER. No.

Mr. FLORIO. The authority of the Agency to not do things. I mean, we're going back to

fundamentals of administrative law. Administrative law and rulemaking is not to have to go through case by case by case. The cases presuppose that someone's already been injured. The rulemaking process is to spell out a course of conduct, so that future instances will not occur.

Do you concede that rationale?

Mr. OLIVER.. Yes, certainly. But there are more effective ways to do it.

I'm interested not in rulemaking; I'm interested in having an effect for the benefit of consumers. If I can have a faster and better effect by bringing a case instead of making a rule, I think it serves the consumers' interest better.

Mr. FLORIO. The case deals with the one instance. So you've got to go out and let all the consumers be injured one by one by one, and you, after the fact, bring the case?

Mr. OLIVER. In the case of the cigarette industry, which is what we're talking about, it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers.

So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Mr. FLORIO. If we get to the point in the—there's going to be a reauthorization here; there will be a reauthorization in the Senate—if we duplicate what happened last session of Congress, that they have an exemption and we do not, how locked in concrete are you on this question of the exemption?

Clearly in the last session of Congress, you came down on the Senate side, and nothing happened. If you came down on our side on saying you should continue, and that promised the hope of having a reauthorization, is that anything we could conceivably receive from you?

Mr. OLIVER. I would expect so, although I would have to confer with my four colleagues, you understand.

Mr. FLORIO. Thank you very much.

Mr. LUKEN. The gentleman from Tennessee.

Mr. COOPER. Thank you, Mr. Chairman.

Mr. Oliver, I would like to suggest first that you perhaps amend your written statement. You start off with the words, "I am happy to be here today." From your attitude and your brief statement of earlier, I would suggest you edit that to be, "I am unhappy to be here today." And to be honest with you, I can't say that I blame you.

I have a couple of specific questions and then some more general ones.

Are you really looking at your budget so closely that other $200,000 items are being examined and cut, and if so, what are some of those items?

Mr. OLIVER. We look at the budget carefully all the time. If we find $200,000 that we think is not

being deployed usefully, we would certainly make an attempt to switch it.

This is a case that has—the cigarette lab has been on the mind of the commission, I gather, for awhile. It has not felt that those dollar have been spent usefully, and whenever you do find dollars that aren't being spent usefully, it seem to me you should spend them more usefully.

Mr. COOPER. Can you think of any other examples right now of miniature expenditures like that that have been selectively cut out and eliminated by the commission.

Mr. OLIVER. Not offhand. I have not gone through the budget this week. But I'd be happy to respond to that.

Mr. COOPER. Well, I'd like that for the record.

Are you planning, then, to lower your budget request by $200,000 when we do get around to an authorization hearing?

Mr. OLIVER. We had not planned to lower the budget request by $200,000, but if you would like us to lower it by $200,000, I'd be happy to take that under consideration.

Mr. COOPER. Well, if you were not planning on lowering your request, how are you planning on spending the $200,000?

Mr. OLIVER. We will redeploy the funds in other law enforcement activity.

Mr. COOPER. That means you'll think of a way?

Mr. OLIVER. That will be added to the other law enforcement activities that the commission

engages in, yes, unless you'd like to cut out the $200,000.

Mr. COOPER. Well, I might take you up on that.

Mr. OLIVER. Fine.

Mr. COOPER. How about cost of getting the work contracted out?

Mr. OLIVER. We estimate there will be some cost in monitoring the activities of the industry, as Mr. MacLeod has described, and I think our current estimate is something like $30,000 or $40,000 in order to get the kind of contracting we would need.

Mr. COOPER. This is for one study during a year, or is this for—

Mr. OLIVER. No. This would be for the annual activities. Maybe Mr. MacLeod would care to respond.

Mr. MACLEOD. Certainly. We have anticipated that we could spend somewhere in the nature of $40,000 in a year. These are not hard estimates, of course, because a lot would depend on what we found in the course of monitoring. In the Barclay case, we spent over $100,000 once we went into litigation in getting the information that we needed to make sure those ads were accurate.

But in the normal course of monitoring, we have allocated or we expect that we would have to have part-time of an attorney and occasional time of a chemist or an expert who would be able to go to other laboratories and see what is going on, and then occasional testing of cigarettes ourselves at a laboratory that we choose in order to make sure that we generate competitive information.

Mr. COOPER. Have you gotten a price quotation from any particular laboratory?

Mr. MACLEOD. Yes, we have some price quotations. The prices range from $3,000 to $9,000 per brand, depending on how many brands we test, and those prices generally are prices that we negotiate, and we use competition in that sector, too. We try to find where we can get the best testing for the best price.

Mr. COOPER. This Oak Ridge backup facility you've been describing, not your facility but some other facility at Oak Ridge National Labs—and I should warn you, I am from Tennessee; that's not in my district—who pays for that facility at Oak Ridge National Labs?

Mr. MACLEOD. That is a facility that is under the budget of the Department of Energy. It is actually operated by private contractors to the Department of Energy, and it is available for the use of Government agencies that wish to use it.

Mr. COOPER. Why do they have smoking testing machines that are better than yours, or at least a machine?

Mr. MACLEOD. They have machines in which they have been able to spend money and improve the equipment that we have not been able to do.

I should emphasize that we do not question the accuracy of our machine vis-a-vis their machine. Their machine is more automated, has better computers, et cetera.

Mr. COOPER. Does DOE have jurisdiction over tobacco.

Mr. MACLEOD. Not that I'm aware of, no.

Mr. COOPER. How did they get a machine that's more automated and better at testing tobacco than your machines?

Mr. MACLEOD. These machines can test the substance—these machines have many components that test for many different constituents of smoke and chemicals, and I would be glad to provide for the record a historical account of how that Oak Ridge Laboratory ended up with a machine at that location. I don't have the precise history right now.

Mr. LUKEN. Would the gentleman yield?

Mr. COOPER. Yes, I'd be happy to yield.

Mr. LUKEN. Since you're not under any time constraint, I don't apologize for interjecting.

What I'd like to do, since I think other Members are also curious about that is suggest to the gentleman that he pursue this line of questioning. I think we would all like to know, among other things, what would be—since this facility is available, what would be the opportunity for the Federal Trade Commission to use it as a substitute laboratory.

Mr. COOPER. That's just my thinking. And it seems curious to me that of all the towns in the United States, that one particular town, a small town in one State, would have two of the best smoking testing machines in the country, one operated by one Government agency and the other operated by another that has no jurisdiction over tobacco.

Mr. MACLEOD. Well, cigarette testing equipment at the Oak Ridge Laboratory, I understand, was established to do contract work for the National Cancer Institute, and part of the

explanation, I think, has to do with the reason why we believe the FTC is not as appropriate a place for this kind of work, because this is scientific work, and there is a great deal of synergy that scientists can take advantage of when they have these kinds of functions that they can share among other functions that they have.

Mr. COOPER. Does the Surgeon General of the United States share your opinion that you're not supposed to be in this line of testing?

Mr. MACLEOD. We have contacted, among the Government Agencies and health Agencies before we made the decision, individuals at the Surgeon General's office, and they have not raised any objection to our decision here.

I also do want to address the question that you put: Would we want to replace our testing with full-scale testing at the Oak Ridge facility? The answer to that, I think, is no, because the cost advantage of the Oak Ridge facility is a cost advantage that we can obtain by virtue of occasional contracts when we do want to test as a backup method.

If we were to use those kinds of contracts for regular periodic testing of many brands, the contract costs would probably exceed the cost that we had spent on the lab.

Mr. COOPER. I hope both of you gentlemen still have your current jobs when the figures come in. It would be interesting to see how the contract costs end up comparing with the costs of your current facility.

Are you aware of the foreign pesticide problem on tobacco?

Mr. OLIVER. Are you suggesting it will be higher or lower? I didn't understand our comment.

Mr. COOPER. Well, I don't know what the answer will be. I just hope that you have your current position, so that when the figures do come in, you can either be congratulated for your business judgment or perhaps criticized, if the contract cost is in excess of your annual operating cost.

Mr. OLIVER. That would depend on how much you contracted out, obviously.

Mr. COOPER. Yes. Are either of you gentlemen aware of the foreign pesticide problem on imported tobacco?

Mr. MACLEOD. I have heard reports relating to the issue. We are not—it is not a matter that has been put to the commission specifically.

Mr. COOPER. I think it's really outside of your jurisdiction. It just seems that if there's a laboratory there with expertise in these matters, and there is a current problem due to the unknown nature of substances sprayed on tobacco leaves which we import from other countries, and about—what—one-third of our current cigarettes are composed of imported tobacco, that someone should be looking into this. And as I understand it, it is properly within the Department of Agriculture's jurisdiction.

But before you close down your facility, turn out the lights or tear it down, I would urge you to at least check with the Department of Agriculture to see if they have use for your type of facility before it's entirely dismantled, because it is an area tangential to your direct concerns, but still important to public health and safety, at least until we get final answers.

On the main question of the hearing today, it seems to me, here we have what's really a piddling expenditure in the big scheme of things—and while we all agree that saving every dollar is important—we have a piddling expenditure, and it's singled out, and the answer we're given is, "Oh, you can trust the tobacco companies," in particular in their furnishing of scientific information. And Mr. Oliver has already supplied us a single instance in which one company tattled on another, and I hope that's representative of industry practice.

But most oligopolies have a tendency, according to economic theory, which Mr. Oliver seems to delight in so much, most oligopolies have a tendency to collude.

And if you're talking about the specific area of scientific information, Mr. Oliver, would you say that the tobacco companies have competed against each other in supplying reliable, overall scientific information to the American public on the health dangers of smoking cigarettes? Have they competed against each other to be more accurate, more perceptive, more ahead of the curve, in supplying up-to-date, fair, accurate scientific knowledge to the American people?

Mr. OLIVER. When cigarette companies first started advertising their health claims back in the 1950's, they started making claims about their cigarettes, that they were essentially healthier than other brands, they were told by the Federal Trade Commission that they couldn't make those claims, because the commission concluded at that time, the Government concluded, that they were impliedly saying that cigarettes were, in fact, safe and healthy. So cigarette companies which had been making

health claims up until just that time were dissuaded by the government from making any fires health claims.

So I think that to the extent they don't make health claims, it was the government that stopped them from doing that.

Mr. COOPER. Let's look at more recent times. Are you aware of any reputable scientific body in the United States which agrees with most tobacco companies current health claims about the relative health or safety of their products?

Mr. OLIVER. I beg your pardon. Am I aware of what?

Mr. COOPER. Are you aware of any reputable scientific group in are the United States that agrees with the health claims of current tobacco companies in this country?

I'm not talking here about specific tar and nicotine levels. I'm talking about the full-page ads that we've seen in various newspapers and other things that have come out of the tobacco community?

Mr. MACLEOD. Mr. Cooper, if I may, I would like to explain that the chairman has some difficulty answering a question like this, because he is currently sitting on the commission which has before it a matter in adjudication involving an advertisement that some health claims, so it is very difficult for the chairman to make a comment because of the possibility that it could indicate some kind of attitude or prejudgment of the merits.

Mr. COOPER. That's fair. I was not aware you were in current litigation.

But in general, I think that's the source of this committee's skepticism, that if you're having to litigate or take into adjudication some sort of a scientific claim on the part of a tobacco company, it doesn't exactly give us the fullest confidence that we can trust the companies.

We would like a watchdog, and we're worried when a piddling expenditure like this is denied. Perhaps your agency wasn't up to snuff. That's an argument to bolster it, though, not to eliminate it.

Mr. OLIVER. Except as we've indicated, we don't test—indeed, the Government does not do its own testing in regard to a variety of products and standards. The R-value rule, the appliance energy labelings standards, we don't measure the energy efficiency of appliances. We rely to some extent on competition, and we always have the option, as we've tried to indicate here, of contracting out spot tests at Oak Ridge, and that just strikes me as a much more cost effective way to monitor the industry.

Mr. COOPER. I would urge you to talk to the Surgeon General, because he, at least, doesn't view this as any regular sort of product. He views this as a major, if not the major, health threat that our country faces, aside from AIDS and a few other things like that, I suppose.

Finally, if I could ask this question, let's go along with your free market theory and let's have competition and let's assume that everybody is going to vigorously compete against each other in all ways

Mr. OLIVER. Let's not make it too theoretical, after we've seen what happened to airlines after the free market took over.

Mr. COOPER. Well, let's concede the ideal situation—great competition is functioning out there—should there be a bad actor in the field, would you favor a stiff penalty, perhaps, if one of the tobacco companies is found to have lied about its tar and nicotine content?

Mr. OLIVER. Yes, we'd bring an action against them, the way we do against any industry practice.

Mr. COOPER. What sort of penalty is assessed in a case like that? Is it a traffic violation type penalty, or is it one that would really make a large, diversified company sit up and take notice?

Mr. OLIVER. Well, there are civil fines for noncompliances with rules and orders, and we try to make them.

Mr. COOPER. In what amount?

Mr. OLIVER. It would depend on the company and the circumstances. I don't think I could answer that here. But we try to make them sufficient to discourage the activity in the future.

Mr. COOPER. I have no further questions, Mr. Chairman.

Mr. LUKEN. The gentleman from Iowa, Mr. Tauke.

Mr. TAUKE. Thank you, Mr.. Chairman.

I'll be very brief. I have people waiting in my office, but I wanted to make a couple of points.

First, could you provide to the subcommittee a listing of those laboratories which would be available that could provide the services that are currently provided, or were being provided by your own laboratory?

Mr. OLIVER. Yes, I'd be happy to do that.

Mr. TAUKE. Can you tell us how many that might be? Are there two, three, six, a dozen out there?

Mr. MACLEOD. I think that we've identified in the letter that we have submitted to the committee already four laboratories, five counting TITL, and I suspect that we could find more if we looked. There is also—as the chairman indicated, we will be glad to give a more detailed listing of locations and capabilities.

Mr. TAUKE. I appreciate that.

Mr. LUKEN. Without objection, the record will be held open for that.

Mr. TAUKE. Thank you, Mr. Chairman.

[Testimony resumes on p. 42.]

[The following letter was submitted for the record:]

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office Of
The Chairman

June 8, 1987

The Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation,
Tourism and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Luken:

The following information is provided in response to questions raised at the hearing on May 7, 1987 on the FTC's decision to close its cigarette testing facility. Your request for information has been granted because it is an official request of a Congressional Subcommittee. 5 U.S.C. § 552(d), as amended by Pub. L. No. 99-580, § 1802 (Oct. 27, 1986). The responses to the questions consist of public and non-public information. Certain information in the answer to your question regarding the Carlton ad campaign was submitted to the Commission voluntarily in lieu of compulsory process in a law enforcement investigation and is exempt under FOIA exemption 3(B), by virtue of section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). *Dairymen, Inc. v. FTC*, 1980-82 Trade Cas. CCH 163,479 (D.D.C. July 19, 1980) in addition, some of this information includes marketing and sales data that may also be exempt from disclosure under section 6(f) of the FTC Act, 15 U.S.C. § 46(f).

The Commission, in its announcement of its decision to terminate the testing progress, indicated that it would have continued access to testing facilities at the Department of Energy's Oak Ridge Laboratory to conduct spot checks on cigarettes alleged to be rated incorrectly or to run a veracity check on a sample of cigarettes. During questioning at the hearing, Mr. Tauke further requested a listing of other laboratories that would be available to provide the type of testing performed by the FTC. In addition to the four laboratories listed in the Commission's May 7, 1987 letter to the Subcommittee, a survey of private testing facilities in the United States indicated there are four additional locations with at least some capability to do tar and nicotine testing.

1. Case Consulting Laboratories inc., Whippany, New Jersey

2. Fitelson Laboratories, New York, New York

3. Stillwell & Gladding Inc., New York, New York

4. Arthur D. Little, Cambridge, Massachusetts

You requested that we provide examples of cigarette advertisements and point out the location of the tar and nicotine disclosure. In all of the advertisements that we are providing the disclosure is either near the top or the bottom of the ad. The ratings are either referenced to the 1985 FTC Report or to tests conducted by the companies pursuant to the FTC Method.

You also requested information about a 1983 campaign for Carlton cigarettes. In 1983, staff conducted a non-public investigation of certain advertising by American Brands for its Carlton cigarette. One advertisement prominently featured the Carlton box - which the ad claimed was the "lowest". The Commission had received several complaints that this variety of Carlton was not available, but that Carlton varieties higher in tar than that advertised were readily available. The staff then conducted an investigation to determine whether American Brands was engaged in "bait" advertising, that is, "an alluring but insincere offer to sell a product which the advertiser in truth does not intend or want to sell." Guides on Bait and Switch Advertising" 16 C.F.R. § 238.4.

Staff's investigation indicated that the box variety of Carlton was available to some degree in

35% of all wholesale locations. The company stated that although it was producing adequate supplies of the box variety and was supporting the sales effort with vigorous advertising campaign, the cigarette was not popular and was not selling well. Since sales were minimal, wholesale locations started to cut back on orders Staff concluded, based upon these facts, that this was not a bait advertising campaign.

Staff also notes that although ads in the 1983 campaign disclosed the tar and nicotine ratings for only three varieties of Carlton cigarettes, more recent Carlton advertising provides tar and nicotine ratings for other higher tar varieties of Carlton cigarettes as well. In addition, all varieties of Carlton list the tar and nicotine ratings on the front of the package.

Mr. Cooper requested an indication of what expenditures in the range of $200,000 or smaller other than the cost of the lab in the Commission's budget have been examined and reduced or eliminated. Over the past five years the Commission has taken numerous steps to reduce unnecessary expenditures. While most of these actions have involved major cost-saving efforts such as space consolidation and office automation, the Commission has also aggressively sought smaller cost saving measures wherever possible. Listed are rough estimates of these smaller cost-saving initiatives:

	Estimated Annual Savings ($000)
1. Contracting Out Commercial Services of 10 workyears or less:	

-Audit Services	$ 25
-Micrographics Laboratory	75
-Mail Operations	50
-Library Cataloging	20
-Warehousing	20
-ADP Operations	20

II. Other Efforts:

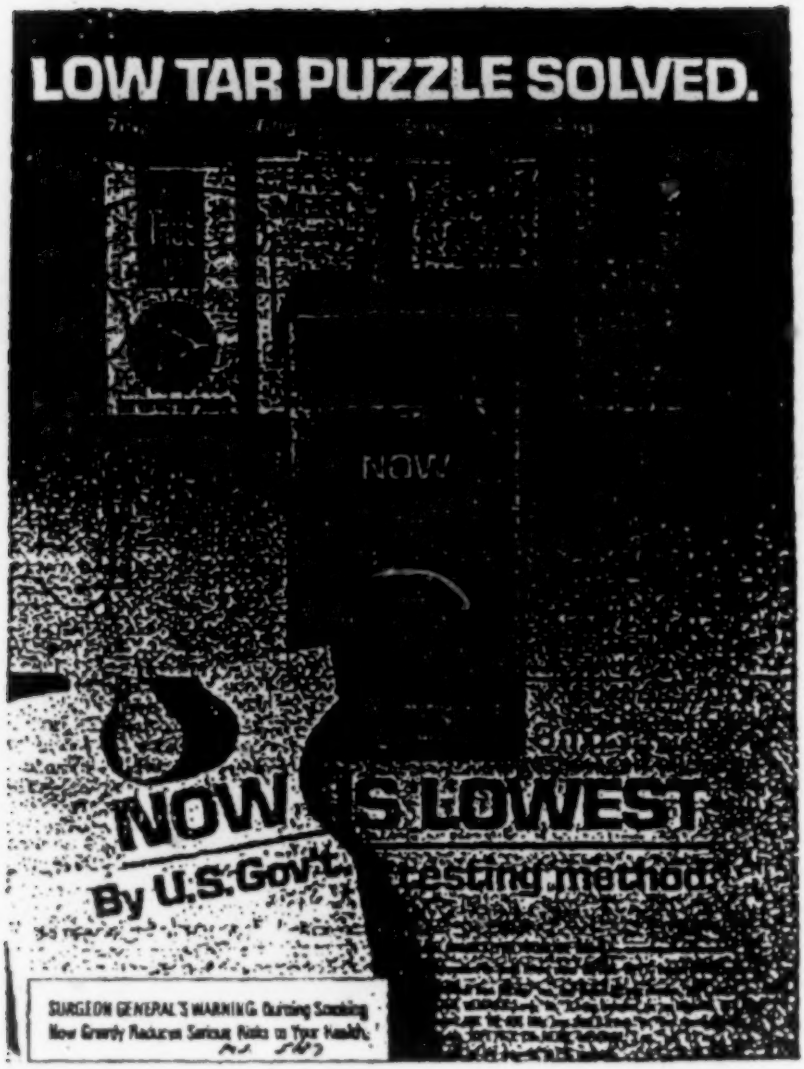
-Reductions in Periodical Subscriptions	$ 20
-Direct Deposit of Employee Payroll Checks	10
-Removal of Infrequently Used Consultants from Payroll	10
-Reduction in Number of GSA Rental Cars	7

Notwithstanding the exempt status under the FOIA of some of the information responsive to your request, the FOIA is not authority to withhold information from Congress, 5 U.S.C. § 552(c), and the Commission has therefore authorized its release to you. Because this non-public information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain the confidentiality of this information.

By direction of the Commission,

/s/_____

Daniel Oliver
Chairman


LOW TAR PUZZLE SOLVED.
NOW
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S LOWEST
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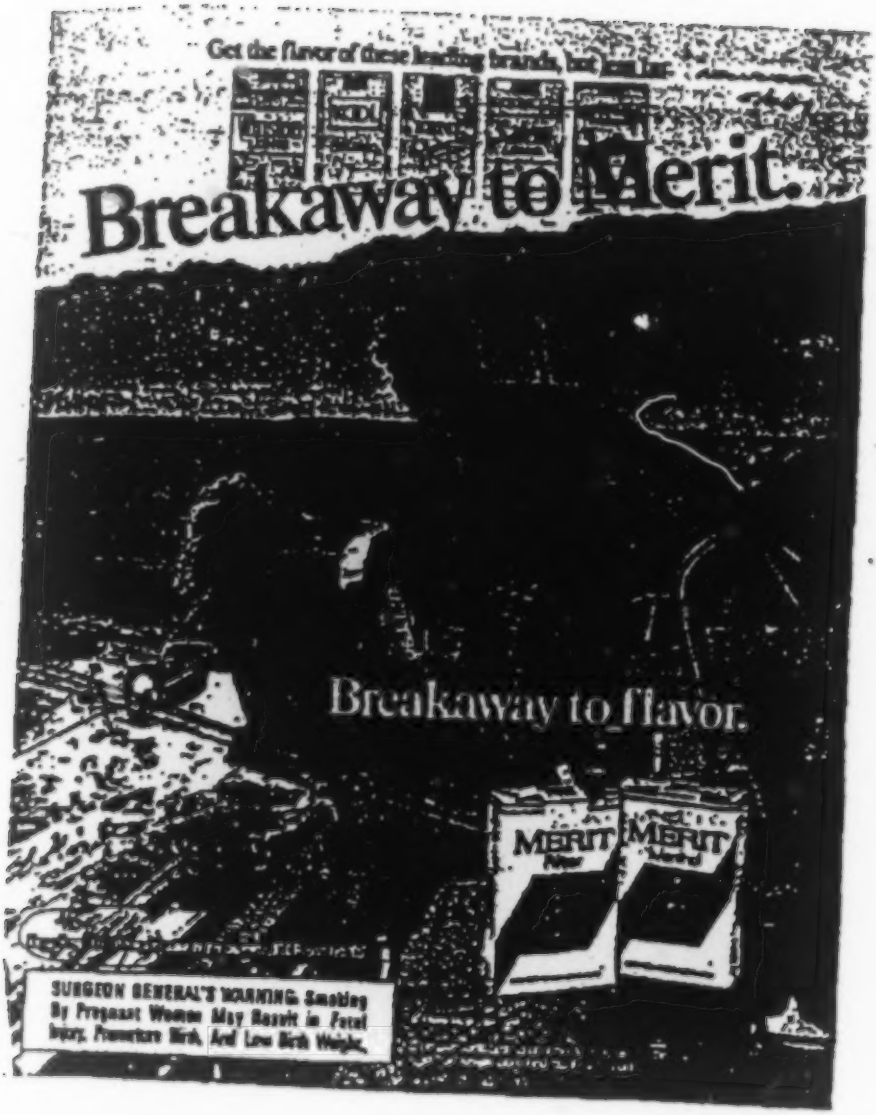
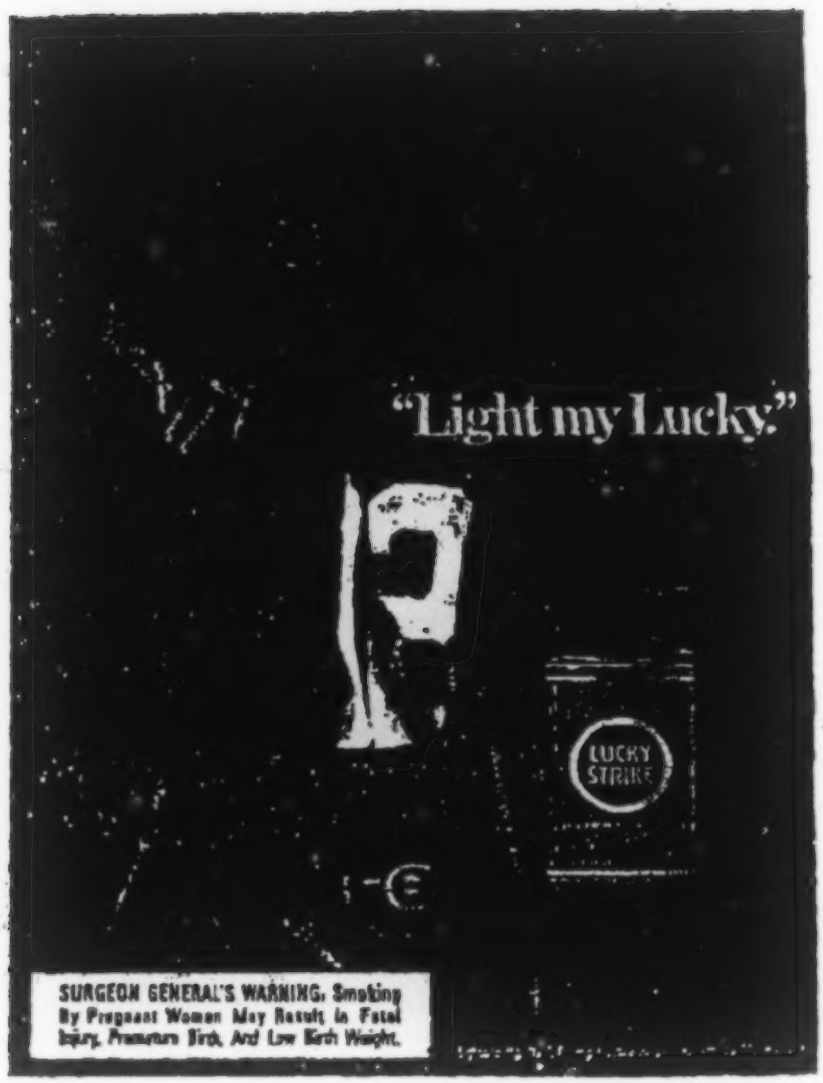
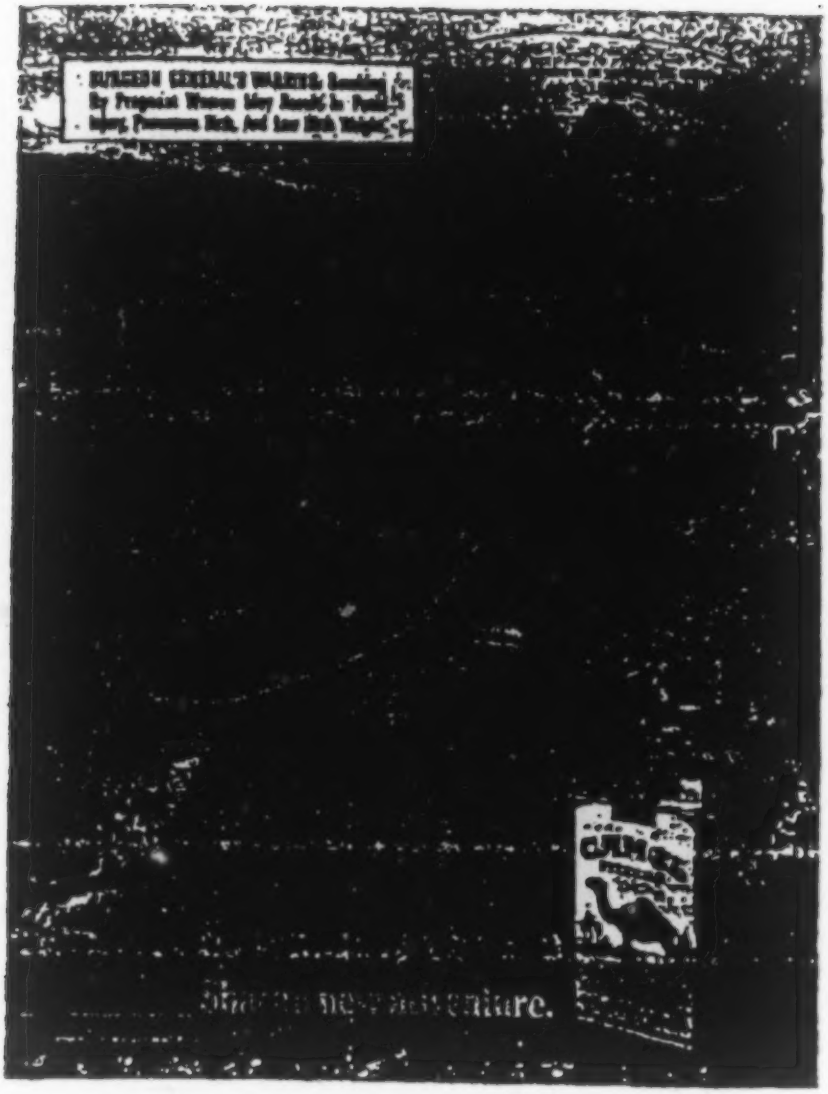
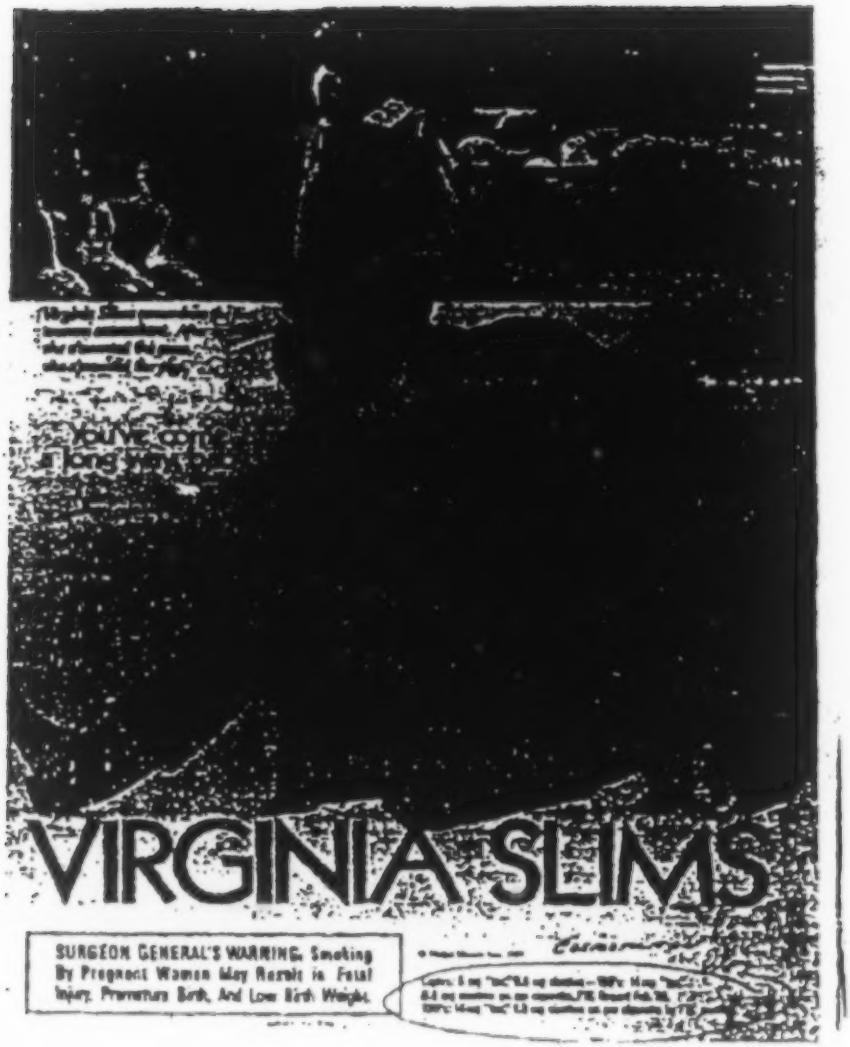
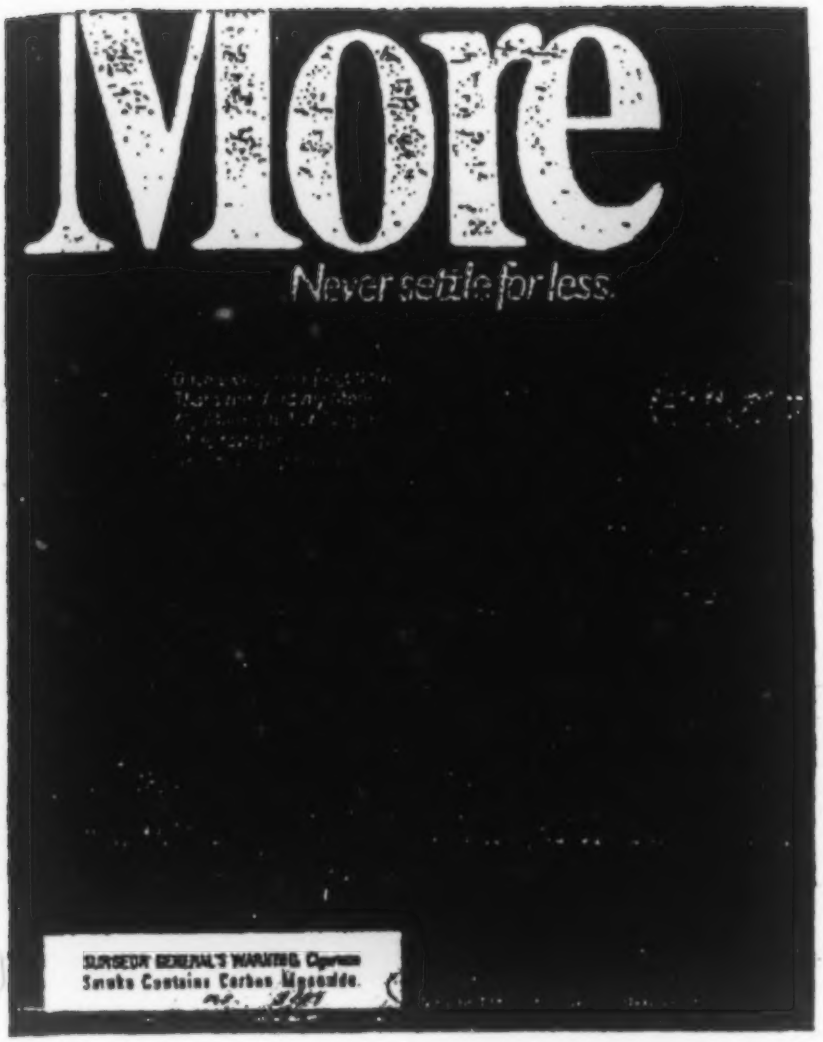
testing method
SURGEON GENERAL'S WARNING: Quitting Smoking
Now Greatly Reduces Serious Risks to Your Health.


Get the flavor of these leading brands, but
Breakaway to Merit.
Breakaway to flavor.
MERIT
MERIT
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

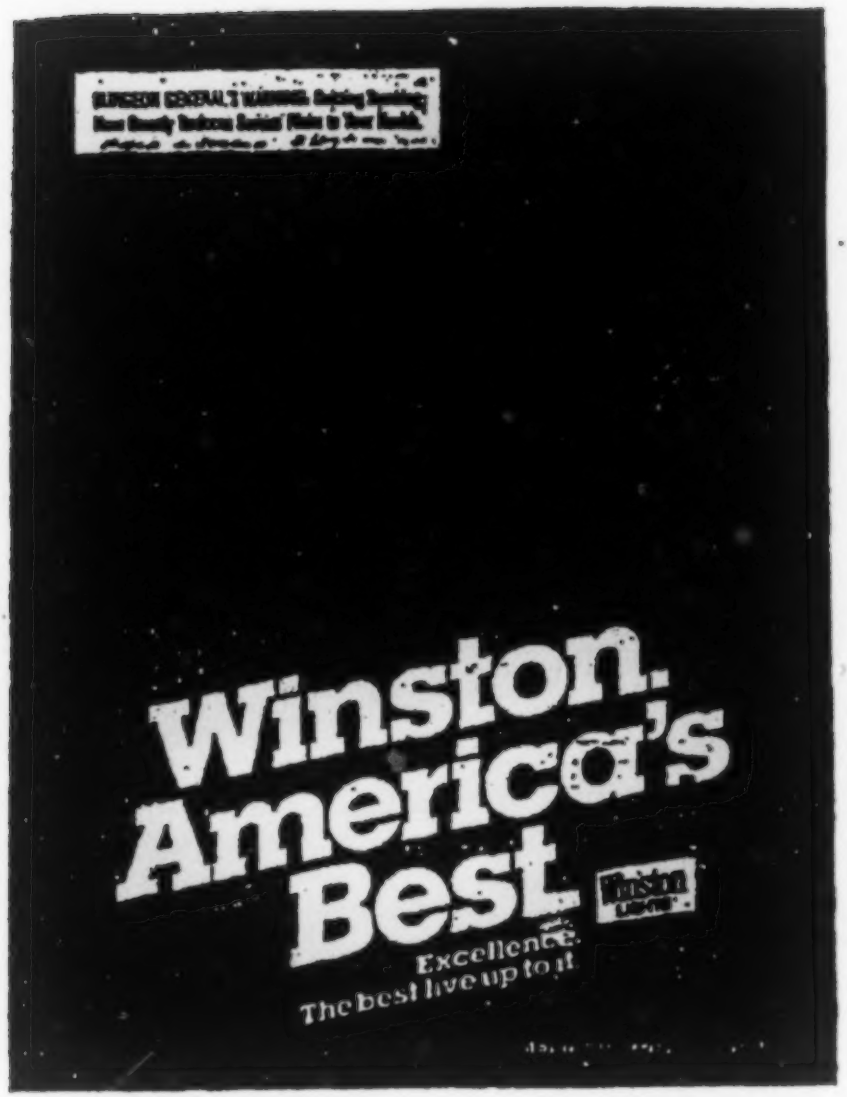

"Light my Lucky."
LUCKY STRIKE
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

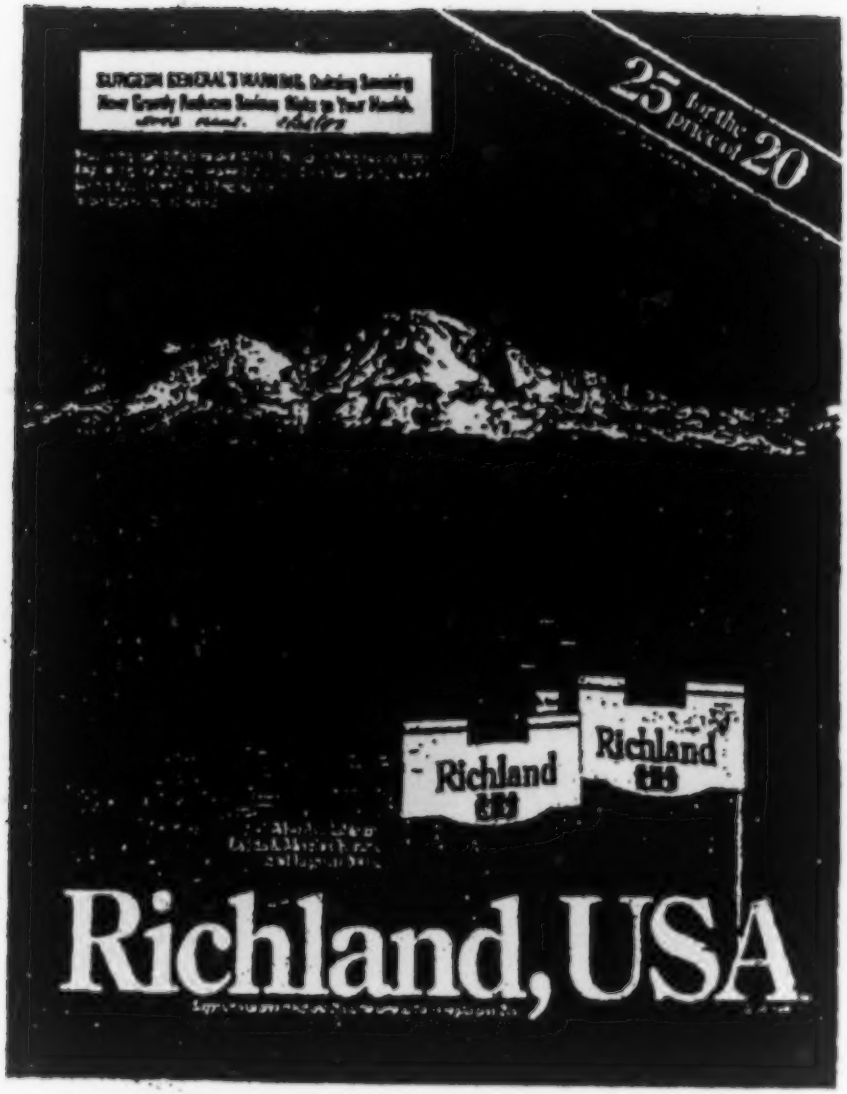


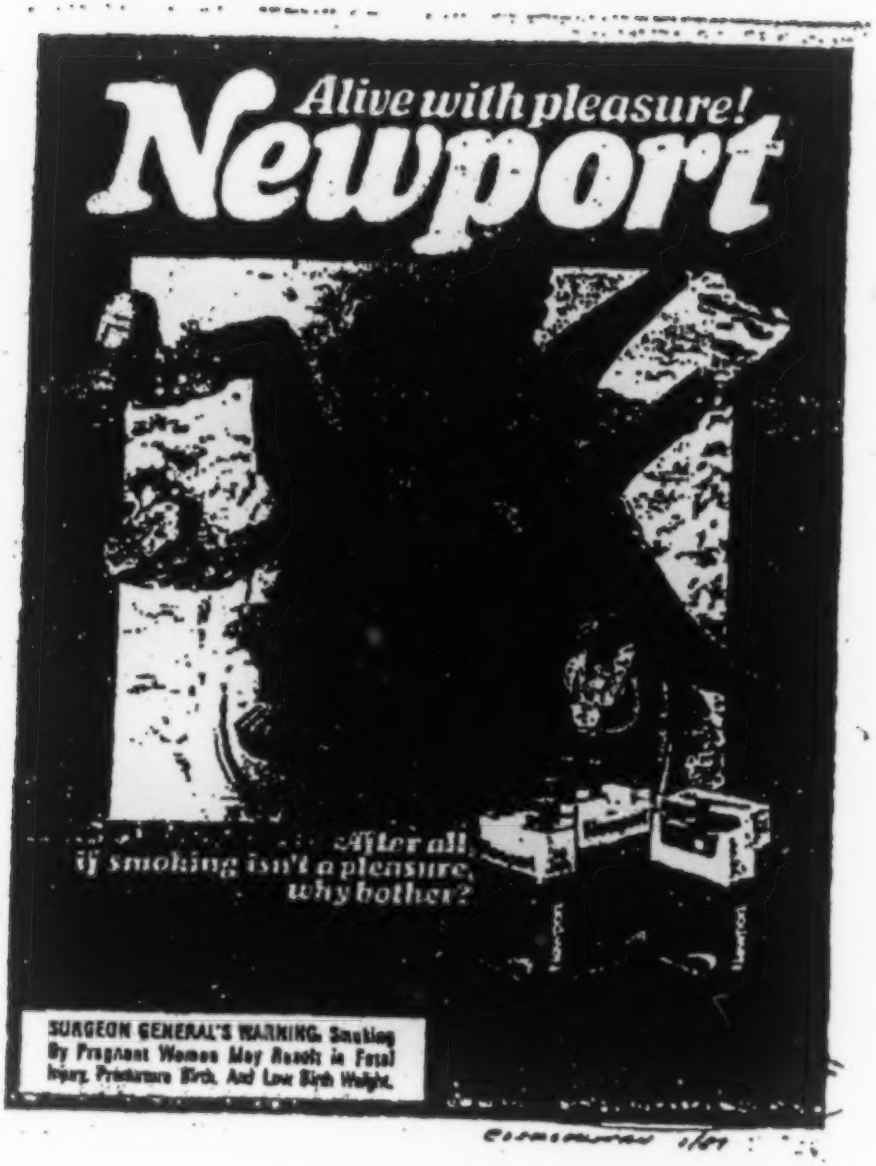

VIRGINIA SLIMS
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.


More
Never settle for less.
SURGEON GENERAL'S WARNING: Cigarette
Smoke Contains Carbon Monoxide.

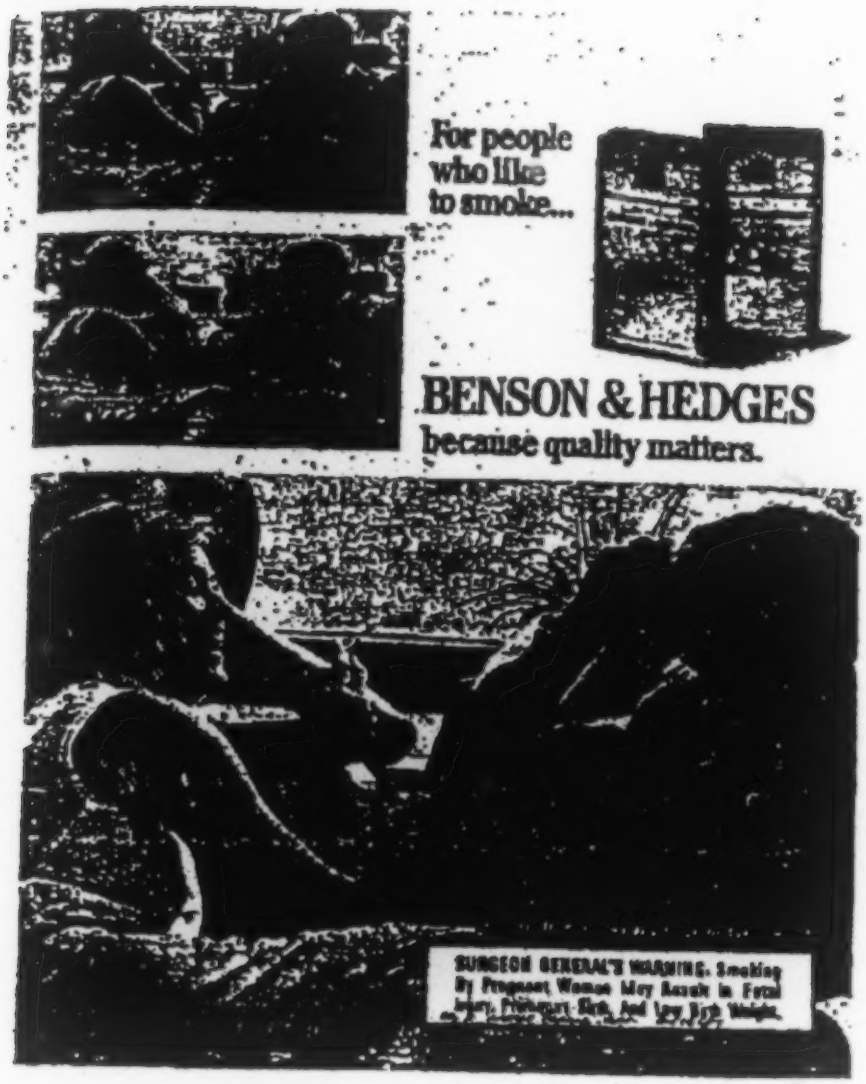
PERFORMANCE COUNTS.
VANTAGE

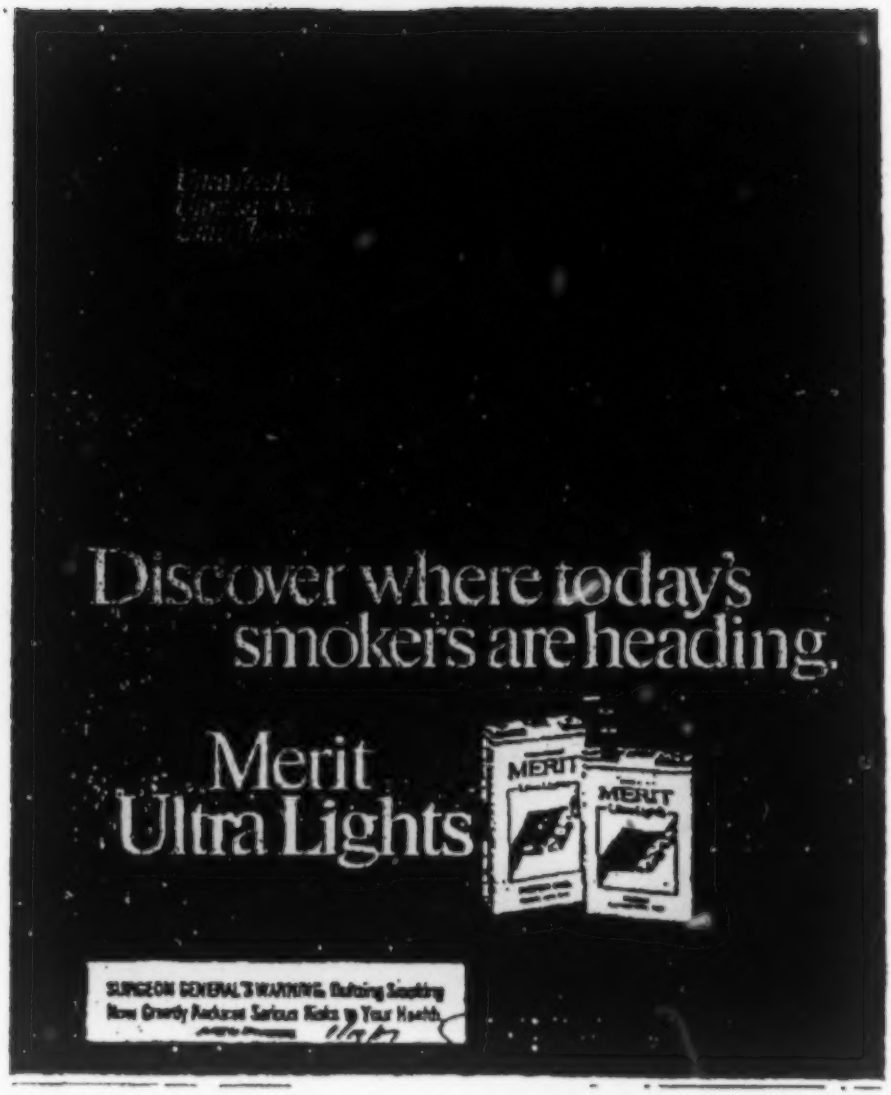

Winston.
America's
Best.
Excellence.
The best live up to it

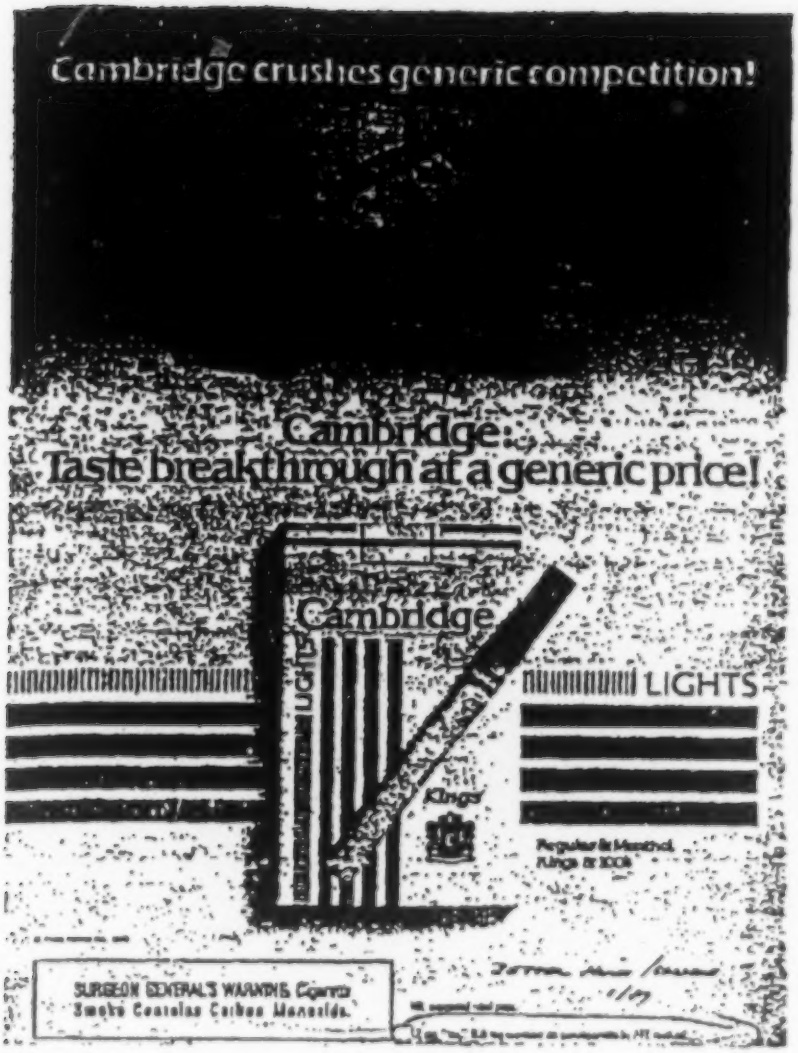

25 for the price of 20
Richland
Richland
Richland, USA

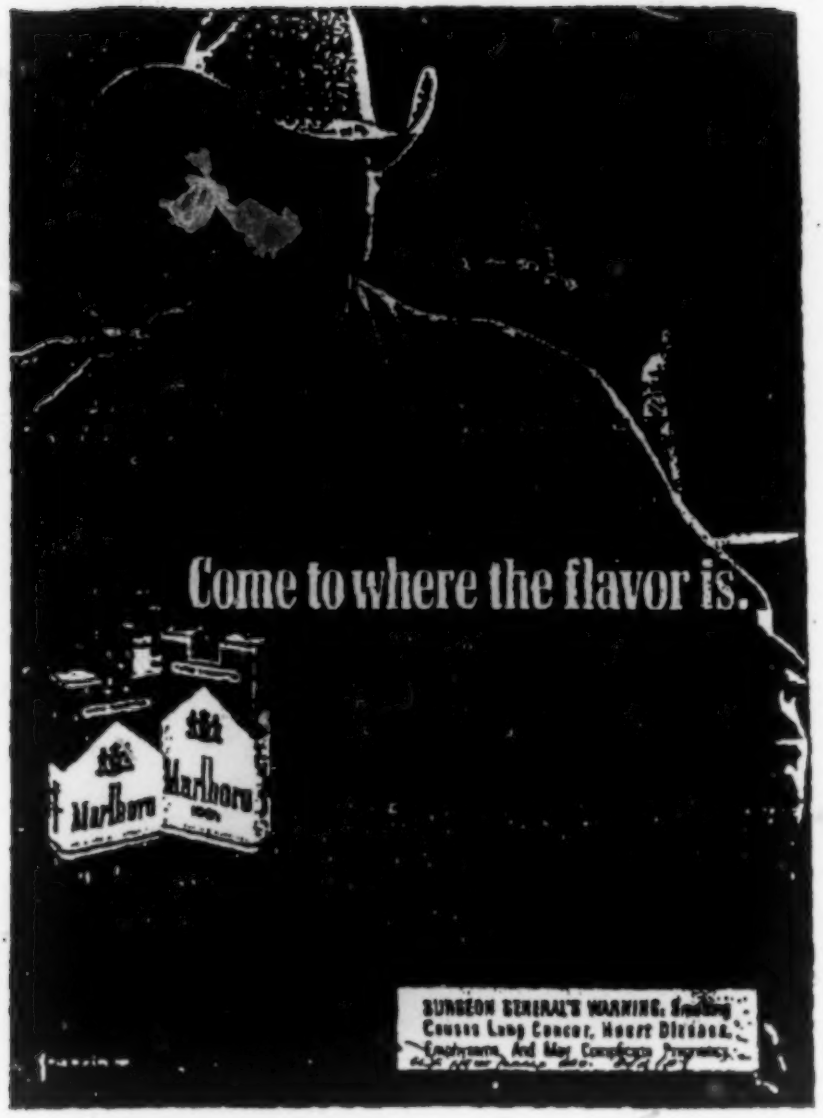

Alive with pleasure!
Newport
After all,
if smoking isn't a pleasure,
why bother?
SURGEON GENERAL'S WARNING: Smoking
By Pregnant Women May Result in Fetal
Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.
When you've been there and back
TRUE
TRUE
THE RIGHT TASTE. RIGHT NOW.


For people
who like
to smoke...
BENSON & HEDGES
because quality matters.
SURGEON GENERAL'S WARNING: Smoking


Discover where today's
smokers are heading.
Merit
Ultra Lights
MERIT
MERIT
SURGEON GENERAL'S WARNING: Quitting Smoking
Now Greatly Reduces Serious Risks to Your Health.


Cambridge crushes generic competition!
Cambridge:
Taste breakthrough at a generic price!
Cambridge
LIGHTS
Kings
SURGEON GENERAL'S WARNING


Come to where the flavor is.
Marlboro
Marlboro
SURGEON GENERAL'S WARNING: Smoking
Causes Lung Cancer, Heart Disease,
Emphysema And May Complicate Pregnancy.

* * *

Mr. TAUKE. It has been my observation, as I have listened, that really you guys have little jurisdiction in this whole area. I'm not sure that you're the ones who ought to be doing the testing. Your jurisdiction relates to advertising and whether or not the claims are correct. Your jurisdiction doesn't deal with health or any of the potential health problems created by cigarettes.

I assume, therefore, that you do not look at any of the factors that may contribute to increased inhalation of tar and nicotine, despite what the figures might be, that are in the advertisements. We've had testimony in other subcommittees that if you cut down on the tar and nicotine, people adjust their smoking habits in order to take in more tar and nicotine, but you don't look at that issue, I presume.

We have had indication in other subcommittees that when people smoke low-tar, low-nicotine cigarettes, that there are additives put into those cigarettes in order to make them more—taste better or be more attractive. I take it you don't look at those things because those things are kind of outside of your jurisdiction.

Am I correct in that assessment?

Mr. MACLEOD. Not entirely. We do look at those issues, because those issues do bear upon the accuracy and reliability of the numbers that are reported, and it is a very difficult question, a question in which there is still substantial disagreement in the scientific community.

I think that of a couple of areas in which there is consensus in the scientific community, it is this, the data that have been collected on smoking low-tar

cigarettes over the past 20 years show a definite, measurable decrease in the incidence of lung cancer for example.

Mr. TAUKE. Well, then, tell me, how do you compensate for the—what compensation do you put into your system to take into account the fact that people smoke—their smoking habits are different when they smoke low-tar cigarettes?

Mr. MACLEOD. Our system does not now accommodate—

Mr. TAUKE. That was my point.

Mr. MACLEOD. Yes, but we—that is something that we are looking into, that we have been looking into.

Mr. TAUKE. And how does that relate to advertising? Are you going to say, well, if you—well, how does it relate to advertising?

Mr. MACLEOD. It would relate to advertising if we found that these numbers had no value or even a deceptive value. But what we have found is that there does seem to be a correlation between the tar and nicotine in a cigarette and the tar and nicotine that is delivered to a smoker along broader ranges of tar and nicotine disparities.

So while we don't have the precise answers and the kinds of tests that are required to measure the actual delivery and the actual extent of the so-called compensatory smoking, we do have—we are looking into that—we do have confidence that there is a value to reporting the tar and nicotine numbers, and that value is not eliminated by some of these questions or some of these other issues that have been raised with respect to that.

Mr. TAUKE. I don't have time to pursue this. I wish I did. But I guess it just occurs to me that you're not the right agency to be testing cigarettes, and we ought to be transferring that to some other agency.

The second observation I'd make is the issue that you just raised. I have real concern about whether or not the publication of some of the information that you require is helpful or if it's not helpful, because the testimony we received in the Health subcommittee certainly suggests that lower tar and lower nicotine isn't all it's cracked up to be, and the implication is that if you have cigarettes that have substantially lower tar, that you're much safer, and I have concern about whether or not the message we're sending is indeed accurate.

So in any event, for reasons that may differ from your own, I think perhaps it's not all that bad, if you aren't in the testing business.

But somebody probably should be, Mr. Chairman, and that's what we might want to take a look at.

Thank you.

Mr. LUKEN. I thank the gentleman.

We've just about completed the major points, but there are a couple of points that I want to follow up on that we discussed before.

Mr. Chairman, the problem that we have from my standpoint in relying on private operations may be exemplified by this exchange.

In your testimony, you say that the cigarette industry has included tar and nicotine ratings in all advertising as a result of a voluntary agreement

among the cigarette companies. Now you say that—that's what your testimony says.

The cigarette industry has included tar and nicotine ratings in all advertising? What do you mean by all advertising?

Well, let me put it this way. I read that before and I couldn't' figure it out, and now we have the answer to our questions, which we did submit to you just last week, and your answers you submitted just a few moments ago, so maybe we're even in being tardy in submitting questions and answers.

But in the questions that we specifically addressed to you, we asked you as to the brands of cigarettes in the United States which are not tested by the manufacturer for tar and nicotine levels. And in your answer you say that there are 24 manufacturers and importers of cigarettes, exclusive of the six major manufacturers—that's important to the discussion we're having here now—and you do not know, and I quote, "Which, if any, of these 24 companies test for tar and nicotine. The FTC did not test any of the brands of these companies."

So you do not know which ones advertise; is that right?

Mr. MACLEOD. Mr. Chairman, we cover, among those brands—let me put it the other way. The brands that are not tested, we suspect, amount to less than 1/2 of 1 percent of all the sales.

Mr. LUKEN. Well, let's get to the—do they all advertise, or do they generally advertise? Do you know whether they advertise on this nicotine and tar question?

Mr. MACLEOD. Their advertising is almost nonexistent, and I would be glad to provide an answer for the record. We could certainly look into that further. But we virtually never see advertising of most of those brands we listed. As I said, their market shares and sales are so small.

Mr. LUKEN. Let's take the industry as a whole.

Mr. MACLEOD. The industry as a whole, we cover virtually all the advertising.

Mr. LUKENN. In the industry as a whole, do the cigarette manufacturers, in their advertising, include any claims with regard to tar and nicotine?

Mr. MACLEOD. They do.

Mr. LUKEN. Generally? Universally?

Mr. MACLEOD. Universally.

Mr. LUKEN. Every ad that's put out, say, in the newspaper has a claim with reference to tar and nicotine, right?

Mr, MACLEOD So far as we know.

Mr. LUKEN. Every one?

Mr. MACLEOD. Well, I would not be at all surprised if a publication in a local town somewhere in the West or other portion of the country might have missed it every now and then, but so far as we know, compliance with that general approach has been virtually 100 percent.

Mr. LUKEN. Well, we'll hold the record open. You can, I assume, gather various current clipping, newspaper and magazine clippings on the subject, and circle the—in case it's too small a print for some of us to read—circle the nicotine and tar.

But in any event, your response, then, goes to—

Mr. OLIVER. Are we looking for the one ad that doesn't have the tar and nicotine? Is that

Mr. LUKEN. No, no. Not at all. I asked generally. No, I'm not looking for the exception, no.

Mr. OLIVER. Well, what is it—I wasn't quite sure—what is it that we're supposed to provide?

Mr. LUKEN. Several, an assortment of advertisements, for those of us who don't assiduously watch the ads of cigarettes, to give us an idea of what they look like, how prominent they are, and various things like that.

I'm not questioning at all—I don't really know, and you're statement—you re now backing up your statement, which is fine.

Mr. OLIVER. I thought we were being asked to prove a negative, and I figure that would be quite difficult.

Mr. LUKEN. Well, if I gave that impression, I did not—I don't intend—I'm not asking you to prove it right now. I'm just asking you for some examples of what you say is the general rule, and I have no reason to doubt it.

Mr. OLIVER. I apologize. My misunderstanding.

Mr. LUKEN. But now on the question of you don't know which, if any, of the 24 companies test for tar and nicotine, right; that's what you say?

Mr. MACLEOD. Yes, Mr. Chairman.

Mr. LUKEN. Which, if any, of the 24 companies test for tar and nicotine. We don't know that, so we can't very well rely on what they're doing,

if we don't even know whether they're testing or not. Now you say on page 2 of your statement that all of the cigarette companies include tar and nicotine ratings as a result of a voluntary agreement. Now there s no law or regulation on that, right, requiring them to advertise tar and nicotine?

Mr. MACLEOD. That's correct.

Mr. LUKEN. And we notice that, some of the staff did, that Camel and Marlboro, for example, don't take pains to advertise tar and nicotine levels. Do you know that, whether that's the case?

Mr. MACLEOD. I am not aware.

Mr. LUKEN. Maybe they just don't do it prominently.

Mr. MACLEOD. I am not aware of any major brand that does not advertise tar and nicotine levels, Mr. Chairman.

Mr. LUKEN. Wasn't there an issue with regard to Carlton cigarettes where they have different kinds of cigarettes within that brand of Carlton, and they advertise the one that had low tar and nicotine whereas the others in the Carlton brand contained higher, much higher, levels, and those were not advertised? Wasn't that the case with Carlton, Mr. MacLeod?

Mr. MACLEOD. Well, generally with respect to cigarette brands, there may be a variety of different kinds of cigarettes within a brand. For example, longer cigarettes are slightly narrower, and to the extent that any of these is advertised, they will have the legend of tar and nicotine.

Mr. LUKEN. Are you familiar with the Carlton case, the bait and switch case?

Mr. MACLEOD. I sin familiar generally with questions that have arisen in that regard. With respect to the Carlton facts, no, I am not familiar.

Mr. LUKEN. Well, I'm reading from this publication--what is it, Consumer Reports. It says it turns out that American Brands, Incorporated makes eight varieties of Carlton. The cigarette featured in that ad is only one of them, the box with 85 millimeter long cigarettes. The other seven, according to American Brands' own figures, yield up to 700 times more tar than the one being promoted. One is rated at less than 1 milligram of tar; two at 1 milligram; two at five milligrams; and two at 7 milligrams.

Is that a problem that you found, Mr. MacLeod?

Mr. MACLEOD. What you are suggesting, Mr. Chairman, is something that I would certainly be interested to look into. Beyond that, it would be difficult for me to say precisely, not knowing any more facts.

Mr. LUKEN. All right. I wonder if you would give us a report on the issue, and we will provide you with the magazine that I just read from, bait and switch issue.

But a high tar nicotine cigarette wouldn't want to include that information in its advertising, would it, Mr. MacLeod?

Mr. MACLEOD. Would want to?

Mr. LUKEN. Would not want to include that information; right?

Mr. MACLEOD. Would not want to. I really couldn't speak for what the individual brand would or would not want to do.

Mr. LUKEN. All right. What assurances are there that the cigarette companies will continue to include this information in their advertisements as to tar and nicotine content in the future? What assurances do we have?

Mr. MACLEOD. We have no assurance today, we had no assurance yesterday, and don't have an assurance tomorrow. What we do have is a pattern that the industry has been following, an agreement for the last 20 years, in which they have been doing that, and it is our understanding that that agreement is not about to be abandoned. I believe that—

Mr. LUKEN. Well, what would the Commission do if one or more companies decided to discontinue including this information as to tar and nicotine content in their advertising? What would the Commission do? Can you assure us as to what the Commission would do?

Mr. LUKEN. I cannot assure you as to what the commission do because that is a matter, of course, that the commission would have to determine based on my recommendation. I can tell you this, that what the commission would do has nothing to do with our lab. Whether or not we have a cigarette lab does not change in any way our authority to require cigarette companies to post the legends in the advertisements.

Mr. LUKEN. Well, I remain at least concerned that the disbanding of the lab would be a signal of a relaxation of the vigilance of the commission in this regard. It would be a pull-back in the effort of the commission in holding the tobacco companies responsible with regard to the advertisements on nicotine and tar, and in the coming months and

years where there will be predictably increased pressure on the tobacco industry as an industry, I think we as the public and Government ought to be more vigilant and not less vigilant in examining the claims and in examining the contents of the cigarettes, and we will now, as soon as the other Members have their second round, talk to some of the private health people who have some suggestions in this area.

Mr. OLIVER. I would like to respond, Mr. Chairman, if I could. I don't see it as a concern, one bit, as I guess you realize by now. I do not think that closing the cigarette lab in any way implies that the FTC will be less vigilant or will have any effect on the vigilance of the FTC at all.

Indeed, to the extent that we have more dollars to deploy in more efficient, more effective law enforcement, it seems to me the FTC will be doing a better job for consumers, not a worse job.

Mr. LUKEN. Does the gentleman from Kansas have anything further?

Mr. WHITTAKER. Nothing further.

Mr. LUKEN. We thank you very much for your excellent responses and your candid discussions. We don't agree on everything but I think we have narrowed the issues this morning, and Mr. Oliver, we will be proceeding to the matter of reauthorization, but I think that we can take up the reauthorization by examining particular instances and cases and get better acquainted as we go along. So we will move with all deliberate speed in that area.

Mr. OLIVER. Thank you, Mr. Chairman.

Mr. MACLEOD. Thank you, Mr. Chairman.

Mr. LUKEN. All right. We will now call the remaining witnesses, and they are Dr. Alfred Munzer, chairman of the Government Relations Committee, American Lung Association, and Mr. Scott Bailin, Office of Public Affairs of the American Heart Association.

Dr. Munzer.

We have your statement and we have Mr. Ballin's statement, which will be received, without objection, and each of you may proceed in any way you think will be most helpful on the issue. And don't hesitate to respond to anything that's been said, if you are so of a mind.

STATEMENTS OF ALFRED MUNZER, CHAIRMAN, GOVERNMENT RELATIONS COMMITTEE, AMERICAN LUNG ASSOCIATION, AND ALSO AMERICAN THORASIC SOCIETY; AND SCOTT D. BALLIN, VICE PRESIDENT AND LEGISLATIVE COUNSEL, OFFICE OF PUBLIC AFFAIRS, AMERICAN HEART ASSOCIATION

Mr. MUNZER. Mr. Chairman, Members of the subcommittee, we are delighted to have the opportunity to comment today on the recent decision of the Federal Trade Commission to close its cigarette testing laboratory. I speak today as the chairman of the Government Relations Committee of the American Lung Association and the American Thoracic Society, but perhaps more importantly, as a practicing physician specializing in diseases of the lung who, day in and day out, is confronted by the ravages of tobacco smoke.

As in know, tobacco smoking claims close to 350,000 deaths a year m the United States, and

approximately 51 million—there are approximately 51 million smokers still in the United States today.

We totally disagree, therefore, with the decision of the Federal Trade Commission to close this very important facility. The Federal Trade Commission's cigarette testing program was initiated because it was believed that tar and nicotine levels in cigarettes affected their relative health risks and that the Federal Trade Commission's tar and nicotine rating system provided consumers with useful information about the relative tar and nicotine levels of different brands of cigarettes.

Although it was recognized that the commission's testing methodology did not produce data on actual levels of tar and nicotine intake by consumers of the different brands of cigarettes, the commission did assume that its test results provided consumers with relative tar and nicotine figures. That assumption, however, has never been verified.

There is ample evidence that there is both upward and downward self-titration of nicotine and carbon monoxide intake when smokers change to cigarettes with standard yields that differ over a wide range, and that the actual nicotine content is not always lower in the low yield cigarettes.

Indeed, the nicotine concentration actually in tobacco may in some cases correlate inversely with that measured in the Federal Trade Commission smoking machines.

We believe that the Federal Trade Commission's testing program may therefore have contributed to what Dr. Claude L'Enfant, Director of the National Heart, Lung and Blood Institute, has called seductive advertisements that lead consumers

to believe there are less hazardous or safer cigarettes.

But the action of the Federal Trade Commission is basically to throw out the baby with the bath water. We do not believe that the Federal Government should abdicate its testing program. It should improve on it.

We recommend that the Federal Government initiate a major educational program to inform consumers about the impact of their smoking behavior and their metabolism on the actual intake of tar, nicotine and carbon monoxide.

Serious consideration should be given to requiring a printed disclosure or disclaimer about this fact whenever tar and nicotine figures are disclosed in cigarette advertisements and on cigarette packages.

Consumers should be informed about how to avoid increasing their tar, nicotine and carbon monoxide intake. The Federal Government should initiate an educational program about the current scientific evidence as it relates to the relative health risks of low yield cigarettes.

The Federal Trade Commission's own survey indicates that many Americans falsely believe that it has been proven that low yield cigarettes are safe or at least safer than standard yield cigarettes.

Studies to date do not provide evidence that low yield cigarettes reduce the health, risk of heart disease, chronic obstructive lung disease or even lung cancer.

The testing program has played a major role in the switch by many Americans to low yield cigarettes based upon the assumption of safety.

The Federal Government should initiate an intensive research program to determine the relevance of the test results to the actual intake and absorption of tar, nicotine and carbon monoxide in smokers. If a different or modified testing methodology will produce more relevant, more reliable data, the testing program should be so modified or transferred to the appropriate agency. But it should not be in the hands of industry.

If it is determined that the testing program does not produce information relevant to actual practice, and that no modification can be adopted to accurately produce this information, the American public should be so informed.

And further, public comment about the overall benefits of the testing program should then be requested.

Millions of Americans make their decisions about what cigarette to smoke based upon their belief that the testing program provides meaningful information about their own actual intake. If this belief is false, the American consumer has an absolute right to know this fact.

We believe that the Federal Government should also initiate a research program to assess the over 1,000 additives in cigarettes. The Food and Drug Administration tests additives in food products. Many of these additives are similar to those found in cigarettes. Such an assessment would provide the consumer with a more detailed description of the tobacco product.

In conclusion, we urge restoration of the Federal Government's cigarette testing program. Assuming the industry will match the standard of the current program is, in your words, like allowing the fox to guard the henhouse.

Further, the improvements we have recommended will allow consumers to make more educated choices about their smoking habits, and perhaps upon learning that low yield cigarettes are not safer, choose to kick the habit instead.

Thank you.

(The prepared statement of Mr. Munzer follows:)

STATEMENT OF ALFRED MUNZER ON BEHALF OF AMERICAN LUNG ASSOCIATION, AND AMERICAN THORACIC SOCIETY

Mr. Chairman and Members of the Subcommittee, the American Lung Association thanks you for this opportunity to comment on the recent decision by the Federal Trade Commission to close its Cigarette Testing Lab. I am Alfred Munzer, MD, Chairman of the ALA Government Relations Committee. I am a physician specializing in disease of the lung and am Director of Critical Care at Washington Adventist Hospital.

At the outset, Mr. Chairman, ALA commends you for your interest in this issue. ALA has long been concerned with the Federal Trade Commission's testing and believes that review of its function and methodology is appropriate. Our comments today urge you to seek restoration of this program and consider improve merits to it.

The American Lung Association is the Nation's oldest voluntary health agency and is committed to the prevention and control of lung disease. ALA's medical section, the American Thoracic Society, is an 8500 member scientific and professional organization dedicated to the acquisition and dissemination of knowledge about the lung and lung disease. Public education about the dangers of smoking is central to the purpose of the Association and the Society.

Cigarette smoking is the single most preventable cause of death in the United States, accounting for over 800,000 deaths annually. Approximately 51 million adult Americans are current smokers—about 80 percent of population. Ultra-low yield cigarettes are smoked by approximately 8.8 percent of these smokers. Current male smokers are ten times more likely to die prematurely from emphysema or chronic bronchitis than nonsmoking males. Current female smokers are eleven times more likely to die from emphysema or chronic bronchitis than nonsmoking females. Cigarette smoking costs the United States economy approximately $65 billion annually in health care and lost productivity costs.

The Federal Trade Commission's cigarette testing program was initiated because it was believed that tar and nicotine levels in cigarettes affected their relative health risks and that the Federal Trade Commission's tar and nicotine ratings system provided consumers with useful information about the relative tar and nicotine levels of different brands of cigarettes.

Although it was recognized that the Federal Trade Commission testing methodology did not produce data on actual levels of tar and nicotine

intake by consumers of the different brands of cigarettes, the Federal Trade Commission did assume that its test results provided consumers with relative tar and nicotine figures. That assumption, however, has never been verified.

There is ample evidence to suggest that there is both upward and downward self-titration of nicotine and carbon monoxide intake when smokers change to cigarette with standard yields that differ over a wide range and that actual nicotine content is not always lower in low yield cigarettes. Indeed, the nicotine concentration actually in the tobacco may in some cases correlate inversely with that measured in the Federal Trade Commission smoking machines. We believe that the Federal Trade Commission's testing program may therefore have contributed to what Claude Lenfant, M.D., Director of the National Heart, Lung and Blood Institute has called "seductive advertisements" that lead consumers to believe there are less hazardous or safer cigarettes.

There are a number of reasons for this phenomenon. Some are related to the differences in human metabolism; others are related to how different people smoke and even how the same people smoke different cigarettes. There is considerable inter-individual variability in the metabolism and cardiovascular effects of nicotine in man and this may be the way in which cigarette smokers regulate nicotine intake to maintain relatively constant body levels of nicotine regardless of the type of cigarette smoked. There is also evidence that when some people switch to law yield cigarettes, they smoke more cigarettes and smoke each cigarette longer. A study just published in the Many issue of Journal of the American Public Health

Association, "Nicotine Yield and Measures of Cigarette Smoke Exposure in a Large Population: Are Lower-Yield Cigarettes Safer?", supports these earlier findings. The authors conclude that the lower the nicotine yield of the cigarette, the greater the number of cigarettes smoked per day. The authors go on to state that their data do not support the concept that ultra-low yield cigarettes are less hazardous than others. It has been shown that even if cigarette smokers continue to smoke the same number of cigarettes when they switch to low yield brands, they may increase the intensity with which they smoke so as to maximize delivery of nicotine.

Carbon monoxide is a major culprit in development of disease but disclosure if its yield, which is often paradoxically high in certain low yield cigarettes, is not currently required by the Federal Trade Commission, nor widely known by consumers.

The American Lung Association became very concerned when then Federal Trade Commission announced its decision to close its Cigarette Testing Lab. Although we contend that many of the procedures used are inadequate for determining tar and nicotine yields of cigarettes, we do not believe that the tobacco industry will improve upon the testing and reporting procedures. The so-called voluntary code for advertising by the tobacco industry is a case in point. Any of us looking at magazines targeted to young people can identify advertisements that do not meet with the intent of the guidelines. In our view, the results will be the same for the testing of low yield cigarettes by the tobacco industry—the results will be the utilization of flawed methodologies, reported to the public in a

manner that continues to suggest such cigarettes are safer, less hazardous.

The American Lung Association recommends that the federal government resume its role in the testing program. Without the federal government's watchdog role in certifying the testing program, we seriously question whether the industry will continue to conduct the testing in a good faith manner. Further, the American Lung Association recommends that the federal governments.

—Initiate a major educational program to inform consumers about the impact of their smoking behavior and their metabolism on their actual intake of tar, nicotine, and carbon monoxide. Serious consideration should be given to requiring a printed disclosure about this fact whenever tar and nicotine figures are disclosed in cigarette advertisements and on cigarette packages. Consumers should be informed about how to avoid increasing their tar, nicotine and carbon monoxide intake.

—Initiate an educational program about the current scientific evidence as it relates to the relative health risks of low yield cigarettes. The Federal Trade Commission's own survey indicates that many Americans falsely believe that it has been proven that low yield cigarettes are safe, or at least safer, than standard yield cigarettes. Studies to date do not provide evidence that low yield cigarettes reduce the health risk of heart disease, chronic obstructive lung disease, or lung cancer. The testing program has played a major role in the switch by many Americans to low yield cigarettes based upon the assumption of increased safety.

Initiate an intensive research program to determine the relevance of the test results to the

actual intake and absorption of tar, nicotine, and carbon monoxide in smokers. If a different or modified testing methodology will produce more relevant, reliable data, the testing program should be so modified. If it is determined that the testing program does not produce information relevant to actual practice and that no modification can be adopted to accurately produce this information, the American public should be so informed and further public comment about the overall benefits of the testing program should be requested. Millions of Americans make their decisions about what cigarette to smoke base upon their belief that the testing program provides meaningful information about their own actual intake. If this belief is false, the American consumer has an absolute right to know this fact, whether the cause of lack of relevance of the test results is human smoking behavior, the way the human body metabolizes cigarette smoke or the inadequacy of the testing technology.

—Initiate a research program to asses the over one thousand additives in cigarettes. The Food and Drug Administration tests additives in food products. Many of these additives are similar to those found in cigarettes. Such and assessment would provide the consumer with more detailed description of the tobacco product.

In conclusion, Mr. Chairman, we urge restoration of the federal government's cigarette testing program. Assuming the industry will match the standard of the current program is, in our opinion, like allowing the fox to guard the henhouse. Further, the improvements we have recommended will allow consumers to make more educated choices about their smoking habits and perhaps—upon

learning that low yield cigarettes are not safer—choose to "kick the habit".

Mr. LUKEN. Thank you, Dr. Munzer.

Mr. BALLIN.

STATEMENT OF SCOTT D. BALLIN

Mr. BALLIN. Mr. Chairman, Mr. Whittaker, I am Scott Ballin. I am vice president and legislative counsel of the American Heart Association.

The American Heart Association appreciates the opportunity to testify with respect to the Federal Trade Commission's decision to close its cigarette testing lab. While we are concerned that the closing of the laboratory leaves the door open for abuses by the tobacco industry to both the testing methods and also the use of the information, we have expressed concerns in the past that the testing program as presently constituted was fraught with many problems, and that additional steps needed to be taken to assure the consumers were not led to believe that smoking low tar, low nicotine cigarettes was in fact safer.

Cigarette smoking has long been considered by the American Heart Association to be one of the three major modifiable risk factors of coronary heart disease, still the Nation's number one killer.

Since the release of the first Surgeon General's Report in 1964, the number of low tar and nicotine cigarettes appearing on the market has increased dramatically. Switching to low tar and nicotine cigarettes was perceived to be a way of reducing one's health risks, while continuing to smoke. But in the late 1970's, while still noting the benefits of switching to low tar and nicotine cigarettes, the

Public Health Service became more cautious. The 1979 report issued by the then-Surgeon General Julius Richmond stated, "Consumers should be advised to consider not only levels of tar and nicotine, but also levels of other smoke constituents. They should be warned that in shifting to a less hazardous cigarette, they may in fact increase their hazard if they begin smoking more cigarettes or inhaling more deeply."

The development of the low yield tar and nicotine cigarettes—it was once believed that these cigarettes would be leas hazardous to an individual's cardiovascular health. Both the 1981 Surgeon General's Report, entitled "The Changing Cigarette," and the 1983 report on cardiovascular disease, determined that there was no sufficient evidence to conclude that use of lower tar and nicotine cigarettes causes any reduction in cardiovascular mortality or morbidity.

The American Heart Association believes the cigarette testing program must continue, but with major modification. Although we recognize that the Federal Trade Commission's testing program did not suggest or recommend to the public that the low tar and nicotine cigarettes are safer, there is the misperception by the public that in fact they are safer, as Dr. Munzer pointed out.

While the Federal Trade Commission's testing program is designed to test for tar and nicotine levels for comparative purposes, the program has been flawed because its methodology does not take into account the actual smoking behavior or smoking habits of the cigarette smoker.

In addition, the tobacco industry has used the comparative results of the FTC's testing program for

competitive advertising and promotion purposes, with each company attempting to outdo the other by producing the lowest yield but best tasting cigarette on the market.

These practices are particularly distressing to the American Heart Association. With the demise of the FTC's testing program, no regulatory criteria will be to ensure that accurate and reliable information is provided to consumers.

We are in effect going from a bad situation to a worse situation. The end result could well be that consumers will be led further into believing that the risk of disease decreases substantially if they smoke lower yield cigarettes:

Even if one were to resolve the problems of blocking the air holes on cigarette filters and warning consumers that they may be smoking more cigarettes and inhaling deeper, there is still the potential health risk associated with unknown chemical constituents in cigarettes, and the way these chemicals react when burned both separately and in conjunction with other chemicals additives.

While the tobacco industry is not required to disclose to the public any of the additives they use to flavor their products, it is estimated that there are now well over 1,000 such additives.

The 1981 Surgeon General's report, the changing cigarette found the question of cigarette additives to be a major concern with respect to health risks.

The 1983 Surgeon General's report on cardiovascular disease noted well over 4,000 different compounds that have been identified in cigarette smoke, and that it is unlikely that a safe

cigarette can be developed that will reduce cardiovascular disease risk.

In conclusion, Mr. Chairman, the ABA believes that the FTC's testing program serves an important function, but it must go beyond its present testing methods, if it is to serve a more useful and reliable purpose. The program should have as its goal the improvement of health, not economic gain for the tobacco industry. If the program is reestablished by the FTC or any one of a number of other appropriate Federal Agencies, it is important that the other objectives be incorporated into the program. And these objectives would be to ensure that consumers are informed that tar, nicotine, and carbon monoxide intake levels by smokers will vary depending on how they smoke the cigarette; and that the FTC test results, or whatever agency does the testing, does not necessarily reflect the consumers actual intake.

Also, ensure that consumers are informed specifically that there is no safe cigarette, and there is no evidence that switching to low yield cigarettes reduces one's risk to cardiovascular disease.

Ensure that consumers are informed that although they are smoking low yield cigarette, the product contains other compounds and chemical additives about which very little is known of the health risks.

And ensure that the tobacco industry does not use the FTC's results in such a way that they mislead consumers into believing that there is in fact a safe or safer cigarette.

I want to thank the subcommittee for having the opportunity to appear here today, and I would be happy to answer any questions.

(The prepared statement of Mr. Bailin follows:)

STATEMENT OF AMERICAN HEART ASSOCIATION,
BY SCOTT D. BALLIN

Mr. Chairman I am Scott Bailin, Vice President and Legislative Counsel of Public Affairs of the American Heart Association. The American Heart Association is this Nation's second largest voluntary health organization representing over 120,000 members and over 2 million volunteers nationwide.

We appreciate the opportunity to testify with respect to the Federal Trade Commission's (FTC) closing of its cigarette testing laboratory. While we are concerned that the closing of the laboratory leaves the door open for abuses by the tobacco industry in both the testing methods and use of information, we have expressed concerns In the put that the program as presently constituted was fraught with many problems and that additional steps needed to be taken to ensure that consumers were not led to believe that smoking low tar, low nicotine cigarettes were safer.

Cigarette smoking has long been considered by the AHA to be one of the three major modifiable risks factors for coronary heart disease –still the Nation's Number 1 killer. As the 1983 Surgeon General's report on cardiovascular disease clearly stated: "Cigarette smoking is a major cause of coronary heart disease in the United States for both men and women. Because of the number of persons in the population who smoke and the increased risk that smoking represents, It should be considered the most important of the known modifiable risk factors for Coronary Heart Disease (CHD)." It has been conservatively estimated that cigarette smoking is

responsible for approximately 170,000 premature cardiovascular deaths each year.

Since release of the fast Surgeon General's Report in 1964, the number of low tar and nicotine cigarettes upon the market have increased dramatically. In the early 1970's it was generally becoming accepted that the lower tar and nicotine cigarettes would be less harmful to health. In fact, the 1964 Surgeon General's Report had identified "TAR" and "Nicotine" as the major harmful constituents of cigarette smoke. In 1966 the Public Health Service announced that the "preponderance of scientific evidence strongly suggests that the lower tar and nicotine content of cigarette smoke, the less harmful would be the effect." This continued to be the trend during the 1970's. Switching to the lower tar and nicotine cigarettes was perceived to be a way of reducing ones health risks while continuing to smoke. But in the last 1970's, while still noting the benefits of switching to low-yield cigarettes, the Public Health Service became more cautions. The 1979 report issued by Surgeon General Julius Richmond, M.D., stated that three caveats were in order

—Consumers should be advised to consider not only levels of tar and nicotine but also when the evidence becomes available) levels of other smoke constituents, including carbon monoxide.

—They should be warned that, in shifting to a less hazardous cigarette, they may in fact increase their hazard if they begin smoking more cigarettes or inhaling more deeply.

—And most of all they should be cautioned that even the lowest yield of cigarettes present health hazards very much higher than would be

encountered if they smoke no cigarettes at all, an that the single most effective way to reduce the hazards associated with smoking is to quit.

It is well established that the risk of coronary heart disease increases with the number of cigarettes smoked per day, the total number of years smoked and the degree of inhalation. With the development of the low-yield tar and nicotine cigarettes, it was once believed that these cigarettes would be less hazardous to an individual's cardiovascular health. Scientific evidence from the Franingham heart study suggests otherwise.

Both the 1981 Surgeon General's Report entitled the "Changing Cigarette" and the 1983 report on Cardiovascular Disease concluded that there was no sufficient evidence to conclude that use of lower tar and nicotine cigarettes causes any reduction in cardiovascular mortality or morbidity.

The American Heart Association agrees with the conclusions of both the 1981 and 1983 Surgeon General's Reports. As both reports pointed out, numerous reasons have been suggested for the findings that low-yield cigarettes do not reduce the risk of cardiovasculare disease. First, many smokers who switch to low tar and nicotine cigarettes often change their smoking behavior. They will compensate for the low tar and nicotine yield by smoking more cigarettes per day. This is borne out by statistics from the Mice on Smoking and Health. United States Department of Health and Human Services, which show that although there are fewer smokers in the United States, those who smoke are smoking more. There is also evidence, as referenced in the reports, that smokers who switch to the low-

yield cigarettes also inhale more deeply and take more puffs on the cigarette.

* * *

more deeply; and that FTC test results do not necessarily reflect the consumers actual intake.

—Ensure that consumer are informed specifically that there is no "safe" cigarette and there is no evidence that switching to low- laid cigarettes reduces ones risk of cardiovascular disease.

—Ensure that consumers are informed that although they are smoking low-yield cigarettes, the product contains other compounds and chemical additives about which very little is known with respect to health risks.

—Ensure that the tobacco industry does not use the FTC's results in such a way that many mislead consumers into believing that there is in fact a "safe" or safer cigarette.

I want to thank the subcommittee for the opportunity to appear here today and I would be happy to answer any questions.

Mr. LUKEN. Gentlemen, do you know anything about the Oak Ridge facility? What I mean is, do you know whether it has been used? What the possibilities are

Mr. MUNZER. No, sir.

Mr. LUKEN. The first you heard of it is today?

Mr. MUNZER. In my case it is.

Mr. LUKEN. Is that right.

Mr. BALLIN. Same here.

Mr. LUKEN. And you've been contending with this tobacco field for some time, and you haven't heard of it being utilized before?

Mr. BALLIN. No, sir.

Mr. LUKEN. You have observed the tobacco companies we were to relegate the testing to the tobacco companies, the Tobacco Institute, what will happen if the Tobacco Institute were to become the commonly used testing facility for a tobacco company? Would that be an agency of the tobacco industry?

Mr. MUNZER. It definitely would. There's no question about that.

Mr. LUKEN. I don't think we can hear you—is your mike turn on?

Mr. MUNZER. Sorry. There is no question that the Tobacco Institute is an arm of the entire tobacco industry. And I think it would be disastrous for the American public for the Tobacco Institute to provide very vital information to the American public as to what is present in tobacco products. I think it makes no sense at all.

It's a perversion of the entire concept of privatization.

Mr. LUKEN. But would you agree with the speculation that I was making, I'm sure you heard it, if the FTC laboratory goes out of business, and the private companies, and we now know there are at least 24 of them, and the importing tobacco operators, if they're left to their own devices and they continue to be besieged by consumer groups and health groups and public agencies that there just might be a bit of cooperation among the companies,

and they would actually have no incentive to produce critical reports or reports that challenge the claims of the companies. Do you have any comment about that?

Mr. BALLIN. I would agree with that assessment. I think that's why the Tobacco Institute exists, to ensure that the industry remains viable, and economically productive.

Mr. LUKEN. Do health organizations currently conduct independent tests of tar and nicotine levels in cigarette?

Mr. MUNZER. Our organization does not. We really believe that this is a proper function of Government, and that's where it should remain.

Mr. LUKEN. Are there any alternatives, at the present time, then, to either the Federal Trade Commission continuing its laboratory or the private companies, as Federal Trade Commission now proposes? Are there any other alternatives, so that the consumer, American consumer would be given reliable information on nicotine and tar content; do you know of any?

Mr. MUNZER. I am sure we would not object to seeing the Food old Drug Administration assume control over tobacco products, as they do over all drugs. And I think there may be some other Agencies in Government that might be appropriate. But for the moment, the Federal Trade Commission is the only game in town. And I don't think we should abandon the laboratory of the Federal Trade Commission until we've got something better.

Mr. LUKEN. Well, you've heard—go head.

Mr. BALLIN. I would agree with his assessment. I think that—I think the Congress needs to look at what appropriate agencies are out there that should be doing some of this testing, because it's not just tar and nicotine we're concerned with, the additives that are in there. And there are many toxic substances, gases, contained in cigarette smoke that are also harmful that need to be looked at.

Mr. LUKEN. Well, you heard Mr. Oliver in the oral testimony here, and he mentioned many shortcomings of the Federal Trade commission laboratory, you heard that, didn't you?

Mr. BALLIN. Yes, sir.

Mr. MUNZER. Yes, we did.

Mr. LUKEN. And then I questioned him as to whether that didn't obviously then present an option to the Federal Trade Commission, options, more than one. Evidently they construed it as presenting only one, close the thing up because it had problems and it wasn't completely—it didn't give complete results, and it was the perfect operation. The options would be, and I think you have followed up on that to improve the research, and to improve the dissemination of information on the problems of tar and nicotine as part of an overall educational program for the American public.

Mr. MUNZER. Absolutely.

Mr. LUKEN. That's the option that we might, this Congress or this subcommittee, might consider. Would you agree with that?

Mr. BALLIN. Yes, I would.

Mr. LUKEN. Do you have any thoughts? Now, you have both, I think, submitted similar kinds of proposals. Can you concretize them any further? What do you think our subcommittee might do from here?

Mr. BALLIN. Well, I think you might want to hold a hearing to look into the whole issue of what agency is the most appropriate one to put this kind of program under, and what kinds of things you would like them to do. And we would be happy to come back and provide you with our expertise on that.

Mr. LUKEN. We might ask the Commission to review the adequacy of its testing program, and seek to improve its methods. I guess they have testified to that effect.

Would you think that the General Accounting Office or the Office of Technology Assessment, do you know if they have been involved? To our knowledge, GAO has not been. Has OTA, to your knowledge?

Mr. BALLIN. Not to my knowledge.

Mr. LUKEN. Those are both organizations. Perhaps, especially the OTA today would have information that we have not developed. I don't know that we have developed what information they might have, and what resources they may have in helping us in pursuing the matter.

Well, I—go ahead, Dr. Munzer.

Mr. MUNZER. We need better technology to arrive at better data. And then the public needs to be better informed about what the data means.

Mr. LUKEN. Rather than less technology, and less information, which is apparently what we'll get out of this decision.

Well, I might say in concluding my remarks here that, Mr. Oliver mentioned that a couple of months ago, they made this decision that the FTC, and notified certain people, not this subcommittee I might add, of their intention, and got some kind of a cursory response from the Appropriation Subcommittee without obviously any consideration. And I've talked to the people at the Appropriation Subcommittee. I've talked to Neal Smith, and they had no hearing or no investigation of the matter at all.

So, this is not a situation where, either this full committee or this subcommittee has waived any interest or waived any rights or prerogatives in the matter. And once it came to our attention in the press that this action was taken, and that's basically where we got it, about 1 month ago, we moved to hold this hearing, and if necessary, we'll hold further hearings in working with the minority. And in continuing to work with you we will try to ensure that instead of having a restricted program for examining this question of the contents of cigarette with regard to their nicotine and tar levels, that we will be looking at an expanded program for governmental activity including the additives, which I believe you have mentioned, and which may be even more important.

Do you have any further comment on that, on the question of additives?

Mr. MUNZER. It's additives, and also, in the issue of carbon monoxide, which presently is not reported by, the Federal Trade Commission, and is a very important ingredient in tobacco smoke. In fact, there is a lot of evidence that low tar and—low tar cigarette actually yield more carbon monoxide which

is largely responsible for heart disease due to smoking.

Mr. BALLIN. Also, there are many other gases. Some of the hydro cyanide is contained in tobacco smoke, and nitrogen oxide; many others that really need to be looked at.

Mr. LUKEN. I thank you.

And the gentleman from Kansas is recognized.

Mr. WHITTAKER. Thank you, Mr. Chairman.

I would like to direct this question to either one of our panel. They're both experts in this area. I'd like to inquire a little bit about your success in placing public service announcements.

You have been involved in the creation and the dissemination of public service announcements for some time. I am aware that you do so on electronic media. I assume that you produce ads for the print media. Is that correct?

Mr. BALLIN. Yes.

Mr. WHITTAKER. Broadcasters by their licensure have a duty to serve the public, and often air those free public service announcements as part of their duty. Also, the Subcommittee on Telecommunication and Finance just marked up a Fairness Doctrine which requires broadcasters to air both sides of an issue that they might want to sponsor or carry.

The duty of the broadcasters to serve the public and uphold the Fairness Doctrine should provide easy access for your public service announcements on television and radio. What is your experience today in placing public service announcements with

broadcasters, and does it differ from your past experience?

Mr. BALLIN. Well, in a print area I can give you one example. This morning Mr. Oliver was talking about a case that's in litigation concerning an advertisement that R.J. Reynolds had been running that disputed this cardiovascular disease and smoking. And the American Heart Association, along with the Lung Association, Cancer Society, developed a counter ad and sent it to all of the major newspapers in the country. I can't remember the number, whether it was a substantial number of newspapers. Now, to our knowledge, not one newspaper printed our counter ad. It was a scientifically based ad, and that was the best example that we have.

Very few antismoking ads appear in the press.

Mr. WHITTAKER. To followup on that, and since we're discussing the print media, have you noticed, in your own experience in tracking, any difference between your success in placing antidrug or blood pressure PSA's as compared to your success in placing antismoking PSA's?

Mr. BALLIN. Yes, that has occurred. Also, not just with respect to print media, but also, I think, electronic media. I think they're more inclined to take a blood pressure PSA or a nutrition PSA. Now, I don't know what the reasons are, you know, we just have to take them at their word.

For example, they may say the are too many antismoking spots; they would rather do some other concerns related to health. We have to take them at their word.

Mr. WHITTAKER. Have you had the opportunity to track the relative success between the electronic and the print concerning antismoking? You acknowledge that your blood pressure and your anti-drug ads are more successful in both medias, but do you feel that your success in getting the antismoking ads on is a little higher in he electronic media than the print, vice versa or about the same.

Mr. BALLIN. I don't think we really had the opportunity to assess it, because it's a difficult and costly undertaking to follow major newspapers, and also, the electronic media.

Again, we're not paying for these ads. If we were paying for them, it would be a lot easier to track. But we turn these ads over to the electronic media, and also to the newspapers, and it's up to them to decide whether they want to run it.

Now, generally speaking, we can draw some conclusions that we are not seeing these ads. And so that will raise some concern to us.

And again, the Heart Association's messages are on a wide spectrum. So, if we're not finding that one area is successful, we'll move into something else, but we do not track it,

Mr. WHITTAKER. Did you have a comment, doctor?

Mr. MUNZER. I believe that in general we have been more successful in placing our ads, our public service announcements in the electronic media. And I will verify that with our communications experts and give you a written answer, I think it's a very important question.

Mr. WHITTAKER. I think that would be very helpful to the committee. And with the Chairman's consent, in fact asking for unanimous consent, I would ask that you provide that information and submit it to the record. I think it would be helpful to this committee

Mr. LUKEN. Without objection.

(Testimony resumes on p. 147.)

(The following letter was submitted for the record.)

Philip Morris USA
November 14, 2005

Policies, Practices & Positions

PM USA's Position on FDA & Tobacco

On March 17, 2005, bipartisan legislation was reintroduced to the 109th Congress in an effort to establish, for the first time, a comprehensive and coherent national tobacco policy in this country. The legislation would provide the U.S. Food and Drug Administration (FDA) authority to broadly regulate tobacco products. Altria and Philip Morris USA (PM USA) welcome this congressional action and applaud the Senate and House sponsors, Senators Mike DeWine (R-011) and Edward Kennedy (D-MA) and Representatives Tom Davis (R-VA) and Henry Waxman (D-CA), for their leadership and ongoing efforts to pass FDA regulation of tobacco.

Altria and PM USA strongly support the passage of this legislation and remain committed in our support for comprehensive, meaningful and effective FDA regulation of tobacco products. We believe FDA regulation would play a significant role in reducing the harm caused by tobacco. This is a goal that we

share with the public health community and society and believe is good for our companies, our employees, our shareholders and the Industry as a whole.

This legislation would set in place a wide array of important provisions that will greatly benefit consumers, the public health and all legitimate participants in the tobacco industry. The bill includes the following:

- Changing the language of the current cigarette health warnings and substantially enlarging their size and granting the FDA the authority to require new warnings In the future;
- Full disclosure of ingredients added to tobacco products;
- Authority for the FDA to regulate, or ban, terms such as "light" and low tar";
- Authority for the FDA to mandate changes in the design of tobacco products to protect the public health, including authority to remove harmful ingredients and smoke constituents;
- Authority for the FDA to do more to prevent minors from using tobacco products;
- Authority to establish standards for products that could potentially reduce the harm caused by smoking and define the appropriate ways to communicate about these products; and
- A ban on the sale of candy and fruit-flavored cigarettes.

Last year, the 108th Congress made unprecedented and positive advancements in its efforts to grant the FDA authority to regulate tobacco products in 2004. In May 2004, bipartisan legislation was introduced in both the Senate and the House. In July, acting on

a corporate tax bill, the Senate amended the Foreign Sales

Corporation/Extraterritorial Income Act to include the FDA legislation introduced in May.

However, on October 11, 2004, the Senate followed the House in approving a conference agreement on the corporate tax bill that failed to provide the FDA with any authority to regulate tobacco products.

Reintroduction of this legislation before the 109th Congress represents another important step forward for establishing this national tobacco policy. Taking a leadership role in calling for FDA regulation of tobacco products is the right thing to do. It is something we have been committed to and will remain committed to. We have worked diligently, as has the public health community, members of Congress and government officials, in search of common ground and policy solutions to complex, unresolved issues that surround the tobacco industry and will continue to do so.

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Overview of FDA Regulation

Philip Morris USA Testimony Before Congress In Support of FDA Regulation:

Summary of Written Statement of Michael Szymanczyk to the House Agriculture Committee (July 24, 2003)

Summary of Written Statements of Michael Szymanczyk to the House Government Reform Committee and to the House Energy and Commerce Committee's Subcommittee on Commerce, Trade and Consumer Protection (June 3, 2003)

Statement of PM USA CEO Michael Szymanczyk to the Specialty Crops Subcommittee of the House Agricultural Committee (September 26, 2002)

Written Statement of PM USA CEO Michael Szymanczyk Submitted to the Senate Health, Education, Labor and Pensions Committee (September 19, 2002)

BEFORE THE
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In re: Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure	)	Docket No. ____

PETITION FOR RULEMAKING

PRELIMINARY STATEMENT

Philip Morris Incorporated ("PM"), by counsel and pursuant to 16 C.F.R. § 1.9 and Section 18 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 57(a)(1)(B), hereby petitions the Federal Trade Commission ("FTC") to promulgate rules governing:

(1) the disclosure of average tar and nicotine yields of cigarette brands,

(2) the use of disclaimers with respect to average tar yield and the health effects of "low-yield" cigarettes,[1] and

[1] The FTC has historically defined "low-yield" cigarettes by tar range. For instance, as early as 1968, the FTC established three "categories" of tar yields: 15 mg and under; 16-21 mg; and 22 mg. The FTC characterized low-yield cigarettes as those having 15 milligrams of tar or less. FTC Report to Congress at 18-19 (June 30, 1968) (Ex. 1). As the industry succeeded in reducing average tar yields, standardized industry practices in the use of descriptors is reflective of those reductions. Today, continuing to rely on the FTC method, the industry standard for full-flavor cigarettes are those with an average yield of 15 mg or more tar per cigarette; light cigarettes those with an

(3) the use of descriptors, such as "light" and "ultra light."

The requested action by the FTC is appropriate in light of recent scientific developments, described below, culminating in the release of the National Cancer Institute's *Risk Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, Smoking and Tobacco Control Monograph No. 13, Bethesda, MD: U.S. Department of Health and Human Services, NIH Pub. No. 02-5074 (Oct. 2001) (Ex. 2) ("Monograph 13").

By this petition, PM is requesting that the FTC take immediate action in response to evolving scientific information about low-yield cigarettes. Historically, the FTC has played a central role in developing the method for measuring average tar and nicotine yields and in determining what communications would be permitted regarding those yields. Beginning in the 1950s, credible scientific evidence began appearing suggesting that reductions in tar and nicotine yields in cigarettes would reduce the risk of certain diseases, such as lung cancer.[2] Based on this evidence, the public health community

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[Footnote continued from previous page]

average yield of 7 to 14 mg of tar per cigarette; and ultra lights an average yield of less than 7 mg of tar per cigarette.

[2] *See, e.g.*, E.L. Wynder, et al., *A Study of Tobacco Carcinogenesis, II, Dose-Response Studies*, Cancer 10(6): 1193-1200 (1957) (Ex. 3); E.C. Hammond, et al., *'Tar' and Nicotine Content of Cigarette Smoke in Relation to Death Rates*, Environmental Research 12:263-74 (1976) (Ex. 4); E.A. Zang & Wynder, *Cumulative Tar Exposure: A New Index for Estimating Lung Cancer Risk among Cigarette Smokers*, Cancer 70(1):69-75 (1992) (Ex. 5).

urged tobacco companies to develop and market low-yield cigarettes and repeatedly advised smokers who would not quit to smoke low-yield cigarettes.[3]

In March 1966, consistent with the position of the public health community, the FTC announced that it would permit statements of average tar and nicotine yield, but only if such statements were based on the results of a standardized test method—the Cambridge Method:

> On the basis of the facts now available to it, the Commission has determined that a factual statement of the tar and nicotine content . . . would not be in violation of [FTC] Guides, or of any of the provisions of law administered by the Commission, so long as (1) no collateral representation (other than factual statement of tar and nicotine contents of cigarettes offered for sale to the public) are made; expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method . . . .[4]

The FTC made clear that the measurements provided by the Cambridge Method should be the

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[3] *See, e.g.*, Monograph 13 at 69 (Ex. 2); *Smoking and Health — A Report of the Surgeon General*, xiv (1979) (Ex. 6); *The Health Consequences of Smoking: The Changing Cigarette — A Report of the Surgeon General* v (1981) (Ex. 7).

[4] Trade Regulation Reporter ¶ 39,012, at 41,603 (CCH 1995) (Ex. 8).

only measurements communicated to the public: "statements or representation" of tar or nicotine yield based on other testing methodologies "would tend to confuse and mislead the public." [5] Three years later, the FTC proposed a trade regulation rule *requiring* the disclosure of tar and nicotine ratings in cigarette advertisements.[6] The tobacco industry responded by voluntarily agreeing to disclose average tar and nicotine yields as measured by the Cambridge Method in cigarette advertising—and has continued to do so to this day.[7]

Throughout the last several decades, the FTC continued to monitor the tobacco companies' statements regarding average tar and nicotine yields. The FTC has specifically permitted the use of descriptors, such as "low," "lower," and "reduced" tar that reflect the Cambridge Method's yield measurements.[8] In September 1997, the FTC most recently raised the issue of whether the use of the Cambridge Method test is potentially misleading to smokers who might think that the average per cigarette yields disclosed reflect actual smoker intake. Accordingly, the FTC issued a notice for

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[5] Letter from Joseph W. Shea to Howard H. Bell of 10/25/67 at 3 (2023098313) (Ex. 9).

[6] 35 Fed. Reg. 12,671 (Aug. 8, 1970) (Ex. 10).

[7] FTC Report to Congress at 18-19 (Dec. 31, 1970) (Ex. 11). This new requirement was "strongly" supported by prominent U.S. public health organizations, such as the American Cancer Society. Letter from E. Cuyler Hammond to Miles Kirkpatrick of 10/29/70 at 3 (TIMN 0069530) (Ex. 12).

[8] *See, e.g.*, Decision and Order, *In the Matter of American Brands, Inc.*, No. 8799 (Aug. 20, 1970) (Ex. 13); 59 Fed. Reg. 51,980, at 51,981 (Oct. 13, 1994) (Ext. 14).

comment on proposed revisions to the testing methodology.[9] At the same time, the FTC expressed concern about descriptive terms such as "light" and "ultra light" and asked for comment: "Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes? If yes, why? If no, why not?"[10] In 1998, the FTC requested that the Department of Health and Human Services ("HHS") "conduct a complete review of the FTC's cigarette testing methodology." The HHS in turn asked the National Cancer Institute ("NCI") to review the evidence of the relationship between machine-measured cigarette yields and disease risk. Three years later, on November 27, 2001, the NCI issued Monograph 13. In response to the Monograph, the FTC stated that it would be "working with" HHS "to fix the current cigarette tar and nicotine testing methodology." No timetable has been set, and the matter is pending.

In short, the FTC for the last five years has been considering what action, if any, to take on the subject matter of low tar cigarettes. Meanwhile, since 1997, concerns have increased with respect to (1) whether the FTC's Cambridge Method provides meaningful information to consumers and (2) whether descriptors, such as "light" and "ultra light," are potentially misleading to some consumers.[11]

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[9] FTC Report to Congress for 1996 at 1 (Ex. 15); *see also* 62 Fed. Reg. 48,158 (Sept. 12, 1997) (Ex. 16).

[10] 62 Fed. Reg. 48,158, at 48,163 (Ex. 16).

[11] *See, e.g.*, Monograph 13 at 10 ("Measurements of tar and nicotine yields using the FTC method do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette.") (Ex. 2); *id.* at 197 ("many

Recently emerging scientific analyses, such as those presented in NCI's Monograph 13, have placed into doubt the premise under which the FTC previously acted in this area: that low-yield cigarettes reduce the risk of harm. NCI's Monograph 13 concludes that "[t]here is no convincing evidence that changes in cigarette design between 1950 and the mid 1980s have resulted in an important decrease in the disease burden caused by cigarette use either for smokers as a group or for the whole population."[12]

Against this backdrop, PM respectfully files this petition asking the FTC to take immediate and appropriate action in light of the current state of the science in this area. Specifically, PM submits that, in response to recent criticism of the Cambridge Method, the FTC should reconsider its use of the Cambridge Method and consider whether a new method for determining tar and nicotine yields will more accurately estimate tar and nicotine delivery to the smoker. PM stands ready to assist the FTC in attempting to develop such a method. Further, PM submits that the FTC should require disclosure of tar and nicotine yields (as measured by the Cambridge Method or, if adopted, an alternative method) and require that any such disclosure be accompanied by certain disclaimers. The purpose of these disclaimers would be to communicate to the public uniform and consistent messages: (1) that the amount of tar delivered by any cigarettes depends on

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consumers use the terms 'Light' and 'Ultra Light' as a guide to the riskiness of particular brands of cigarettes").

12 *Id.* at 81.

how a person smokes the cigarette, (2) that smokers may intake more tar and nicotine than estimated by the Cambridge Method, (3) that low-tar cigarettes have not been established to be safer than other cigarettes, and (4) that smoking low-tar cigarettes does not make quitting smoking easier. Finally, PM submits that the FTC—while requiring the above-described disclaimers—should continue to allow the use of descriptors to differentiate among brands and brand styles, particularly within a single brand family, and to provide information relating to differences in taste. The FTC, however, should promulgate appropriate regulations to ensure that descriptors are used in a uniform manner throughout the industry and are defined by specific tar and nicotine ranges as prescribed by the FTC.

BACKGROUND

I. CURRENT REGULATORY SCHEME RELATING TO TAR AND NICOTINE TESTING AND DISCLOSURE

For more than three decades, the FTC has collected and published average per cigarette tar and nicotine yields using the Cambridge Testing Method. At the FTC's request, the cigarette companies entered into an agreement requiring the disclosure of these average yields in advertisements. Consistent with the FTC's policy, the cigarette companies have used descriptors such as "light" and "ultra light" to refer to taste characteristics as well as to ranges of average tar and nicotine yields.

The instant petition is submitted against the backdrop of the FTC's actions and regulations in this area, which we outline below.

A. The FTC's Decision to Ban Tar and Nicotine Disclosures

In the mid-1950s, in response to what it perceived as a rising number of health claims in cigarette advertising, the FTC issued Cigarette Advertising Guidelines. Among other things, the Guidelines prohibited claims "that any brand of cigarette or the smoke therefrom is low in nicotine or tars. . . when it has not been established by competent scientific proof . . . that such difference or differences are significant." [13] In December 1959, the FTC notified the industry that it considered "*all* representations of low or reduced tar . . . to be health claims" and advised each manufacturer to cease making such representations.[14] In short, the FTC took the position that disclosures of tar and nicotine yields were *inherently* deceptive and would not be allowed. A month later, the FTC negotiated an agreement with the industry banning tar and nicotine advertising.[15] Although the agreement was technically voluntary, the Chairman of the FTC

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[13] Trade Regulation Reporter ¶ 39,012, at 41,602 (CCH 1995) (Ex. 8).

[14] *See, e.g.*, Letter from William H. Brain to Addison Yeaman of 12/17/59 at 1 (521058489) (emphasis added) (Ex. 17).

[15] Trade Regulation Reporter 1 7853.51, at 11,730 (CCH 1988) ("[T]here will be no more tar and nicotine claims in cigarette advertising.") (Ex. 18); *see also Annual Report of the FTC for the Fiscal Year Ended* 82 (June 30, 1960) ("In the most important achievement under [the guidelines] the seven major manufacturers agreed to delete all tar and nicotine claims from cigarette advertising—a noteworthy example of industry—government cooperation to eliminate a practice considered deceptive and confusing to (the public.") (Ex. 19).

subsequently explained that, if necessary, the Commission would have enforced the agreement with litigation:

> [The Guidelines] constituted, in effect, informal advice and guidance to industry with respect to the regulatory posture which the Commission had reason to believe would be established as a basis for issuance of complaints, and subsequent proceedings under Section 5(B) of the Federal Trade Commission Act, . . .
>
> In 1960, then, the Commission was informing the industry that in its opinion the evidence then available would support a complaint against any marketer who-made any reference to tar and nicotine content, charging that such a reference was false and misleading.[16]

B. Growing Evidence in Support of Lower Tar and Nicotine

At the same time that the FTC was banning disclosure of tar and nicotine yields, scientific evidence began to emerge indicating that lowered yields of tar and nicotine reduce the risk of contracting certain types of disease, such as lung cancer. For example, in the 1950s, scientists discovered a dose-response relationship between skin tumors in laboratory animals and exposure to

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[16] Letter from Chairman Paul Rand Dixon to the Honorable Warren G. Magnuson of 4/11/66 at 2-3 (Ex. 20).

cigarette tar.[17] Scientists inferred from this evidence that reducing the tar yields of cigarettes might reduce the risk of lung cancer. In 1957, Dr. Ernst Wynder—one of the pioneers of smoking and health research—advocated a 40% reduction in tar yields based on the findings in the mouse skin painting experiments.[18] Dr. Wynder's historic recommendation led the way to a public health consensus that tar and nicotine reductions were an important potential means of reducing the health risks associated with smoking.

In 1966, the U.S. Public Health Service convened a technical committee of scientific experts to consider whether tar and nicotine reductions should be encouraged. After evaluating the evidence, the committee concluded that:

> [t]he preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect.

The committee "recommend[ed] to the Surgeon General that action be encouraged which will result

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[17] *See, e.g.*, E.L. Wynder, *et al.*, *A Study of Tobacco Carcinogenesis, II,. Dose-Response Studies*, Cancer 10(6): 1193-1200 (1957) (Ex. 3).

[18] E.L. Wynder & J. Mann, *A Study of Tobacco Carcinogenesis, III. Filtered Cigarettes*, Cancer 10(6): 1201-05, 1204 (1957) (Ex. 21); *see also* E.L. Wynder, et al., *A Study of Tobacco Carcinogenesis, II. Dose-Response Studies*, Cancer 10(6): 1193-1200, 1199 (1957) (Ex. 3).

in the progressive reduction of the 'tar' and nicotine content of cigarette smoke."[19]

In an effort to obtain additional evidence as to whether reductions in tar would be beneficial, in the mid-1960s scientists began to conduct epidemiological studies that examined the effects of smoking low-yield cigarettes. The scientists compared the disease rates for smokers of low-yield or filtered cigarettes to the disease rates for smokers of high-tar, non-filtered or "full-flavored" cigarettes. The NCI published the first study of this kind in 1968. The study showed that smokers who switched to filtered cigarettes had a 40% reduced risk of lung cancer as compared to smokers of other cigarettes. The author concluded that further tar and nicotine reductions could provide even greater protection:

> These findings provide the first human evidence that redesign of the product can reduce health hazards. They indicate that, if full advantage were taken of existing filter and other cigarette technology, a greater protection could be provided immediately.[20]

This finding was confirmed almost immediately in a 1970 epidemiological study conducted by Dr.

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19 *Reviewing Progress Made Toward the Development and Marketing of a Less Hazardous Cigarette, Hearing Before the Consumer Subcomm., of the S. Comm. on Commerce*, 90th Cong. 7-8. (1967) (Ex. 22). The committee's written report was circulated in 1966, but was not formally submitted to Congress until 1967.

20 I.D.J. Bross, *Effect of Filter Cigarettes on the Risk of Lung Cancer*, NCI Monograph 28: 35-40, 38 (1968) (Ex. 23).

Wynder, who found that filtered cigarette smokers had a reduced risk of lung cancer compared to non-filtered cigarette smokers.[21]

C. The FTC Reverses Its Position

As a result of this growing scientific evidence that filtered cigarettes reduce the risk of certain types of disease, the FTC in March 1966 reversed its position and allowed the disclosure of tar and nicotine yields in cigarette advertisements — albeit only under certain conditions. The FTC sent letters to each of the manufacturers explaining that "a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation" of the 1955, Guidelines, so long as the measurements are "supported by adequate records of tests conducted in accordance with the Cambridge Filter Method."[22] Its goal was "to encourage cigarette manufacturers to provide consumers with comparative information about their products' tar and nicotine yields."[23] The FTC subsequently explained that this decision to "augment information available to the public on the tar and nicotine content of cigarettes" was "[b]ased

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21 E.L. Wynder, et al., *The Epidemiology of Lung Cancer – Recent Trends*, J. Amer. Med. Ass'n 213(13): 2221-28 (1970) (Ex. 24).

22 Trade Regulation Reporter ¶ 39,012, at 41,603 (CCH 1995) (Ex. 8).

23 C.L. Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Review, in The FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes: Report of the NCI Expert Committee, Smoking and Tobacco Control Monograph* 7: 1 8, 1 (1996) (Ex. 25) (hereinafter, "Peeler").

on the proposition that lower yield cigarettes present a lessened hazard to the American public."[24] The FTC admonished, however, that "statements or representations" of tar yield "based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public"[25]—and thus would not be allowed.

At about the same time, the FTC issued a notice seeking comment as to "what action, if any, should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method" and announced that it would hold a hearing on the subject.[26] Before the hearing, the tobacco industry made a submission advising the FTC about the difficulties that are inherent in measuring the tar that any individual smoker will intake: "Cigarette smokers vary greatly in their manner of smoking—puffing rate, volume, frequency length of cigarette smoked, etc."[27] After the hearing, the industry again pointed out the limitations of the proposed testing methodology:

> The [Cambridge] Method does not measure the *volume* of smoke—or the PM [particulate matter] or nicotine in the volume of smoke—that any *human being* will draw from smoking any particular

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24 FTC Report to Congress at 17 (June 30, 1968) (Ex. 1).

25 Letter from Shea to Bell of 10/25/67 at 3 (2023098311) (Ex. 9).

26 31 Fed. Reg. 14,278 (Nov. 4, 1966) (Ex. 26).

27 Before the Federal Trade Commission, Technical Data and Recommendations at 18 (Nov. 28, 1966)(1005115719) (Ex. 27).

> cigarette. Each smoking characteristic is leveled or averaged out by the standard method.
>
> No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. . . .
>
> The [Cambridge] Method does not and cannot measure these many variations in human smoking habits.[28]

Notwithstanding the industry's observations regarding the limitations of the testing method, the FTC began testing cigarettes by the Cambridge Method in August 1967.[29] The FTC justified its use of the Cambridge Method in a press release, in which the Commission acknowledged the limitations of its method.[30] At times copying the industry's statements verbatim, it advised that "[n]o two human smokers smoke in the same way" and that its test "does not and cannot measure these many

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[28] Supplemental Observations Following November 30, 1966 Hearing Before the Federal Trade Commission at 2-3 (emphasis in original) (Ex. 28).The industry continued to point out the limits of the test method even after the Cambridge method was adopted. For instance, in the context of the Barclay dispute, discussed below, Brown & Williamson advised the FTC that "[a]ny one smoker can and may reduce the dilution by the way he or she holds the cigarette with hand or lips." Letter from Martin London to Matthew L. Myers of 7/16/81 at 17 (03531854) (Ex. 29).

[29] *See* 32 Fed. Reg. Reg. 11,178 (Aug. 1, 1967) ("issu[ing] directions ... to commence the first formal test") (Ex. 30).

[30] *See* Press Release, FTC to Begin Cigarette Testing (Aug. 1, 167) (Ex. 31) (hereinafter, "Press Release").

variations in human smoking habits."[31] The FTC noted further that its method does not even attempt to determine "the amount of smoke, or tar and nicotine, which the 'average' smoker will draw from any particular cigarette," because "there are too many variables as to both smokers and smoking conditions for any average to be meaningful." Indeed, the FTC was concerned that any attempt to determine results for an "average" smoker "could be misleading to the public, became a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly 'average' smoker."[32]

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[31] *Id.* at 2. The FTC has repeated this warning about the limitations of its testing methodology on numerous occasions. *See, e.g.*, FTC Report to Congress for the Year 1977 at 6 & n.6 ("implication" that cigarettes with lower tar ratings may be safer is correct only "as long as the smoker does not smoke more cigarettes, smoke further down on the cigarettes smoked, inhale more deeply, or otherwise modify his or her smoking behavior") (Ex. 32); FTC Report to Congress for the Year 1981, Attachment at 4 (If consumers who switch to lower yield cigarettes change their smoking pattern, for example, by smoking more cigarettes per day, they may receive a greater yield than suggested by the FTC test results.") (Ex. 33); FTC Report to Congress for 1993 ("The Commission alleged that consumers would not necessarily get less tar because the ratings shown in the ads were obtained by smoking machines that did not reflect actual smoking, partly because they did not account for 'compensatory smoking.") (Ex. 34); FTC Consumer Alert, *Up in Smoke: The Truth about Tar and Nicotine Ratings* (May 2000) ("The Federal Trade Commission wants you to know that cigarette tar and nicotine ratings can't predict the amount of tar and nicotine you get from any particular cigarette.") (Ex. 35).

[32] *Id.*

Nonetheless, the FTC made clear that it would require the use of the Cambridge Method. The FTC concluded that "the public interest requires that all test results presented to the public be based on a uniform method" because "use of more than one testing method . . . would only serve to confuse or mislead the public."[33] The FTC chose the Cambridge Method to be the "uniform method" because it provides a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable."[34] Finally, the FTC promised that it would "continue evaluating its results, and on that basis may determine in the future to change the number of cigarettes tested or any other testing procedures as may be found necessary."[35]

Three years later, the FTC went a step further and proposed a trade regulation rule *requiring* the disclosure of tar and nicotine ratings in cigarette advertisements.[36] Thus, in just 10 years, the FTC

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33 *Id.* at 1-2.

34 *Id.* at 1; *see also* Peeler at 2 (Ex. 25) ("[T]he Commission believed that the most important thing was to make certain the results presented to the public were based on a reasonable, standardized method and could be presented to consumers in an understandable manner.").

35 Press Release at 2-3 (Ex. 31).

36 35 Fed. Reg. 12,671 (Aug. 8, 1970) (Ex. 31). In 1969, Surgeon General Dr. William Stewart testified before Congress in favor of a law requiring the disclosure of tar and nicotine yields in advertisements and on packaging. Dr. Stewart explained that "[w]e believe the consumer is entitled to know the tar and nicotine levels of his cigarette. . .. It is the view of the Public Health Service that this issue is useful information; that the lower these levels are, the less hazardous is the

went from a position of banning tar and nicotine disclosures to a position of requiring such disclosures. In justifying its proposal, the FTC explained that "responsible medical opinion indicates that the reduction of tar and nicotine content in cigarette smoke decreases the hazard to the health" and thus "[t]o promote the public interest, advertisers should not be discouraged from promoting these varieties which rank low in tar and nicotine."[37] The FTC believed that requiring tar and nicotine disclosures would serve two purposes. First, disclosures would "lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette." Second, disclosures would encourage "competition among the cigarette companies to meet that interest."[38]

Notwithstanding its proposed regulations, the FTC sent a letter to the industry expressing its willingness "to explore . . . the possibility of reaching an agreement with all of the cigarette manufacturers on the inclusion of a statement of tar and nicotine contents in cigarette advertising," so long as the agreement would include an "effective method of insuring compliance with the terms of any

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cigarette likely to be." Cigarette Labeling and Advertising, Hearings on H.R. 643, H.R. 1237, H.R. 3055 & H.R. 6543 Before the House Comm. on Interstate and Foreign Commerce, 91st Cong. 86 (1969) (statement of Dr. William H. Stewart) (Ex. 36).

37 FTC Report to Congress at 14 (Dec. 31, 1970) (Ex. 11).

38 *Id.* at 15. Prominent public health organizations such as the American Cancer Society "strongly" supported the proposed trade rule. Letter from Hammond to Kirkpatrick of 10/29/70 at 3 (TIMN 0069530) (Ex. 12).

agreement."[39] In response, five of the six major manufacturers submitted a written plan agreeing to include tar and nicotine disclosures in advertising, and the FTC suspended its proposed trade rule indefinitely.[40] The FTC explained that relying on the industry's plan would free its resources to pursue other matters, and at the same time warned that it would return to the proposed trade rule if necessary:

> It appears to be in the public interest to afford the tobacco industry an opportunity to implement the letter and spirit of the amended plan which it has proposed. In taking this action, the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this subject at any time it deems such action to be necessary or desirable in the public interest.
>
> The Commission believes that if the amended plan operates satisfactorily, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing

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[39] Letter from FTC to Horace R. Kornegay (Sept. 16, 1970) (TIMN 0101668 (Ex. 37).

[40] FTC Report to Congress at 18-19 (Dec. 31, 1970) (Ex. 11); *see also* Letter from Horace R. Kornegay to FTC (Dec. 17, 1970) (TIMN 0063404) (Ex. 38).

with the serious problems relating to cigarette advertising.[41]

D. The Scientific and Public Health Community Continued to Support Lower Tar and Nicotine Yields

1. Scientific Evidence and Public Health Recommendations

Following the FTC's adoption of the Cambridge Method, scientific evidence continued to accumulate indicating that reductions in tar yield would reduce the risk of certain diseases, such as lung cancer.

Most notably, in 1976, the American Cancer Society ("ACS") published an epidemiological analysis of its groundbreaking Cancer Prevention Study ("CPS-P"). CPS-1 tracked over one million Americans for a 12-year period. The study categorized its subjects as either "high," "medium," or "low" yield smokers, as determined by the Cambridge Method's measurements. The study found that, compared to smokers of high-tar and nicotine cigarettes, people who smoked low-yield cigarettes were 26% less likely to die from lung cancer. The study also found that the health benefits from low-yield cigarettes were not limited to lung cancer. Smokers of low-yield cigarettes had a 14% reduced risk of dying from heart disease and a 16% reduced total mortality rate. Encouraged by these findings, the ACS concluded "we think it fair to say that switching from 'high' [tar] to 'low' [tar]

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41 FTC Report to Congress at 19 (Dec. 31, 1970) (quoting December 22, 1970 press release, attached as Appendix D) (Ex. 11).

cigarettes was at least a small step in the right direction for those who continued to smoke cigarettes."[42]

Numerous other studies in the United States and Europe similarly found that smokers of filtered or low-yield cigarettes as identified by the FTC or similar testing method had a reduced risk of disease:

- In 1981, an English study found that smokers of filtered cigarettes had less than 50% the lung cancer incidence of higher tar, non-filtered cigarette smokers.[43]
- In 1984, an epidemiological study based on seven locations in Western Europe found that male smokers of filtered cigarettes had a 41% reduction in lung cancer risk as compared to non-filtered smokers and that female smokers of filtered cigarettes had a 51% reduced risk. The authors concluded "our findings indicate that lifetime filter smokers have a lower risk relative to lifetime nonfilter smokers than previously thought . . . smoking cessation must be the primary goal of efforts to prevent lung cancer, although changing to low tar

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[42] Hammond, *'Tar' and Nicotine Content of Cigarette Smoke in Relation to Death Rates*, Environmental Research 12: 263-74, 273 (1976) (Ex. 4).

[43] J. Rimington, *The Effect of Filters on the Incidence of Lung Cancer in Cigarette Smokers*, Environmental Research 24: 162-66 (1981) (Ex. 39).

(filter) cigarettes should help in reducing the risk."[44]

- In 1992, an epidemiological study conducted by Dr. Wynder projected a 15-20% reduction in lung cancer risk for every 10-mg reduction in tar yields.[45]
- In 1995, a combined analysis of four British epidemiological studies found that "about a quarter of deaths from lung cancer, coronary heart disease, and possibly other smoking related diseases could be avoided by switching from higher tar cigarettes (30mg/cigarette) to lower tar ones (15mg/cigarette)."[46]

As recently as 2001, researchers found that lung cancer mortality rates in young Australian women had declined despite increases in smoking prevalence, concluding that "[r]eductions in tar yields . . . may be responsible."[47]

Relying on these and other studies, public health officials concluded that low tar cigarettes did

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44 J. H. Lubin, et al., *Patterns of Lung Cancer Risk According to Type of Cigarette Smoked*, Int'l J. Cancer 33: 569-76, 575 (1984) (Ex. 40).

45 Zang & Wynder, *Cumulative Tar Exposure: A New Index for Estimating Lung Cancer Risk among Cigarette Smokers*, Cancer 70(1): 69-75 (1992) (Ex. 5).

46 J.L. Tang, et al., *Mortality in Relation to Tar Yield of Cigarettes: A Prospective Study of Four Cohorts*, Brit. Med. J. 311: 1530-33, 1533 (1995) (Ex. 41).

47 L. Blizzard & T. Dwyer, *Declining Lung Cancer Mortality of Young Australian Women Despite Increased Smoking is Linked to Reduced Cigarette 'Tar' Yields*, Brit. J. Cancer 84(3): 392-96, 396 (2001) (Ex. 42)

reduce disease risk. In a 1981 comprehensive review, the Surgeon General concluded that "[t]oday's filter-tipped, lower 'tar' and nicotine cigarettes produce lower rates of lung cancer than do their higher 'tar' and nicotine predecessors."[48] In 1986, the International Agency for Research on Cancer ("IARC") similarly concluded that the epidemiological evidence "suggest[ed] that prolonged use of non-filter and high-tar cigarettes is associated with greater lung cancer risks than prolonged use of filter and low-tar cigarettes."[49] More recently, in 1996, the NCI concluded that the "more recent" scientific evidence continued to support the Surgeon General's 1981 conclusion that "[t]oday's filter-tipped, lower 'tar' and nicotine cigarettes produce lower rates of lung cancer than do their higher 'tar' and nicotine predecessors."[50]

Consistent with these conclusions, the public health community throughout the world called for cigarette manufacturers to reduce tar and nicotine yields in their cigarettes:

- In 1983, the U.K. Independent Scientific Committee on Smoking and Health concluded

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[48] U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette – A Report of the Surgeon General*, 18 (1981) (Ex. 7).

[49] IARC Working Group, *IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Tobacco Smoking*, 38: 1-421, 313 (1986) (emphasis added) (Ex. 43).

[50] J.M. Samet, *The Changing Cigarette and Disease Risk: Current Status of the Evidence, in the FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes: Report of the NCI Expert Committee, Smoking and Tobacco Control Monograph* 7: 77-92, 86 (1996) (Ex. 44).

that it was "encouraged by the decrease in tar yields over the last few years and recommend a continued reduction."[51]

- In 1985, the Fourth Scarborough Conference on Preventive Medicine—an international conference of public health authorities—issued a consensus statement declaring that "the policy [of encouraging tar and nicotine reductions] has been beneficial and that tar yields should be further reduced."[52]
- In 1988, the U.K. Independent Scientific Committee on Smoking and Health again concluded that "Government and the tobacco industry should consider what further action could be taken to persuade more smokers to favour low tar brands."[53]
- In 1991, Dr. Wynder reaffirmed the position he had advocated since the mid-1950s, explaining that "a strong social case is made for further developments in the low-yield cigarette."[54]

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[51] Department of Health and Social Security, et al., *Third Report of the Independent Scientific Committee on Smoking and Health, Chairman: Dr. Peter Froggatt*, 11 (1983) (Ex. 45).

[52] Participants of the Fourth Scarborough Conference on Preventive Medicine, *Is There a Future for Lower-Tar-Yield Cigarettes*, The Lancet II(8464): 1111-14, 1111 (1985) (Ex. 46).

[53] Department of Health and Social Security, et al., *Fourth Report of the Independent Scientific Committee on Smoking & Health, Chairman: Sir Peter Froggatt*, 11 (1988) (Ex. 47).

[54] D. Hoffmann, I. Hoffmann, E.L. Wynder, *Lung Cancer and the Changing Cigarette, in Relevance to Human Cancer of N-*

- In 1998, the U.K. Scientific Committee on Tobacco and Health again addressed the issue, recommending that a "policy of further tar reduction in manufactured cigarettes should be pursued."[55]

- In 2000, the Health Committee of the House of Commons focused on the fact that, notwithstanding evidence of compensation, in the U.K. "cancer rates have fallen faster than can be explained by changes in smoking prevalence and overall consumption of tobacco." The Committee considered this trend to be evidence that "tar reduction is responsible for the health improvement," leading it to "support further reduction in tar levels."[56]

Furthermore, the public health community went one step further and expressly urged smokers who would not quit to switch to a lower tar brand:

- In the 1960s and 1970s, the U.S. Government issued a pamphlet for smokers, entitled If You

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Nitroso Compounds, Tobacco and Mycotoxins 449-59 (I.K. O'Neill, J. Chen, H. Bartsch, eds., 1991) (Ex. 48).

55 Department of Health, et al., *Report of the Scientific Committee on Tobacco and Health, Chairman: Professor David Poswillo*, 7.21 (1998) (Ex. 49).

56 2000 U.K. House of Commons Report at ¶¶ 129, 137 (Ex. 50).

Must Smoke," that advised them to "[c]hoose a cigarette with less tar and nicotine."[57]

- In 1974, the U.S. Department of Health, Education, and Welfare issued a poster listing the tar and nicotine yields of commercially available cigarettes and advising smokers to switch to the cigarette with the lowest yield: "The Cigarette World is divided into the bad and the worse. You can buy as much as 34 mgs. of tar in a cigarette, or as little as 2. As much as 2.1 mgs. of nicotine, or as little as 0.2. There's a Tar & Nicotine list below that tells you which is which. Look them up. If you must smoke, at least bad is better than worse."[58]
- In 1988, the Health Departments of the U.K. issued a poster recommending that smokers choose "a brand of cigarette in a lower tar group than the brand you smoke at present."[59]
- In 1989, the American Cancer Society issued a brochure, "Cancer Facts & Figures," that recommended that "those who are not yet able to quit would be well advised to switch to

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57 U.S. Department of Health, Education, and Welfare, *If You Must Smoke* ... (1973) (Ex. 51); *see also* U.S. Department of Health, Education, and Welfare, *If You Must Smoke* ... (1969) (Ex. 52).

58 U.S. Department of Health, Education, and Welfare, *The Cigarette World is Divided into the Bad and the Worse* (1974) (Ex. 53).

59 Health Departments of the United Kingdom, *Tar, Carbon Monoxide and Nicotine Yields of Cigarettes* (Jan. 1988) (Ex. 54).

brands with the lowest possible tar and nicotine (T/N) content."[60]

4. *Compensation*

In making these findings and recommendations, the scientific and public health community was always well aware of issues surrounding possible "compensation" — i.e., changes in smoking behavior accompanying a switch to a cigarette with reduced tar and nicotine yields. In leading the call for low-yield cigarettes in 1957, Dr. Wynder made clear that any potential health benefit could be eliminated by compensation, such as increasing the number of cigarettes smoked.[61] Similarly, as early as 1964, the U.S. Surgeon General expressed his concern to the public reported in a popular U.S. newsmagazine — that "removing tar [and] nicotine . . . might also lead to different levels of cigarette consumption and different amounts of inhalation, and so forth."[62]

Nevertheless, the scientific community generally believed that the epidemiologic findings of a reduced risk would be valid even if smokers of low-yield cigarettes compensate. The reasoning was that the studies compare the risks of smokers of low-tar cigarettes to the risks of smokers of high-tar cigarettes—and thus would inherently take into

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60 American Cancer Society, *Cancer Facts & Figures – 1989*, 21 (1989) (Ex. 55).

61 Wynder & Mann, *A Study of Tobacco Carcinogenesis. III. Filtered Cigarettes*, Cancer 10(6): 1201-05, 1204 (1957) (Ex. 21).

62 *Answers on Filters*, U.S. News & World Report, Jan. 27, 1964, at 38 (Ex. 56).

account differences in how each category of smoker smokes and the extent to which those differences in smoking behavior may affect risk. Thus, the scientific community believed epidemiological findings of reduced risk from low-yield cigarettes were valid even if the smokers of low-yield cigarettes in the studies compensated.[63] For example, epidemiologist Dr. Jonathan Samet, in a 1996 review for NCI, explained that epidemiology was particularly important in assessing the health effects of low-yield cigarettes because it took compensation into account:

> Epidemiologic research has had a central role in characterizing the consequences of the changing cigarette because it supplies direct information on the consequences of varying tar and nicotine yield products. Thus, the findings inherently consider compensatory changes in inhalation

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63 Further, scientists generally believed that most smokers did not compensate by smoking more cigarettes when switching to a lower-yield brand. In 1980 scientists from the ACS analyzed CPS 1 and found that "over a long period of time people tend to smoke the same number of cigarettes a day regardless of the tar and nicotine level." L. Garfinkel, *Changes in Number of Cigarettes Smoked Compared to Changes in Tar and Nicotine Content over a 13 Year Period*, Banbury Report 19 (G.B. Gori, F.G. Bock eds., 1980) (Ex. 57). Based on this and numerous other studies, in 1984 the U.S. Surgeon General concluded that smokers do not generally compensate by increasing the number of cigarettes smoked: "most studies agree that smokers rarely increase their daily cigarette consumption upon switching from higher to lower-yield brands." U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease — A Report of the Surgeon General* 342 (1984) (Ex. 58).

patterns or in numbers of cigarettes smoked and provide the evidence needed to answer the question of immediate public health relevance: whether disease risk varies with cigarette tar and nicotine yield as determined by the FTC method.[64]

E. The FTC Continued to Re-evaluate its Testing Methodology

Since 1970, and in light of the evolving scientific evidence, the FTC has frequently reevaluated the propriety of its tar and nicotine rating, choosing in each instance to retain it. In 1976, the FTC tentatively rejected as "inappropriate" a request by Lorillard that its Kent Golden Lights be measured at a 5 mm depth of insertion into the smoking machine (as opposed to 11 mm required by the Cambridge Method).[65] In a separate letter to Lorillard, the FTC reaffirmed its view that "it would be *deceptive to advertise a tar figure which is higher* than the latest applicable FTC tar figure."[66] At the same time, however, the FTC acknowledged its concerns about whether its testing methodology adequately accounted for the possibility of ventilation blocking:

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64 J.M. Samet, *The Changing Cigarette and Disease Risk: Current Status of the Evidence, in The FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes; Report of the NCI Expert Committee, Smoking and Tobacco Control Monograph 7*: 77-92, 79-80 (1996) (Ex. 44).

65 42 Fed. Reg. 21,155 (Apr. 11, 1977) (Ex. 59).

66 Letter from Carol M. Thomas to Michael I. Gastman of 9/26/79 at 1 (TIMN 0063432) (emphasis added) (Ex. 60).

> Of special concern when considering any such modification of the standard 11 mm. insertion is whether the insertion depth would and should be decreased beyond the point consumers cover the cigarette with their lips, fingers, or both when they puff. The Commission believes that additional information is necessary before deciding whether further action should be taken in connection with this matter.

42 Fed. Reg. 21,155.

Based on these concerns, the FTC solicited further comments from the industry concerning whether the depth of insertion should be varied to account for the placement of ventilation holes, and Lorillard responded by arguing in favor of a varied depth of insertion.[67] The FTC rejected Lorillard's position, explaining that "a change in the insertion depth would cause a lack of continuity with previous test results" and that it would thus be inappropriate to change the procedure "in the absence of information indicating that a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use."[68]

In 1981, at the request of several competitor manufacturers, the FTC commenced an investigation into allegations that Brown & Williamson's Barclay cigarette "was assessed inaccurately by the current FTC cigarette testing methodology."[69] In June 1982,

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67 43 Fed. Reg. 11,856 (Mar. 22, 1978) (Ex. 61).

68 *Id.* at 11,857.

69 FTC Report to Congress for the Year 181 at 3 (Ex. 33).

the FTC concluded that Barclay's tar rating was "inaccurate" because "the unique construction of the Barclay filter resulted in it delivering less tar and nicotine during smoking by the testing machine than would be delivered to an actual smoker."[70] In April 1983, after Brown & Williamson's attempt to enjoin the FTC from taking action had failed,[71] the agency announced that it would no longer accept Barclay tar ratings based on the Cambridge Method.[72] The FTC sought comment regarding alternate methods of measuring the tar yield of Barclay and whether it should continue using the Cambridge Method for other cigarette brands.[73] Ultimately, the FTC retained the Cambridge Method. "[E]ven though the limitations on the predictiveness of the FTC method caused by compensatory smoking were clearly recognized," the FTC did not have a "sufficient basis for changing the protocol."[74] There was "no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method" and "abandoning the testing system without instituting another method would have been premature because then-current epidemiological evidence suggested that there had been a reduction

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70 *Id.*

71 The history of litigation between the FTC and Brown & Williamson regarding Barclay is described in *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985) (Ex. 62).

72 48 Fed. Reg. 15,953 at 15,954 (Apr. 13, 1983) (Ex. 63).

73 *Id.* at 15,954-55.

74 Peeler at 3 (Ex. 25).

in lung cancer deaths that might be attributable to declines in average tar levels."[75]

Approximately a decade later, in July 1994, the FTC revisited the propriety of its rating system by asking the National Cancer Institute to convene a conference to evaluate the Cambridge method.[76] The conference recommended certain changes, set forth in NCI Monograph 7, "The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes," published in 1996.[77] These recommendations included:

- that the "system should also measure and publish information on the range of tar, nicotine, and carbon monoxide yields that most smokers should expect from each cigarette"
- that the "system must be accompanied by public education to make smokers aware that individual exposure depends on how the cigarette is smoked and that the benefits of switching to lower yield cigarettes are small compared with quitting"
- that "[b]rand names and brand classifications such as 'light' and 'ultra-light' represent

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75 *Id.* at 7.

76 FTC Report to Congress for 1993 at 3 (Ex. 34); *see also* FTC News Release, *FTC Seeks Study of Low-Tar Cigarette Testing Method for Your Information*, 1994 WL 378961 (F.T.C. July 20, 1994 ("[T]he Commission is aware of concerns that have been raised about the limitations of the current testing methodology.") (Ex. 64).

77 *See* FTC Report to Congress for 1995 at 2 (Ex. 65).

> health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer"

NCI Monograph 7 at vii.

In response to these recommendations, the FTC in September 1997 issued a notice for comment on proposed revisions to the testing methodology that "would require that each cigarette variety be tested under two different sets of smoking conditions."[78] Finally, in 1998, the FTC sought expert scientific advice again, requesting that HHS "conduct a complete review of the FTC's cigarette testing methodology."[79] The FTC explained that it "has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces" because the "current ratings tend to be relatively poor predictors of tar and nicotine exposure."[80]

The FTC has not made any changes to its testing methodology (other than adding measurements for carbon monoxide). That methodology has now with the publication of Monograph 13 become the subject of more intense scrutiny and appears to have few, if any, supporters in the public health community. As discussed below, PM now formally petitions the FTC to once again review the testing methodology and, if possible,

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78 FTC Report to Congress for 1996 at 1 (Ex. 15); *see also* 62 Fed. Reg. 48,158 (Sept. 12, 1997) (Ex. 16).

79 FTC Report to Congress for 1997 at 5 (Ex. 66).

80 *Id.* at 4.

develop a more appropriate methodology supportable by scientists and the public health community.

F. The FTC Scrutinized Use of Descriptors

Since 1970, the FTC has also scrutinized the manner in which the cigarette companies could use descriptors such as "light" and "lower" tar to characterize their cigarettes in advertisements. During this time period, the FTC made clear that manufacturers could use such descriptors provided that the advertisements also included the average tar measurements determined by the FTC method.

In September 1969, the FTC issued a complaint against American Brands, Inc.'s ("American") advertisements that its Pall Mall Gold brand was "lower in tar than ever before" and that it was "[l]ower in tar than the best selling filter king."[81] The FTC contended that this advertising was deceptive because American:

> has represented and created the impression that its cigarettes are low in tar when in truth and in fact its Pall Mall Gold 100's and Lucky filters contain approximately 20 and 21 milligrams of tar, amounts which rank them 56th and 77th higher among the 122 brands tested than the brand containing the lowest tar level of 4 milligrams.[82]

The dispute ultimately resulted in a consent order, in which the FTC prohibited American from:

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81 Complaint ¶ 4, *In the Matter of The American Tobacco Co.*, No. 8799 (Sept. 29, 1969) (Ex. 67).

82 *Id.*

> Stating in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in "tar" by use of the words "low," "lower," or "reduced" or like qualifying terms, *unless the statement is accompanied by a clear and conspicuous disclosure of*:
>
> 1. *The "tar" and nicotine content in milligrams in the smoke produced by the advertised cigarette*; and
>
> 2. If the "tar" content of the advertised brand is compared to that of another brand or brands of cigarette, (a) the "tar" and nicotine content in milligrams of the smoke produced by that brand or those brands of cigarette, and (b) the "tar" and nicotine content in milligrams of the lowest yield domestic cigarette; *provided* that a comparison to a class of cigarettes, or to many or most of the cigarettes of a class, shall not be deemed a comparison to another brand or brands of cigarette.[83]

Thus, in this consent decree, the FTC specifically permitted American to use "qualifying terms" such as "low" and "lower" provided that those terms were accompanied by a "conspicuous disclosure of [t]he tar and nicotine content in milligrams in the smoke."

In the mid-1990s, the FTC again challenged an American advertisement, which represented that

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83 Decision and Order, *In the Matter of American Brands, Inc.*, No. 8799 (Aug. 20, 1970) (first emphasis added; emphasis of "provided" in original) (Ex. 13).

"consumers will get less tar by smoking 10 packs of Carlton than by smoking a single pack of the other brands shown in the ads, each of which was rated as having an average of more than 10 milligrams of tar per cigarette."[84] The FTC complained that the advertisements were deceptive because "consumers would not necessarily get less tar because the ratings shown in the ads were obtained by smoking machines that did not reflect actual smoking, partly because they did not account for 'compensatory smoking.'"[85] In January 1995, the FTC reached a consent agreement with American,[86] under which American agreed to forgo any such comparative claims.[87] Nonetheless, the agreement permitted American to use descriptors to make the "express . . . representation that [American's] brand is 'low,' 'lower,' or 'lowest' in tar." *Id.*

It was not until 1997 that the FTC asked for comment regarding descriptive terms such as "light" and "ultra light" per se: "Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes? If yes, why? If no, why not?"[88] The FTC noted that descriptors "appear to be used by the industry to reflect ranges of FTC tar ratings."[89] Disclaimers were also considered.

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84 FTC Report to Congress for 1993 at 2 (Ex. 34).

85 *Id.*

86 *See* FTC News Release, 1995 WL 6995 (F.T.C. Jan. 10, 1995) (Ex. 68).

87 59 Fed. Reg. 51,980, at 51,981 (Oct. 13, 1994) (Ex. 14).

88 62 Fed. Reg. 48,158, at 48,163 (Ex. 16).

89 *Id.*

The FTC has not modified its test method or required additional disclosures.

G. Monograph 13

In 1998, the FTC formally requested HHS to further review its testing method and include recommendations on whether the system should be continued and, if so, what specific changes should be made to the testing methodology.[90] HHS, in turn, asked NCI to review the evidence of the relationship between machine-measured cigarette smoke and disease risk. The result, released November 27, 2001, was Monograph 13, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*. Monograph 13 represents "the first step in [HHS's] response to the [FTC's] 1998 request for assistance in developing recommendations to fix" the Cambridge Testing Method.[91] Its purpose was to determine whether the scientific evidence showed that the changes in cigarette design over the last 50 years resulted in reduced disease risks for smokers.[92]

Monograph 13 represents a fundamental departure from the scientific and public health community's prior thinking about the health effects of low yield cigarettes. Contrary to the conclusions of the Surgeon General and the IARC — and even the

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90 Letter from Donald S. Clark to the Honorable Donna E. Shalala of 11/19/98 at 1-2 (Ex. 69).

91 *Id.*

92 News Release, The National Cancer Institute, Questions and Answers, Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Yield Measured Yields of Tar and Nicotine (Nov. 27, 2001). (Ex. 70).

NCI as recently as 1996 — Monograph 13 concludes that "there is no convincing evidence that changes in cigarette design between 1950 and the mid-1980s have resulted in an important decrease in the disease burden caused by cigarette use either for smokers as a group or for the whole population."[93] The Monograph further concludes:

- The FTC Method does not provide consumers with "meaningful information" about the amount of tar and nicotine they will receive from a cigarette, either standing alone or in comparison to other brands.[94]
- "Existing disease risk data do not support making a recommendation that smokers switch cigarette brands. The recommendation that individuals who cannot stop smoking should switch to a low yield cigarette can cause harm if it misleads smokers to postpone serious efforts at cessation."[95]
- "Epidemiological and other scientific evidence, including patterns of mortality from smoking-caused diseases, does not indicate a benefit to public health from changes in cigarette design and manufacturing over the last fifty years."[96]

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93 Monograph 13, at 81 (Ex. 2). Notably, this conclusion is expressed in terms of changes in cigarette design between 1950 and the mid 1980s. There is very little data about the effects of more recent, "ultra low" cigarettes.

94 *Id.*

95 *Id.* at 146.

96 *Id.* at 10.

- For people who switch to low yield brands, "there appears to be complete compensation for nicotine delivery," on a per cigarette basis, "reflecting more intensive smoking of low yield cigarettes."[97]

In addition, Monograph 13 also notes that, notwithstanding the major modifications in cigarette design between 1950 and 1975, "there have been few substantive changes toward a further reduction of the toxic and carcinogenic potential of cigarette smoke."[98] The Monograph also notes that the levels of tobacco-specific nitrosamines in cigarette smoke have increased over the years and may be responsible for the rising rates of adenocarcinoma:

> Changes in the agricultural, curing, and manufacturing processes of cigarettes have resulted in an increase over the last several decades in the amounts of tobacco-specific nitrosamines in cigarette smoke. These changes are considered to have contributed to the increase in adenocarcinoma of the lung observed over the past several decades.[99]

Finally, the Monograph concludes that, in comparison to the smoke generated by the Cambridge Method, "the inhaled smoke of one cigarette contains 2 to 3 times the amount of tar, nicotine, and carbon monoxide and 1.6 to 1.8 times

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97 *Id.*

98 *Id.* at 184.

99 Monograph 13 at 184 (Ex. 2).

the level of biomarkers for the major lung carcinogens BaP, and NNK."[100]

Although PM dots not agree with all aspects of Monograph 13, it accepts the significance of its conclusions regarding low-yield cigarettes.[101] PM agrees that smokers should not assume that lower-yield cigarettes are less harmful than other cigarettes and that there is no such thing as a safe cigarette. Every cigarette, irrespective of its tar yield, can cause cancer and other fatal diseases. Quitting is by far the best alternative for reducing those risks. PM has publicly made these statements on its website and elsewhere.[102]

II. PROPOSED RULEMAKING

Following the issuance of Monograph 13, the FTC indicated that it intends to reevaluate the Cambridge Method. In a November 27, 2001 press release, the FTC announced that it will be "working with" HHS "to fix the current cigarette tar and nicotine testing methodology."[103] PM believes that the FTC should take immediate and appropriate action with respect to attempting to improve the method by which tar and nicotine yields are measured. Furthermore, PM submits that Monograph 13's conclusions compel the FTC, without waiting for the final selection of the appropriate

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100 *Id.*

101 *Id.* at 146.

102 *See* www.pmusa.com/tobacco_issues (Ex. 71).

103 FTC, Statement of the Federal Trade Commission's Bureau of Consumer Protection on the National Cancer Institute's Report on Cigarette Testing Method (Nov. 27, 2001) (Ex. 72).

testing method, to consider whether disclaimers should be required to accompany any disclosure of tar and nicotine yields and, if so, what those disclaimers should say.

PM submits the following proposals for rulemaking:

A. Reconsider the Cambridge Method

Under the current regulatory scheme, which mandates the exclusive use of the Cambridge Method, consumers are being presented with information regarding tar and nicotine yields that members of the scientific and public health community have come to regard as inaccurate. PM proposes that the FTC immediately solicit the opinions of scientists and public health professionals in order to determine whether there is an alternative method of measuring tar and nicotine yields that will more accurately estimate the amount of tar and nicotine actually delivered to the smoker. PM further proposes that, if such an alternative method is not currently in existence, the FTC develop such a method if technically feasible, and PM stands ready to work with the FTC to develop such a method. Finally, PM proposes that the FTC replace the current Cambridge Method in the event the FTC finds a superior method available.

B. Consider Requiring Additional Information

Regardless of the testing methodology adopted, the FTC should require the disclosure of tar and nicotine ratings along with the provision of mandatory disclaimers for all low-yield brands. These disclaimers, which should be required for low-yield brands tested under the Cambridge Method or

under a new method if one is adopted, should communicate to the public in substance that:

(1) low-yield cigarettes have, not been proven to be less hazardous than other cigarettes and are not a substitute for quitting;

(2) the amount of tar and nicotine that a smoker obtains from a cigarette depends on how the individual smokes the cigarette;

(3) that smokers may intake more tar and nicotine than measured by the FTC testing methodology;

(4) that low tar cigarettes do not make quitting smoking easier than other cigarettes.

Until the FTC determines the appropriate wording and placement for disclaimers, PM intends to continue and expand its efforts to communicate with its consumers on this issue. PM already provides information on this topic on its website and includes the disclaimer, "The amount of tar and nicotine you inhale will vary depending on how you smoke the cigarette," next to the tar and nicotine disclosure in cigarette advertising. In addition, PM is considering additional communication vehicles for the information set forth in attachment A to this Petition.

C. Clarify Use of Descriptors

Cigarette manufacturers have historically used descriptors such as "light" and "ultra light" to differentiate brands on the basis of their machine-measured average tar and nicotine yields as well as taste. In light of the importance of descriptors in product differentiation, the FTC should adopt a rule expressly authorizing the industry to continue to use

such descriptors, provided two conditions are met. First, the use of descriptors should be accompanied by the disclaimers generally described above to minimize consumer confusion. As long as the public is informed that "light" cigarettes are not safer than other brands of cigarettes and that tar delivery ultimately depends on the degree to which a smoker compensates, cigarette companies should be allowed to continue to use the descriptors to differentiate among brands and provide information relating to taste. Second, the use of these descriptors should be allowed, provided that words such as "light" and "ultra light" are used in a uniform fashion and correspond to ranges of average per cigarette yields as estimated by the Cambridge Method now or whatever improved method is selected by the FTC in the future. Use of descriptors in a uniform manner, accompanied by disclaimers, will further the FTC's goal of informing smokers about the relative yields reported by the testing method, enabling them to make educated decisions about whether and what brands to smoke.

It is worth emphasizing that the continued use of descriptors is particularly important given the extent to which consumers associate descriptors with taste considerations. As Monograph 13 reports, for example, a recent telephone survey found that the most cited reason for smoking light cigarettes—81% of those surveyed—was "prefer taste."[104] Consumers should be permitted to use descriptors to accommodate taste preferences, so long as they are also informal that the descriptors do not indicate

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[104] Monograph 13 at 195 (reporting on 1999 Kozlowski study) (Ex. 2).

that any cigarette has been proven to be safer or that any cigarette is a suitable alternative to cessation. Accordingly, there is no reason to deny consumers the opportunity to use descriptors to distinguish among brands for reasons other than health.

CONCLUSION

For all the above reasons, we petition the FTC to promulgate rules governing (1) the disclosure of average tar and nicotine yields of cigarette brands, (2) the use of disclaimers with respect to average tar yields and health effects of low yield cigarettes, and (3) the use of descriptors.

Respectfully submitted this September 18, 2002

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ATTACHMENT A

Information for Smokers:

1. There is no such thing as a safe cigarette.

2. The terms "Ultra Light", "Light", "Medium" and "Mild" are used as descriptors of the strength of taste and flavor. These terms, as well as "low tar," or "lowered tar and nicotine" also serve as a relative indication of the average tar and nicotine yield per cigarette, as measured by a standard government test method.

3. The tar and nicotine yield numbers are not meant to communicate the amount of tar or nicotine actually inhaled by any smoker, as individuals do not smoke like the machine used in the government test method. The amount of tar and nicotine you inhale will be higher than the stated tar and nicotine yield numbers if, for example, you block ventilation holes, inhale more deeply, take more puffs or smoke more cigarettes.

4. Similarly, if you smoke brands with descriptors such as "Ultra Light", "Light", "Medium" or "Mild", you may not inhale less tar and nicotine than you would from other brands. It depends on how you smoke.

5. You should not assume that cigarette brands using descriptors like "Ultra Light", "Light", "Medium" or "Mild" are less harmful than full-flavor cigarette brands or that smoking such cigarette brands will help you quit smoking.

If you are concerned about the health effects of smoking, you should quit. For more information about the numbers, brand descriptors or quitting

smoking, please go to www.pmusa.com or call 1-800-xxx-xxxx.

PETITIONER'S BRIEF

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FILED
MAR 3 1 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Lori A. Spellman and Allain L. Thibodeau were plaintiffs-appellants below and are respondents in this Court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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31 Fed. Reg. 14,278 (Nov. 4, 1966) 6

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55 Fed. Reg. 42,768 (Oct. 23, 1990) 8

62 Fed. Reg. 48,158 (Sept. 12, 1997) 11, 47

OTHER AUTHORITIES

J. Howard Beales, III, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 Antitrust L.J. 1057 (2005) 9

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13 F.T.C. 411 (1929) 28

17 F.T.C. 597 (1933) 28

34 F.T.C. 1689 (1942) 28

46 F.T.C. 1230 (1950) 28

W. Page Keeton et al., *Prosser & Keeton on Torts* (5th ed. 1984) 39

Prepared Statement of the FTC Before the Comm. on Commerce, Sci., and Transp., U.S. Senate (Nov. 13, 2007), *at* http://www.ftc.gov/os/testimony/064508tobacco.pdf 11, 28

Random House Unabridged Dictionary (2d ed. 1993) 23

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is published at 501 F.3d 29. The opinion of the district court (Pet. App. 63a-106a) is published at 436 F. Supp. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2007. The petition for a writ of certiorari was filed on October 26, 2007, and granted on January 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Cigarette Labeling and Advertising Act (Labeling Act), 15 U.S.C. § 1331 *et seq.*, the Federal Trade Commission Act (FTCA), 15 U.S.C. § 41 *et seq.*, and the Maine Unfair Trade Practices Act (MUTPA), Me. Rev. Stat. tit. 5, § 205-A *et seq.*, are reproduced in the appendix to this brief.

STATEMENT

Respondents, on behalf of a putative class of cigarette purchasers, allege that Philip Morris USA Inc. (PMUSA) violated a state-law prohibition on deceptive trade practices by using tar and nicotine "descriptors"—such as "light" and "lowered tar and nicotine"—"with the intention of communicating" in its print and package advertising that certain cigarette brands "were less harmful or safer than" other brands. J.A. 28a.

On summary judgment, the district court ruled that respondents' state-law claims are expressly pre-

empted by the Labeling Act, which precludes States from imposing requirements or prohibitions with respect to cigarette advertising that are "based on smoking and health." 15 U.S.C. § 1334(b). The court of appeals reversed, concluding that respondents' claims are neither expressly nor impliedly preempted because they do not seek to impose a state-law requirement or prohibition "based on smoking and health" and do not conflict with the federal government's regulatory policy governing tar and nicotine disclosures in cigarette advertising.

A. Statutory and Regulatory Background

For decades, the Federal Trade Commission (FTC) has pursued a regulatory policy designed to encourage consumers who do not quit smoking to switch to cigarettes with lower tar and nicotine yields, based on studies showing that such cigarettes may present fewer health risks than cigarettes with comparatively higher yields. To accomplish this federal objective, the FTC has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results. This FTC policy is one component of the uniform federal scheme of cigarette advertising and promotion established by Congress and policed by the FTC pursuant to the Labeling Act.[1]

1. In 1964, the Surgeon General issued a report that concluded that smoking causes lung cancer. The following year, Congress responded to the re-

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[1] A more detailed overview of this regulatory history can be found in the affidavit of former FTC Chairman James C. Miller III, which is reproduced at J.A. 43a-176a.

port—and to ensuing state efforts to regulate cigarette advertising—by enacting the Labeling Act, which "establish[ed] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The Labeling Act mandates that all cigarette packages carry a prominent warning label so that "the public may be adequately informed about any adverse health effects of cigarette smoking" (*ibid.*; *see also id.* § 1333), and provides that no other health-related statements may be required on cigarette packages. *Id.* § 1334(a); *see also infra* note 7. As amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970), the Labeling Act also precludes States from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes labeled in conformity with the statute's requirements. 15 U.S.C. § 1334(b). Congress included a preemption provision in the Labeling Act to ensure that "commerce and the national economy" were "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.* § 1331.

"[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising," the Labeling Act "vested that authority in the" FTC. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001); *see also* 15 U.S.C. § 1336 (expressly preserving the FTC's authority to police deceptive cigarette advertising). Section 5 of the FTCA authorizes the FTC to prevent unfair or deceptive trade practices. 15 U.S.C. § 45(a)(1). The FTC has repeatedly brought that regulatory authority to bear on the tobacco industry, particularly with respect to tobacco

companies' health-related advertising and promotional claims, including statements about cigarettes' tar and nicotine yields.

2. For more than seventy years, the FTC has closely regulated health-related claims in cigarette advertising. *See, e.g., In re Julep Tobacco Co.*, 27 F.T.C. 1637, 1637-38 (1938) (ordering a tobacco company to cease representing that its cigarettes did not make the throat dry); *In re R.J. Reynolds Tobacco Co.*, 46 F.T.C. 706, 733 (1950) (ordering a tobacco company to stop representing that its cigarettes aided digestion and soothed nerves). The FTC began to focus particular attention on tobacco companies' tar and nicotine claims in the 1950s. At that time, various companies used different testing methods to substantiate their tar and nicotine claims, which made it impossible for consumers to draw meaningful interbrand comparisons. To eliminate consumer confusion, the FTC in 1959 directed the tobacco industry to cease making all tar and nicotine claims, upon pain of an enforcement action for engaging in deceptive trade practices. J.A. 401a.

The Surgeon General's 1964 report prompted the public-health community to begin an intensive inquiry into possible means of reducing the risks associated with smoking. The FTC strongly supported this effort. *See* 29 Fed. Reg. 530, 532 (Jan. 22, 1964) ("it is the Federal Trade Commission's policy to encourage the development of less hazardous cigarettes"). Two years later, the U.S. Public Health Service issued a report concluding that the "preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." J.A. 647a. In transmitting the report to Congress, the Secretary of Health, Education, and Welfare sug-

gested that "requiring the identification of 'tar' and nicotine levels on packages and in advertising . . . would be an important step and would result in the progressive reduction of 'tar' and nicotine levels because of public demand." *Id.* at 664a. Public-health organizations made similar recommendations to the FTC. The American Cancer Society, for example, wrote to "express the conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising." *Id.* at 387a; *see also id.* at 386a ("The National Interagency Council on Smoking and Health hopes that [the FTC] will take the steps necessary to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages").

The FTC's response was immediate. "Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public," the FTC in 1966 lifted its prohibition on the advertising of tar and nicotine yields. J.A. 527a; *see also id.* at 478a. The FTC explained that its decision was designed to "prompt cigarette manufacturers to develop less hazardous cigarettes" and to "augment information available to the public on the tar and nicotine content of cigarettes." *Id.* at 527a. In an effort to facilitate consumers' interbrand comparisons of tar and nicotine yields, the FTC specified that only statements substantiated by testing under the "Cambridge Filter Method," a technique for measuring a cigarette's tar and nicotine yields that later became

known as the "FTC Method" (*id.* at 651a), would be permitted. *Id.* at 479a.[2]

Shortly after designating the FTC Method as the exclusive means for computing tar and nicotine yields disclosed in advertising, the FTC held public hearings concerning possible modifications to the test's procedures. 31 Fed. Reg. 14,278 (Nov. 4, 1966). During the hearings, Dr. Clyde Ogg, the Department of Agriculture employee who was the principal developer of the FTC Method, emphasized that "[s]ince smokers vary so greatly in their smoking habits, the [FTC] method will not tell a smoker how much tar and nicotine he will get from any given cigarette." J.A. 607a. Dr. Ogg explained that the FTC Method "will indicate, however, whether [a smoker] will get more from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." *Id.* at 607a-08a. PMUSA and other tobacco companies submitted written comments that similarly explained that the FTC Method did not approximate human smoking behavior. *See id.* at 666a ("The [FTC] Method does *not* measure the *volume* of smoke—or the [particulate matter] or nicotine in the volume of smoke—that any *human being* will draw from smoking any particular cigarette") (emphases in original). Comments from the tobacco industry also highlighted the possibility that smokers would compensate for lower

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[2] The FTC Method measures the tar and nicotine yields of a cigarette's smoke using a machine that takes a two-second puff on a cigarette every minute down to a specified butt length. J.A. 294a, 668a. The tar and nicotine emitted from the cigarette are collected and measured by the machine, and an average tar and nicotine rating is calculated based on a sample of 100 cigarettes. *Id.* at 294a.

tar and nicotine yields by smoking more cigarettes. *See id.* at 622a ("by lowering the nicotine content, the smoker may increase his consumption of cigarettes in search for nicotine satisfaction").

Despite its knowledge of the FTC Method's limitations and the possibility of smoker compensation, the FTC decided to retain the methodology as the exclusive means for measuring tar and nicotine yields. The FTC explained at the time that "[n]o test can precisely duplicate conditions of actual human smoking." J.A. 486a. "[T]he purpose of testing," the FTC continued, "is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" so as to produce "standardized" results "capable of being presented to the public in a manner that is readily understandable." *Id.* at 486a, 487a.

In 1967, the FTC opened its own laboratory to perform testing on the tar and nicotine yields of cigarettes. J.A. 294a. It adopted the FTC Method for its laboratory testing because, the FTC later explained, "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." C.A. App. 176 Ex. 203, at 5. The FTC periodically published the results of its tar and nicotine tests in the *Federal Register* and also included the results in annual reports to Congress. J.A. 265a, 549a.[3]

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[3] In 1987, the FTC closed its testing laboratory due to cost considerations, and the Tobacco Institute Testing Laboratory (TITL), which is funded by the major participants in the tobacco industry, assumed the testing function under FTC supervision. J.A. 93a. TITL continues to this day to conduct tar and nicotine

3. In the years immediately following the FTC's decision to lift the prohibition on the disclosure of tar and nicotine yields, relatively few tobacco companies voluntarily disclosed tar and nicotine yields in their advertising. As part of its effort to encourage consumers to rely on the FTC Method results in making their brand choices and to promote competition among tobacco companies to develop low-tar cigarettes (J.A. 566a), the FTC in 1970 proposed a Trade Regulation Rule that would have made it an unfair or deceptive practice under Section 5 of the FTCA for tobacco companies not to disclose tar and nicotine yields in their print advertising. *Id.* at 177a. This proposal had the strong support of the public-health community. C.A. App. 176 Ex. 38, at 1.

At the FTC's invitation, the leading tobacco companies, including PMUSA, also submitted a proposed agreement to the FTC that required disclosure of FTC-rated tar and nicotine yields in all print advertisements. J.A. 350a. The FTC sought an industry agreement from the major cigarette manufacturers because, in the words of then-Chairman Miles W. Kirkpatrick: "The Commission's objective is to insure that all cigarette advertising make[s] these tar and nicotine disclosures as soon as possible. . . . A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately." *Id.* at 481a-82a.[4]

[Footnote continued from previous page]

testing using the FTC Method, and supplies the results to the FTC under compulsory process. 55 Fed. Reg. 42,768, 42,768 (Oct. 23, 1990).

[4] Indeed, "[u]ntil the 1970s," the FTC's authority to engage in formal rulemaking was in substantial "doubt," and the FTC

Despite the FTC's desire to secure the mandatory disclosure of tar and nicotine yields as quickly as possible, it rejected the tobacco industry's initial proposal as inadequate. J.A. 349a. The major tobacco companies thereafter submitted a revised version of the agreement that included modifications to meet the FTC's specific requirements. *Id.* at 899a. After subjecting the revised agreement to public comment, the FTC accepted the agreement and terminated its rulemaking proceedings, while reserving the right to reinstitute those proceedings in the event of industry noncompliance. *Id.* at 377a.

Since the disclosure agreement went into effect in 1970, the FTC has strictly policed its terms and ensured that the major tobacco companies' cigarette advertisements disclose tar and nicotine yields, as calculated using the FTC Method.[5] Indeed, the FTC has emphasized that the "public interest requires that all test results presented to the public be based

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therefore "proceeded almost exclusively through case-by-case enforcement actions" and "industry-specific guides." J. Howard Beales, III, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 Antitrust L.J. 1057, 1061 (2005).

[5] The agreement requires print advertising for cigarettes to bear the legend "_ mg. 'tar', _ mg. nicotine av. per cigarette, FTC Report (date)." J.A. 903a; *see also ibid.* (alternative legend applicable to new brands for which official FTC-rated tar and nicotine yields are unavailable). The FTC has not extended this requirement to cigarette packages because, under 15 U.S.C. § 1334(a), only Congress has the authority to require a "statement relating to smoking and health . . . on any cigarette package." *See also* J.A. 580a (FTC report to Congress stating that "[c]igarette manufacturers have never been required to disclose 'tar' and nicotine content on cigarette packages").

on a uniform method" because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." J.A. 487a. To that end, the FTC issued an advisory opinion that instructed a tobacco company that "it would be deceptive to advertise a tar figure" based on any method other than the FTC Method, even one that produces a tar yield "*higher* than the latest applicable FTC tar figure." *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978) (emphasis added). The FTC cautioned that "[i]f the headlined tar level [in an advertisement] differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated." *Id.*

Similarly, when another tobacco company began including testing results from an independent laboratory in its advertisements for a uniquely designed cigarette, the Barclay brand, that could not be accurately tested using the FTC Method, the FTC initiated an enforcement action against the company. *See FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985). The suit alleged that the defendant's use of results generated by a means other than the FTC Method was deceptive, and culminated in a holding that the advertisements violated Section 5 of the FTCA. *Id.* at 43.

The FTC has also repeatedly reevaluated the propriety of its low-tar policy, including by studying whether the FTC Method should be replaced by an alternative testing procedure or supplemented by additional disclosures. J.A. 122a. In so doing, it has considered at length the same methodological limitation that forms the basis for respondents' claims: the FTC Method's inability to replicate the variability of human smoking behavior and account for the tendency of some consumers to smoke "light" cigarettes

more intensely to compensate for lower nicotine yields. For example, in the early 1980s, the FTC undertook a multiyear review of its testing methodology and solicited public comments about whether the test should be modified due to compensatory smoking behavior to reflect more accurately smokers' actual tar and nicotine intake. 48 Fed. Reg. 15,953, 15,955 (Apr. 13, 1983). Similarly, in 1997, the FTC initiated a still-ongoing inquiry into whether the FTC Method should be modified or abandoned altogether. 62 Fed. Reg. 48,158, 48,158 (Sept. 12, 1997). To date, the FTC has elected to retain the FTC Method, despite its known methodological limitations and recent public-health studies calling into question the earlier epidemiological evidence associating lower FTC-rated tar and nicotine yields with reduced health risks. *See* Prepared Statement of the FTC Before the Comm. on Commerce, Sci., and Transp., U.S. Senate 6 (Nov. 13, 2007), *at* http://www.ftc.gov/os/testimony/P064508tobacco.pdf; J.A. 713a.

4. A number of tobacco companies, including PMUSA, use descriptors—such as "low tar," "lowered tar and nicotine," and "light"—in their marketing to reflect the results of testing under the FTC Method. The FTC has repeatedly endorsed the use of descriptors.

In 1967, just two months after beginning testing with the FTC Method, the FTC publicly announced its "enforcement policy" with respect to representations relating to tar and nicotine yields:

> As a general rule, the Commission will not challenge . . . statements or representations [of or relating to tar and nicotine content of cigarettes] where they are shown to be accurate and fully substantiated by tests con-

> ducted in accordance with the standardized testing methods and procedures used by the [FTC]. . . . [A] cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public, provided that the basis for comparison is fully and fairly stated.

J.A. 368a-69a. The FTC repeated this policy statement in its 1968 annual report to Congress. *Id.* at 528a.

Subsequently, through a series of consent agreements with individual tobacco companies, the FTC has reaffirmed that tar and nicotine descriptors may be used to encapsulate the results of testing under the FTC Method. In 1971, the FTC entered into a consent order with American Brands that permitted the company to state "in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," so long as "the statement is accompanied by a clear and conspicuous disclosure" of tar and nicotine yields, as measured by the FTC Method. *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971). Similarly, in 1995, the FTC entered into a consent order with the American Tobacco Company prohibiting it from making comparative claims about smokers' actual intake of tar and nicotine, while expressly providing that the company could use descriptive terms such as "low," "lower," and "lowest," in conjunction with tar

and nicotine yields under the FTC Method. *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).[6]

Against this backdrop, PMUSA introduced Marlboro Lights in 1971 and Cambridge Lights in 1986, and marketed its Marlboro Lights as having "lowered tar and nicotine." Both brands have always had less than 15 milligrams of tar, as measured by the FTC Method; their packaging has always borne the Labeling Act-mandated health warning labels; and their print advertising has always included both the warning labels and the FTC-required legend disclosing tar and nicotine yields under the FTC Method.

B. Procedural Background

Respondents filed this putative class action under the Maine Unfair Trade Practices Act, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. tit. 5, § 207. They allege that PMUSA deceived consumers by using the descriptors "light" and "lowered tar and nicotine" in its marketing of Marlboro Lights and Cambridge Lights. Pet. App. 4a. Respondents do not dispute that these brands have lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes as measured using the FTC Method. J.A. 30a. They nevertheless allege that the use of these descriptors is deceptive because smokers may compensate for the lower tar and nicotine yields by taking deeper puffs, holding the smoke in their lungs longer, or smoking more cigarettes, and therefore may not actually receive lower amounts of tar and nicotine than smokers of regular cigarettes. Pet.

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[6] The FTC has defined the term "low tar" in its annual reports to Congress as denoting 15.0 milligrams or less of tar. *See* J.A. 587a n.8; *id.* at 604a n.11.

App. 4a. Respondents allege that PMUSA "intentionally marketed" Marlboro Lights and Cambridge Lights "in this manner with the intention of communicating to consumers that [these brands] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes" (J.A. 28a, 29a), and "with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking." *Id.* at 29a. Respondents explicitly "disclaim any claim for damages for personal injuries" (*id.* at 26a) and instead seek restitution of the sums paid by members of the putative class to purchase Marlboro Lights and Cambridge Lights. Pet. App. 5a.

The district court held that respondents' claims were expressly preempted by the Labeling Act and granted summary judgment to PMUSA. Pet. App. 106a. The court analyzed respondents' allegations under the claim-by-claim preemption framework articulated by a plurality of this Court in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which inquires "in each case . . . whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* at 523-24 (quoting 15 U.S.C. § 1334(b) (first alteration added)). The court concluded that, although respondents had "made a valiant attempt to tailor their claims to fit within the *Cipollone* exception for violations of the duty not to deceive," ultimately, they had "failed" because "the gist of [respondents'] cause of action runs to what [PMUSA] actually said about Lights and what [respondents] claim [it] should have said." Pet. App. 101a, 103a. "To respond to [respon-

dents'] concerns," the court continued, PMUSA "would have to tell the public that the FTC Method test, though accurate in the laboratory, was inaccurate in real life." *Id.* at 104a-05a. Such claims, the court held, are "'intertwined with the concern about cigarette smoking and health'" and therefore expressly preempted by the Labeling Act. *Id.* at 106a (quoting *Reilly*, 533 U.S. at 548).

The First Circuit reversed. The court of appeals acknowledged that respondents' claims are "intertwined with" concerns about "smoking and health," but nevertheless concluded that those claims do not seek to impose requirements or prohibitions "based on smoking and health" because the relevant "prohibition here is the ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act." Pet. App. 20a. According to the court of appeals, the Labeling Act does not preempt claims "premised on a state-law duty that is broader in scope" than the "concern about cigarette smoking and health," even where that general duty is applied in the specific smoking-and-health setting. *Id.* at 21a (internal quotation marks omitted). In so holding, the First Circuit explicitly "disagree[d]" with the Fifth Circuit's conclusion in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), "that the [Labeling Act] preempts fraud theories arising out of 'light' and 'lower tar and nicotine.'" Pet. App. 35a.

The First Circuit also rejected PMUSA's argument that respondents' state-law claims are impliedly preempted because they conflict with the FTC's longstanding policy of requiring the dissemination of standardized tar and nicotine information to consumers and encouraging the development of low-tar cigarettes. Pet. App. 55a. The First Circuit held

that there could be no conflict preemption in the absence of a formal FTC rule regulating the use of tar and nicotine descriptors. *Id.* at 46a. The court further concluded that, even if a formal rule were not required, a preemption defense would still be unavailable to PMUSA because there was no "coherent federal policy on low-tar claims" (*id.* at 54a), and because the FTCA provides that the remedies available in an FTC enforcement action are "'in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.'" *Id.* at 47a (quoting 15 U.S.C. § 57b(e)).

SUMMARY OF ARGUMENT

Respondents' claims are expressly preempted by the Labeling Act because they seek to impose a state-law requirement or prohibition "based on smoking and health" with respect to the advertising or promotion of cigarettes, and impliedly preempted because they represent an obstacle to the FTC's low-tar policy.

I. The text, structure, and purpose of the Labeling Act—together with this Court's express preemption jurisprudence—establish that respondents' state-law challenge to the use of tar and nicotine descriptors in cigarette advertising is expressly preempted.

A.1. A state-law requirement or prohibition is "based on smoking and health" within the meaning of the Labeling Act when it is premised on the relationship between smoking and health. Respondents' claims allege that PMUSA violated Maine law by using tar and nicotine descriptors to "communicat[e] to consumers" that "light" cigarettes "were less harmful . . . than regular" cigarettes. J.A. 28a. If successful, this state-law challenge to allegedly deceptive health

messages in PMUSA's cigarette advertising would impose a state-law requirement or prohibition that is premised on the relationship between smoking and health.

2. The conclusion that respondents' claims are expressly preempted by the Labeling Act is confirmed by the structure of the statute, which establishes a "comprehensive Federal program" governing health-related statements in cigarette advertising and promotion (including packaging). 15 U.S.C. § 1331. As part of this comprehensive federal regulatory framework, the Labeling Act expressly *preempts* state authority to police health claims in cigarette advertising, while explicitly *preserving* the FTC's regulatory authority in this area. Had Congress intended to preserve state authority to regulate health-related claims in cigarette advertising, it would have included an analogous state-law savings clause.

3. Preemption of respondents' claims is also consistent with the Labeling Act's dual objectives of informing the public about the health effects of smoking and protecting the national economy from nonuniform cigarette advertising and labeling requirements. If respondents' state-law claims were allowed to proceed, the likely result would be a patchwork of conflicting state advertising requirements, some authorizing the use of tar and nicotine descriptors, and others imposing restrictions—or outright prohibitions—on their use. Such regulatory inconsistency would inevitably generate consumer confusion about tar and nicotine claims in cigarette advertisements and prevent cigarette manufacturers from operating national advertising campaigns.

B. Notwithstanding the language, structure, and purpose of the Labeling Act, the First Circuit held that respondents' claims are not preempted because they allege a violation of the MUTPA and, according to the court of appeals, therefore seek to impose a state-law requirement that is based on the duty not to deceive, rather than based on smoking and health. That analysis is inconsistent with this Court's holding in *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), that the Labeling Act preempts the application of a general unfair trade practices statute in the specific smoking-and-health setting. *Id.* at 548. The fact that the requirements in *Reilly* were imposed by a state attorney general's promulgation of tobacco-specific regulations implementing a state unfair trade practices statute, while the requirements at issue here would be imposed by a jury's application of the MUTPA to a claim premised on smoking and health, is immaterial because judges and juries—no less than state executive officials—possess the authority to impose state-law requirements. Indeed, this Court has already held that federal law preempts a jury's application of a general state consumer fraud statute to a specific set of facts encompassed by the terms of an express preemption provision. *See Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995). This conclusion was recently reaffirmed in *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008), which reiterated that state-law claims are preempted where they seek to apply a generally applicable state-law obligation to specific factual allegations that fall within the scope of an express preemption clause. *Id.* at 1010.

C. The First Circuit's express preemption analysis is also inconsistent with the preemption framework articulated by a plurality of this Court in *Cipol-*

lone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). In *Cipollone*, a four-Justice plurality concluded that the Labeling Act expressly preempts state-law fraud claims that challenge health-related advertising representations that are only potentially misleading, but does not preempt claims challenging inherently false statements because those claims are based on a state-law duty not to deceive. Respondents' claims are preempted under the *Cipollone* plurality's framework because respondents concede that tar and nicotine descriptors accurately convey the results of testing under the FTC Method (J.A. 30a), and allege only that descriptors could be potentially misleading to smokers who are unaware that the FTC Method may not reflect the amount of tar and nicotine that a smoker actually receives. The First Circuit misapplied the *Cipollone* plurality's preemption framework when it placed dispositive weight on the fact that respondents' claims do not carry the same "warning neutralization" label as the fraud claims that the *Cipollone* plurality found to be preempted.

If this Court were nevertheless to conclude that respondents' claims are not preempted under the framework endorsed by the *Cipollone* plurality, then it should reexamine that framework, which was criticized by a majority of the Court at the time it was articulated. This Court's more recent express preemption decisions in *Reilly*, *Riegel*, and *Wolens* unequivocally establish that respondents' claims are expressly preempted.

II. Respondents' claims are also impliedly preempted because they present an obstacle to the FTC's longstanding policy of encouraging consumers to rely on the standardized tar and nicotine information conveyed by the FTC Method and promoting

competition among tobacco companies in the development of low-tar cigarettes.

A. Based on scientific reports "strongly suggest[ing]" that cigarettes with lower FTC-rated tar and nicotine yields present fewer health risks (J.A. 647a), the FTC designated the FTC Method as the exclusive means of communicating tar and nicotine yields to consumers, required tobacco companies to disclose these yields in all cigarette advertisements, and authorized tobacco companies to use descriptors as a shorthand means of communicating the comparative FTC-rated tar and nicotine yields of different cigarette brands. Respondents contend that the use of descriptors to encapsulate the results of testing under the FTC Method is deceptive under Maine law. These claims present a direct challenge to the FTC's low-tar policy, and are therefore impliedly preempted.

B. The First Circuit's reasons for rejecting PMUSA's implied preemption defense are erroneous. The First Circuit's contention that the FTC lacks a "coherent" low-tar policy (Pet. App. 54a) disregards more than forty years of regulatory activity by the FTC designed to provide consumers with standardized tar and nicotine information using the FTC Method. Moreover, the court of appeals' conclusion that only a formal FTC rule can have preemptive effect is inconsistent with this Court's precedent (*see, e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64 (2002)), and would improperly restrict agencies' otherwise broad discretion to undertake regulation through either formal rulemaking or more efficient, informal regulatory procedures. Finally, the court of appeals' reliance on 15 U.S.C. § 57b(e) is misplaced because that provision simply makes clear that the

FTCA does not preempt the entire field of remedies for unfair and deceptive trade practices.

ARGUMENT

For more than 40 years, the federal government has extensively regulated the content of cigarette labeling and advertising pursuant to the Labeling Act's "comprehensive Federal program to deal with . . . any relationship between smoking and health." 15 U.S.C. § 1331. Congress has prescribed warnings that must appear on every cigarette package and advertisement, prohibited cigarette advertising on radio and television, precluded States from imposing any "requirement or prohibition based on smoking and health . . . with respect to . . . cigarettes," and expressly preserved the FTC's authority to regulate "unfair or deceptive acts or practices" in cigarette advertising. 15 U.S.C. §§ 1333, 1334(b), 1335, 1336.

During this same period of time, the FTC has invoked its authority under the Labeling Act and the FTCA to police health-related claims in cigarette advertising, require the dissemination of standardized tar and nicotine information to consumers, and encourage the development of less-hazardous cigarettes. In order to provide consumers with a useful shorthand means of comparing different brands' tar and nicotine yields, the FTC has also authorized cigarette manufacturers to use descriptors such as "light" or "lowered tar and nicotine" in their advertising, as long as those statements are substantiated by testing under the FTC Method.

Against this backdrop of extensive congressional and FTC oversight of health-related claims in cigarette advertising and promotion, respondents contend that Maine law prohibits the use of descriptors to communicate to consumers the relative FTC-rated

tar and nicotine yields of cigarette brands. Respondents' claims present a direct challenge to the "comprehensive Federal program" governing health claims in cigarette advertising, and are expressly and impliedly preempted by federal law.

I. RESPONDENTS' CLAIMS ARE EXPRESSLY PREEMPTED BY THE LABELING ACT

The Labeling Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity" with the Act. 15 U.S.C. § 1334(b). Respondents do not dispute that their claims seek to impose a "requirement or prohibition" or that they pertain to the "advertising or promotion" of cigarettes that carried the Labeling Act-mandated warning labels on their packages. Pet. App. 82a n.14. They instead attempt to evade the Labeling Act's preemptive reach by contending that their claims—which allege that PMUSA is liable under state law for using descriptors "with the intention of communicating to consumers that" certain cigarettes "were less harmful or safer than" other cigarettes (J.A. 28a)—do not seek to impose requirements or prohibitions "based on smoking and health." Traditional principles of statutory construction establish that, if successful, respondents' claims would indeed impose state-law requirements or prohibitions "based on smoking and health" because they are premised on the relationship between smoking and health.

This Court's express preemption jurisprudence—including its prior interpretations of the Labeling Act—confirms this conclusion. This Court has repeatedly held that a general state-law obligation—

such as the duty not to engage in deceptive advertising—is preempted when it is applied to a specific set of facts encompassed by the terms of an express preemption provision. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 538 (2001); *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995). This principle was most recently reaffirmed in *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008), which held that a jury's application of a general common-law duty to a specific medical device constitutes a preempted state-law requirement "'with respect to'" that device. *Id.* at 1010 (quoting 21 U.S.C. § 360k(a)). Similarly, a general state-law duty not to engage in deceptive advertising constitutes a state-law requirement or prohibition "based on smoking and health" when its specific application is premised on the relationship between smoking and health—whether that application is effected by an executive official (as in *Reilly*) or by a court (as in this case).

A. The Text, Structure, And Purpose Of The Labeling Act Establish That Respondents' Claims Are Expressly Preempted

1. The starting point for the interpretation of any statute—including a preemption provision—is the statutory language. *See Reilly*, 533 U.S. at 545; *Riegel*, 128 S. Ct. at 1006. The plain language of the Labeling Act's preemption provision establishes that a state-law requirement or prohibition is "based on smoking and health" when it is "found[ed]" upon—or premised on—the relationship between smoking and health. *See Random House Unabridged Dictionary* 172 (2d ed. 1993). An examination of the allegations in respondents' complaint leaves no doubt that their claims seek to impose requirements or prohibitions that are "based on smoking and health."

Respondents allege that PMUSA used tar and nicotine descriptors to "communicat[e] to consumers" that "light" cigarettes "were less harmful or safer than regular" cigarettes. J.A. 28a. According to respondents, PMUSA "introduced Marlboro Lights and Cambridge Lights into the market with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking and thereby allow them to continue to smoke cigarettes." *Id.* at 29a. "[C]onsumers buying" these brands allegedly "understood that tar and nicotine were the 'bad' components in cigarettes and, therefore, lower levels of these components would reduce the negative health effects of the cigarette product." *Ibid.* These allegations are explicitly and unambiguously premised on the relationship between smoking and health. Indeed, the degree to which respondents' allegations are infused with health-related concerns is underscored by the fact that respondents use the words "health" and "cancer" more than half a dozen times in their complaint. *See Reilly*, 533 U.S. at 548 (a state-law requirement is "based on smoking and health" when it is "motivated by"—or "intertwined with"—"concerns about smoking and health").

As the complaint itself demonstrates, claims challenging the use of tar and nicotine descriptors are invariably premised on the relationship between smoking and health. Beginning in the mid-1960s, the public-health community repeatedly equated lower tar and nicotine yields with decreased health risks. *See* J.A. 647a (U.S. Public Health Service report concluding that the "preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less

harmful would be the effect"); *see also id.* at 292a (National Cancer Institute committee report stating that "[b]rand names and brand classifications such as 'light' and 'ultra light' represent health claims") (internal quotation marks omitted). The FTC echoed this conclusion in its own public statements. *See id.* at 527a ("Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the [Federal Trade] Commission has acted within the past year to . . . prompt cigarette manufacturers to develop less hazardous cigarettes").

Because consumers were repeatedly told by the public-health community and the federal government that cigarettes with lower FTC-rated tar and nicotine yields may have fewer health risks than regular cigarettes, a state-law claim challenging the use of descriptors to inform consumers about the comparative tar and nicotine yields of various cigarette brands is unquestionably premised on the relationship between smoking and health and, if successful, would impose state-law requirements or prohibitions "based on smoking and health." *See also* Br. of the United States as *Amicus Curiae* at 12-13, *Reilly* (No. 00-596) ("Congress amended Section 1334 to preempt state regulations that could interfere with [the] federal warning requirements. State law restrictions that either require or prohibit health messages in labeling or advertising meet that description.").

2. This conclusion is confirmed by the structure of the Labeling Act, which was designed to "establish a comprehensive *Federal* program to deal with cigarette labeling and advertising with respect to *any* relationship between smoking and health." 15 U.S.C. § 1331 (emphases added).

The Labeling Act requires cigarette packages to carry federally prescribed warning labels regarding the health effects of smoking (15 U.S.C. § 1333) and provides that no other "statement relating to smoking and health . . . shall be required on any cigarette package." *Id.* § 1334(a).[7] The Labeling Act also requires cigarette advertisements to carry these health warning labels (*id.* § 1333) and prevents States from imposing their own "requirement[s] or prohibition[s] based on smoking and health" with respect to cigarette advertising and promotion. *Id.* § 1334(b). Taken together, these provisions establish a comprehensive federal regulatory framework governing health-related claims in the advertising and promotion of cigarettes that—through the Labeling Act's preemption provision—displaces state authority in this area. *See* 115 Cong. Rec. 38,732, 38,738 (Dec. 12, 1969) (statement of Sen. Magnuson, Chairman of the Senate Commerce Committee) (the Labeling Act, as amended, "preempts all State and local health-related regulation of cigarette advertising").

The comprehensive character of this federal regulatory framework is reinforced by the fact that

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[7] Between 1965 and 1970, the statutorily mandated warning read: "Caution: Cigarette Smoking May Be Hazardous To Your Health." Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, § 4 (July 27, 1965). In 1970, Congress strengthened the warning to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, § 4 (Apr. 1, 1970). Since 1985, manufacturers have been required to use, on a rotating basis, four warnings specified by Congress. 15 U.S.C. § 1333(a). The FTC is responsible for approving manufacturers' plans for the rotation of the four congressionally mandated warnings. *Id.* § 1333(c).

"Congress expanded the pre-emption provision [of the Labeling Act] with respect to the States . . . at the same time [that] it allowed the FTC"—which had been subject to the narrower preemption provision of the original 1965 enactment—"to regulate cigarette advertising." *Reilly*, 533 U.S. at 545-46. Congress expanded the FTC's regulatory role by amending "the pre-emption provision to prohibit only restrictions 'imposed under State law'" (*Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 515 (1992)) and through a savings clause that expressly authorizes the FTC to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. The FTC savings clause underscores the absence of any Labeling Act provision preserving *state* authority to regulate health-related claims in cigarette advertising.

Indeed, at the time that Congress expanded the Labeling Act's preemption provision "with respect to the States" in the Public Health Cigarette Smoking Act of 1969, nearly every State had enacted a "Little FTC Act" that paralleled the federal agency's authority to police deceptive advertising practices, and the States were "prepar[ing] to take actions regulating cigarette advertisements." *Cipollone*, 505 U.S. at 515 & n.11. Congress's amendment of the Labeling Act to prohibit States from imposing "requirements based on smoking and health" in cigarette advertising expressly *preempted* the application of the States' Little FTC Acts to health-related claims in cigarette advertising, while expressly *preserving* the FTC's regulatory authority in this area. Had Congress intended the States to retain a role in policing health claims in cigarette advertising, it would have included an analogous state-law savings clause—as it has done in other tobacco regulatory frameworks.

See 15 U.S.C. § 4406(c) (expressly preserving state-law liability based on advertising for smokeless tobacco products).

The Labeling Act's FTC savings clause also demonstrates that Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health. Instead, it allocated responsibility for policing health-related claims in cigarette advertising and promotion to the FTC, which possesses a range of formal and informal regulatory tools that it has used to closely regulate tobacco companies' claims about smoking and health since the 1920s. *See* S. Rep. No. 91-566, at 13 (1969) ("The [Federal Trade] Commission remains free to proceed by complaint against any cigarette manufacturer who it believes is making unfounded health claims or false claims about the product's characteristics in advertising material").[8] Indeed, it is not unusual for Congress to promote national regulatory uniformity by providing a single federal agency with the authority

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[8] *See, e.g.*, 13 F.T.C. 411, 412 (1929) (cigarette manufacturer agreed to cease and desist from representing its cigarettes as "harmless"); 17 F.T.C. 597 597 (1933) (J.H. Guild Co. agreed to cease and desist from advertising cigarettes that "soothe[d] and relieve[d] Asthma"); 34 F.T.C. 1689, 1690 (1942) (Brown & Williamson Tobacco Corp. agreed to cease and desist from representing that its cigarettes "leave[ ] the nose and throat actually cleaner or clearer"); 46 F.T.C. 1230, 1230 (1950) (Leighton Tobacco Co. agreed to cease and desist from representing that its Phantom cigarettes "cause no irritation"); *see also supra* pgs. 4-13 (detailing the FTC's regulation of tar and nicotine claims in cigarette advertising since the 1950s); Prepared Statement of the FTC, *supra*, at 3 ("The Commission also has used its Section 5 authority to prosecute a variety of unfair and deceptive cigarette advertising practices—including claims about tar and nicotine ratings for cigarettes").

to oversee an industry's advertising practices and by simultaneously preempting the States' overlapping authority. *See Wolens*, 513 U.S. at 228 & n.4 (holding that the Airline Deregulation Act preempts state-law consumer fraud claims challenging airline advertising, while emphasizing that the Department of Transportation "retains authority to investigate unfair and deceptive practices and unfair methods of competition by airlines").

Although Congress has amended the Labeling Act on several occasions since 1969 (*see, e.g.*, Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, 98 Stat. 2200), it has never altered the fundamental allocation of regulatory authority between the States and the FTC.[9]

3. Preemption of respondents' health-related claims is also consistent with the policies underlying the Labeling Act, which was enacted both to "inform the public adequately about the hazards of cigarette smoking, and to protect the national economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health." *Reilly*, 533 U.S. at 542-43; *see also* 15 U.S.C. § 1331.

Allowing respondents' suit to proceed would generate consumer confusion about tar and nicotine claims in cigarette advertisements and obliterate the national regulatory uniformity that the Labeling Act

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[9] Congress has also declined to enact legislation that would have prohibited the use of tar and nicotine descriptors and other advertising representations based on the results of testing under the FTC Method. *See, e.g.*, Truth in Cigarette Labeling Act of 2006, S. 3872, 109th Cong.

was designed to establish. If tar and nicotine descriptors could be used in one group of States to communicate cigarettes' comparative FTC-rated tar and nicotine yields, but could be utilized in other States only subject to certain restrictions, and were completely banned in a third group of States, then consumers and tobacco companies would be confronted with precisely the type of "confusing" and "nonuniform" cigarette advertising and warning regulations that the Labeling Act was designed to prevent. *Compare Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1, 6 (Ill. 2005) (holding that the use of descriptors does not violate Illinois's consumer fraud statute because the FTC has authorized such representations), *with* Pet. App. 61a (allowing virtually identical claims under Maine law to proceed). Under this patchwork regime, consumers would receive conflicting messages about the health effects of smoking, and tobacco companies would be effectively foreclosed from operating national advertising campaigns. For these reasons, the FTC itself has expressed opposition to proposals to repeal the Labeling Act's preemption provision due to the pernicious consequences that would result from superimposing divergent state-law standards on the federal framework governing statements about smoking and health in cigarette advertising. *See* J.A. 348a (FTC congressional submission explaining that, "if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict").

The Labeling Act reflects Congress's judgment that health-related statements in cigarette advertising should be governed by a coherent federal regula-

tory framework that provides consumers with consistent and readily understandable information about the health effects of smoking and that provides tobacco companies with a uniform regulatory backdrop against which to operate national advertising campaigns. Preemption of state-law "cigarette advertising regulations motivated by concerns about smoking and health" (*Reilly*, 533 U.S. at 548)—such as respondents' claims that tar and nicotine descriptors are deceptive under Maine law—is essential to the preservation of that uniform federal regulatory framework. *Cf. Rowe* v. *N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 995 (2008) (holding a state law to be preempted where it had a "'significant' and adverse 'impact' in respect to the federal Act's ability to achieve its pre-emption-related objectives").

B. The First Circuit's Express Preemption Analysis Is Inconsistent With This Court's Precedent

Despite the clear import of the Labeling Act's language, structure, and purpose, the First Circuit rejected PMUSA's express preemption defense because it determined that the requirements that respondents' claims seek to impose are not "based on smoking and health" but are instead based on a general state-law duty not to deceive. The court of appeals' reasoning cannot be reconciled with this Court's interpretation of the Labeling Act in *Reilly*, or with the well-established principle—recently reaffirmed in *Riegel*—that federal law preempts a jury's application of a general state-law duty to a specific set of facts encompassed by the terms of an express preemption provision. Because respondents' claims apply the general obligations of the MUTPA to factual allegations premised on the relationship between smoking and health, those claims seek to im-

pose requirements or prohibitions "based on smoking and health" and are therefore expressly preempted.

1. While acknowledging that respondents' claims are "intertwined with the concern about cigarette smoking and health," the court of appeals held that the requirements that those claims seek to impose are not "based on smoking and health" because they are "premised on a state-law duty that is broader in scope" than the concern about smoking and health—the "ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act." Pet. App. 20a, 21a. According to the court of appeals, the Labeling Act does not preempt state-law claims challenging health-related statements in cigarette advertising where those claims are based on a "'general obligation'"—such as the obligation not to engage in deceptive advertising imposed by the MUTPA—that may also have application outside the specific context of smoking and health. *Id.* at 22a.

The First Circuit's conclusion that the Labeling Act does not preempt application of a generally applicable unfair trade practices statute in the specific smoking-and-health setting is directly at odds with this Court's holding in *Reilly* that the Labeling Act preempted state cigarette advertising regulations promulgated pursuant to the Massachusetts Unfair Trade Practices Act. 533 U.S. at 533. The Court concluded that these state regulations—which imposed restrictions on the location and content of outdoor and point-of-sale cigarette advertising in an effort to restrict youth exposure to such advertisements—were "intertwined with the concern about cigarette smoking and health" and therefore "based on smoking and health" within the meaning of the Labeling Act. *Id.* at 548. The fact that the regula-

tions in question were predicated on the general duty not to engage in deceptive advertising established by a state unfair trade practices statute did not give the Court reason to alter its conclusion that the application of that general duty in the specific smoking-and-health context created a state-law requirement "based on smoking and health."

2. Like the advertising regulations in *Reilly*, respondents' state-law claims seek to apply the general duty not to engage in deceptive advertising in the specific smoking-and-health setting and are therefore preempted by the Labeling Act. The First Circuit nevertheless suggested that *Reilly* was inapposite because the Massachusetts tobacco-specific "regulations were themselves the [state-law] 'prohibitions,' while the prohibition here is the ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act." Pet. App. 20a.

The First Circuit's effort to distinguish *Reilly* is unavailing. Respondents' claims seek to impose health-related cigarette advertising requirements on the basis of a state unfair trade practices statute, which is precisely what the Massachusetts Attorney General did in *Reilly* when he promulgated health-related cigarette advertising requirements on the basis of the Massachusetts Unfair Trade Practices Act. The fact that the state-law requirements in *Reilly* were promulgated by an executive branch official, while the requirements in this case would ultimately be imposed by a judgment implementing a jury verdict, is immaterial because judges and juries—no less than officials of the executive and legislative branches—are state actors. *See Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) ("[A jury] is a quintessential governmental body, having no at-

tributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction."). Because "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996)), a jury's invocation of the MUTPA to impose health-related restrictions on the use of tar and nicotine descriptors in cigarette advertising is legally indistinguishable from the Massachusetts Attorney General's invocation of his State's unfair trade practices statute to promulgate health-related cigarette advertising regulations.

Indeed, this Court has explicitly held that federal law preempts claims that seek to apply a general state consumer fraud statute to a specific set of facts encompassed by the terms of an express preemption provision. *See Wolens*, 513 U.S. at 228 (holding that the Airline Deregulation Act—which preempts state laws "relating to rates, routes, or services of any air carrier"—preempts state-law consumer fraud claims challenging airline advertising). In so doing, the Court rejected the argument—relied upon by the First Circuit in this case—that a jury's application of the general duty not to deceive to a specific set of facts can be distinguished from a state attorney general's reliance upon that general duty to promulgate industry-specific regulations. *See id.* at 236 (Stevens, J., dissenting) (disagreeing with the "majority's extension of the ADA's pre-emptive reach from [the] airline-specific advertising standards" at issue in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), "to a general background rule of private conduct"). Thus, no less than the Massachusetts advertising regulations in *Reilly*, a jury verdict finding that it is deceptive under Maine law to use descrip-

tors in cigarette advertising to communicate tar and nicotine yields would impose a state-law "requirement . . . based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. *See also Riegel*, 128 S. Ct. at 1007 (plaintiffs' common-law claims "'relate[ ] to the safety or effectiveness of [a medical] device'" because "[s]afety and effectiveness are the very subjects of the Riegels' common-law claims").

The First Circuit's reasoning would lead to untenable—and nonsensical—results. Like most state consumer fraud statutes, the MUTPA can be enforced either through the state attorney general's promulgation of a regulation defining the scope of the statutory prohibition on deceptive advertising or through a lawsuit initiated by the attorney general or a private citizen. Me. Rev. Stat. tit. 5, §§ 207, 209, 213. Under the First Circuit's reading of the Labeling Act, the Maine Attorney General's invocation of the MUTPA to issue a regulation that prohibited the use of tar and nicotine descriptors in cigarette advertising would be preempted by the Labeling Act but a jury verdict finding that PMUSA had violated the same statute through its use of tar and nicotine descriptors would escape preemption. It defies common sense, however, to suggest that Congress intended to afford state-law juries greater authority to regulate health-related claims in cigarette advertising than state executive and legislative officials by preempting one category of state regulation, but not the other. *See Riegel*, 128 S. Ct. at 1008 ("it is implausible that the [Medical Device Amendments were] meant to 'grant greater power (to set state standards "different from, or in addition to" federal standards) to a single state jury than to state officials acting

through state administrative or legislative lawmaking processes'").

As this Court has explained in rejecting similar arguments regarding the preemption provision of other federal statutes, an exception to the Labeling Act's preemptive reach for the application of the general duty not to deceive in the specific smoking-and-health setting would create an "utterly irrational loophole" because "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Morales*, 504 U.S. at 386 (Airline Deregulation Act); *see also Pilot Life Ins.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (ERISA preemption is not limited to state measures targeting ERISA plans but also includes general common-law tort and contract causes of action); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959) ("Nor has it mattered [in preemption cases under the National Labor Relations Act] whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations").

For all of these reasons, this Court in *Riegel* expressly rejected the argument that the preemptive reach of the Medical Device Amendments to the federal Food, Drug, and Cosmetic Act is restricted to statutory causes of action and common-law obligations that "apply *only* to the relevant [medical] device, or only to medical devices and not to all products and all actions in general." 128 S. Ct. at 1010 (emphasis in original). In holding that the statute preempts the application of a general common-law duty to a specific medical device, the Court emphasized that a "tort judgment . . . establishes that the

defendant has violated a state-law obligation" and "disrupts the federal scheme no less than state regulatory law to the same effect." *Id.* at 1008.

Similarly, the Labeling Act expressly prohibits state regulation of health-related claims in cigarette advertising, whether that regulation is accomplished through a cigarette-specific executive branch regulation or through a court judgment applying a generally applicable state-law duty to the smoking-and-health setting. Indeed, because there are no common-law duties specific to smoking and health, the Labeling Act would not preempt *any* common-law claims if it did not reach the application of a general state-law obligation to a specific health-related advertising representation—a result at odds with this Court's consistently reaffirmed conclusion that Congress intended the Labeling Act to preempt common-law claims. *See Cipollone*, 505 U.S. at 521 (plurality opinion); *id.* at 548 (opinion of Scalia, J.); *see also Riegel*, 128 S. Ct. at 1008 (reaffirming this conclusion); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

C. Preemption Of Respondents' Claims Is Required Under The *Cipollone* Plurality's Interpretation Of The Labeling Act

The First Circuit's express preemption analysis also conflicts with the Labeling Act preemption framework endorsed by a plurality of the Court in *Cipollone*.

1. In *Cipollone*, this Court held that the Labeling Act expressly preempts certain categories of state-law fraud claims against tobacco companies. The plaintiff had "allege[d] two theories of fraudulent misrepresentation" against the tobacco company

defendants. 505 U.S. at 527 (plurality opinion). As described by the district court, one theory alleged "that respondents had willfully, 'through their advertising, attempted to neutralize the [federally mandated] warnin[g]' labels"; the other theory alleged "'false representation of a material fact.'" *Id.* at 510, 528 (alterations in original). Although six Justices agreed that the Labeling Act preempts common-law tort claims, those Justices could not reach agreement as to *which* of the plaintiff's two fraud claims were preempted.

A four-Justice plurality endorsed a claim-by-claim preemption analysis that inquires "in each case . . . whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" 505 U.S. at 523-24 (quoting 15 U.S.C. § 1334(b) (first alteration added)). The plurality concluded that the plaintiff's "warning neutralization" fraud claim was preempted because "[s]uch a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," and thus is "based on smoking and health" within the meaning of the Labeling Act. *Id.* at 527. In contrast, the plurality concluded that fraudulent misrepresentation "claims based on allegedly false statements of material fact made in advertisements" for cigarettes are not preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528-29.

The *Cipollone* plurality explained that it is inherent "falsity" that distinguishes state-law re-

quirements based on the "duty not to deceive" from state-law requirements "based on smoking and health." 505 U.S. at 529. The plurality reasoned that this distinction between inherently false statements and statements that might create a false impression "is wholly consistent with the" Labeling Act's goal of establishing regulatory uniformity because, "[u]nlike state-law obligations concerning the warning necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Ibid.*

The same cannot be said of claims challenging *potentially* misleading representations of fact. *See* W. Page Keeton et al., *Prosser & Keeton on Torts* § 105, at 728 (5th ed. 1984) (noting that some of the elements of the cause of action for deceit "have undergone modification or qualification in some jurisdictions"). Indeed, the potential for divergent state-law standards is heightened in cases—such as this one—where a plaintiff's claims are premised on a state consumer fraud statute. Such statutes vary widely from State to State, including in the extent to which they exempt conduct permitted by the federal government. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002). The proliferation of such conflicting state-law standards is precisely what Congress sought to prevent when enacting the Labeling Act to establish a uniform federal regulatory framework governing health-related representations in cigarette advertising.

Moreover, the distinction that the *Cipollone* plurality drew between inherently false statements and statements that are potentially misleading is hardly a novel one. It is essentially the same distinction that this Court had previously developed to deter-

mine the level of First Amendment protection afforded to commercial speech. *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). For example, "inherently misleading" advertising "may be prohibited entirely," while "potentially misleading information" warrants "not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *In re R.M.J.*, 455 U.S. 191, 203 (1982). If this were a commercial speech case, tar and nicotine descriptors would clearly fall into the second category because it is undisputed that they accurately communicate the results of testing under the FTC Method. J.A. 30a.

2. Respondents' claims are preempted under the framework articulated by the *Cipollone* plurality. Respondents concede that descriptors are an accurate shorthand for conveying to consumers tar and nicotine testing results under the FTC Method. J.A. 30a. They nevertheless contend that PMUSA is liable under state law because descriptors could be potentially misleading to smokers who are not aware that these representations are based on standardized machine testing and thus may not reflect the amount of tar and nicotine that a smoker actually receives. *Id.* at 30a-31a. Respondents further allege that PMUSA used descriptors "with the intention of communicating to consumers that Marlboro Lights [and Cambridge Lights] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes" (*id.* at 28a, 29a) and "to provide smokers who were concerned about their health with a product that could reduce their concerns." *Id.* at 29a. Like the warning-neutralization claim deemed to be preempted by the *Cipollone* plurality, respondents' allegations are therefore "predicated on a state-law prohibition against statements in advertising and promotional

materials that tend to minimize the health hazards associated with smoking." 505 U.S. at 527; *see also Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007) (holding that a state-law fraud claim challenging the use of descriptors was expressly preempted because the "terms 'light' and 'lowered tar and nicotine' cannot . . . be inherently deceptive or untrue").

According to the First Circuit, however, the preemption framework developed by the *Cipollone* plurality does not "differentiate between 'express' and 'implied' misrepresentations." Pet. App. 32a n.18. The court of appeals instead attempted to distinguish the preempted and nonpreempted categories of fraud claims recognized by the *Cipollone* plurality by looking to the label attached to respondents' claims. Because those claims allege a violation of the prohibition on deceptive advertising under the MUTPA—and do not carry the same "warning neutralization" label as the fraud claims that the *Cipollone* plurality found to be preempted—the court of appeals concluded that respondents' claims were based on the "duty not to deceive" and therefore were not preempted. *Id.* at 30a-31a.

In so holding, the court of appeals acknowledged that descriptors "could support a warning neutralization claim, *i.e.*, by suggesting that those brands of cigarettes do not pose the same grave threats to health announced in the accompanying warning label." Pet. App. 32a. The court nevertheless suggested that "those statements [could] also support a different theory of recovery, including one that falls outside the preemptive reach of [the Labeling Act]." *Id.* at 32a-33a; *see also id.* at 33a ("the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted and

some of them not"). According to the First Circuit, respondents avoided the Labeling Act's preemptive reach by "not alleg[ing] that the statements 'light' and 'lower tar and nicotine' diluted the warnings on [PMUSA's] packaging or advertising" but instead "alleg[ing] that the statements deceived them into purchasing Marlboro Lights and Cambridge Lights." *Id.* at 30a-31a.

In addition to misconstruing the substance of respondents' claims (which repeatedly allege that descriptors were used to allay smokers' health concerns (J.A. 28a-29a)), the First Circuit's approach is flawed because it provides for preemption of a fraud claim *only* when a plaintiff uses the precise "warning neutralization" label used by the plaintiff in *Cipollone* (which, needless to say, few if any plaintiffs will do). It is well-established, however, that it is the substance of the claim, not its label, that determines whether a claim is preempted. "[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them," this Court has warned, "would elevate form over substance and allow parties to evade the pre-emptive scope of [a statute] simply by relabeling their . . . claims." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) (internal quotation marks omitted); *see also Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("compliance with the intent of Congress cannot be avoided by mere artful pleading"). Because the *substance*—rather than the label—of respondents' claims is indistinguishable from the warning-neutralization claim in *Cipollone*, those claims are preempted.[10]

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[10] The plaintiff in *Cipollone* also advanced "two closely related theories" in support of a claim for "failure to warn." 505 U.S. at

3. If this Court were to conclude that respondents' claims are not expressly preempted under the framework articulated by the *Cipollone* plurality, then it should reexamine that framework.

As discussed at length above, respondents' claims seek to impose state-law requirements "based on smoking and health" within the meaning of the Labeling Act because they allege that PMUSA used tar and nicotine descriptors to communicate to smokers that "light" cigarettes had fewer health risks than regular cigarettes (J.A. 28a-29a) and because public-health organizations and the federal government repeatedly informed consumers that cigarettes with lower FTC-rated tar and nicotine yields had fewer health risks than higher-yield cigarettes. This conclusion is confirmed by the structure of the Labeling Act—which expressly preserves the FTC's authority to regulate health-related claims in advertising while

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[Footnote continued from previous page]

524 (plurality opinion). The plurality concluded that these claims were preempted "insofar as" they "require[d] a showing that [the manufacturers'] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," but were not preempted insofar as they "rel[ied] solely on [the manufacturers'] testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25. Respondents' claims are substantively identical to the *Cipollone* plaintiff's preempted failure-to-warn claims because they "require[] a showing that [PMUSA's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings" about the methodological limitations of the FTC Method and the fact that the test is not capable of replicating the variations in actual human smoking behavior. *See Brown*, 479 F.3d at 393 ("the gravamen of Plaintiffs' Light claim is that the warnings mandated by Congress are inadequate with respect to Light cigarettes") (internal quotation marks omitted).

preempting the imposition of state-law advertising requirements "based on smoking and health"—and the Labeling Act's purpose of establishing a uniform federal regulatory program governing health claims in cigarette advertising.

If the framework endorsed by the *Cipollone* plurality could be applied in a way that would allow respondents' state-law claims to proceed, then the plurality's interpretation of the preemption provision would conflict with each of these interpretive guideposts. The plurality's analysis would also conflict with the subsequent conclusions of a majority of this Court in *Reilly*—that the Labeling Act preempts state-law cigarette advertising requirements that are based upon the application of a state unfair trade practices statute in the smoking-and-health setting (533 U.S. at 548)—and in *Riegel* and *Wolens*—that federal law preempts a court's application of a general state-law obligation to a specific set of facts encompassed by an express preemption provision. *See also Cipollone*, 505 U.S. at 554 (opinion of Scalia, J.) (preemption under the Labeling Act should be determined by "ask[ing] . . . whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health").

The *Cipollone* plurality's preemption framework—which concededly lacks "theoretical elegance" (505 U.S. at 529 n.27 (plurality opinion))—was criticized by a *majority* of the Court at the time it was articulated. *See id.* at 543 (opinion of Blackmun, J.); *id.* at 552, 556 (opinion of Scalia, J.). If respondents' claims—which fall squarely within the plain language and purpose of the Labeling Act's preemption provision—are not preempted under that framework, then this Court should follow its subsequent holdings in *Reilly*, *Riegel*, and *Wolens*, and explicitly reject the

Cipollone plurality's restrictive reading of the Labeling Act's preemption provision.

* * *

In the Labeling Act, Congress established a uniform federal regulatory framework governing smoking-and-health claims with respect to cigarette advertising and promotion by explicitly *authorizing* the FTC to regulate such claims and expressly *preempting* state authority to do so. Respondents' suit falls squarely within the language and purpose of the Labeling Act's preemption provision because respondents are attempting to invoke Maine law to regulate PMUSA's alleged use of tar and nicotine descriptors to communicate to consumers that "light" cigarettes present fewer health risks than regular cigarettes. If these state-law claims—which present a direct challenge to health-related statements in cigarette advertising—are not preempted, then the Labeling Act's preemption provision would be largely nullified and the express preemption principles established in *Riegel*, *Reilly*, and *Wolens* would be effectively overruled.

II. RESPONDENTS' CLAIMS ARE IMPLIEDLY PREEMPTED

Respondents' claims are also impliedly preempted because, if allowed to proceed, they would present an obstacle to the FTC's longstanding policy of encouraging consumers to rely on the standardized tar and nicotine information conveyed by the FTC Method and promoting competition among tobacco companies in the development of low-tar cigarettes.

State law is impliedly preempted where it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-

gress'" or a federal agency. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). This Court has repeatedly applied these principles to preempt state laws that interfere with an agency's regulatory policies. *See, e.g., Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000); *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 159 (1982). Because respondents' state-law challenge to the use of FTC-authorized descriptors would substantially impede the FTC's low-tar policy, their claims are impliedly preempted.[11]

A. Respondents' Claims Present An Obstacle To The FTC's Low-Tar Policy

The FTC has long supported the efforts of public-health officials to reduce the risks posed by smoking. *See* 29 Fed. Reg. at 532. Since the publication of the first scientific reports in the early 1960s "strongly suggest[ing] that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be

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[11] Although PMUSA's implied preemption defense relies primarily on the conflict between respondents' claims and the FTC's low-tar policy, respondents' state-law challenge to the use of tar and nicotine descriptors also conflicts with the policies underlying the Labeling Act, which was enacted to establish a "comprehensive Federal program to deal with" health-related statements in "cigarette labeling and advertising." 15 U.S.C. § 1331. The fact that the Labeling Act contains an express preemption provision does not bar the statute from also impliedly preempting state law. *See Freightliner*, 514 U.S. at 287 (the argument "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute . . . is without merit"); *see also Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 65 (2002) (same). *But see Cipollone*, 505 U.S. at 517.

the effect" (J.A. 647a), the FTC has pursued a regulatory policy designed to "lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette" and to encourage "competition among the cigarette companies to meet that interest." *Id.* at 566a.

Toward those ends, the FTC designated the FTC Method as the exclusive means of measuring tar and nicotine yields (J.A. 479a), and required tobacco companies to disclose tar and nicotine yields, measured under the FTC Method, in all print advertisements for cigarettes. *Id.* at 377a, 899a. Through a 1967 policy statement and a series of consent agreements with tobacco companies, the FTC also authorized the use of tar and nicotine descriptors in cigarette advertising as a shorthand means of communicating tar and nicotine information to consumers, as long as those descriptors were substantiated by testing under the FTC Method. *Id.* at 368a; *see also In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).

Since the inception of this policy, the FTC has been well aware of the FTC Method's inherent inability to replicate the variability of human smoking behavior and has repeatedly reevaluated the propriety of this testing procedure. *See* 48 Fed. Reg. 15,953 (Apr. 13, 1983); 62 Fed. Reg. 48,158 (Sept. 12, 1997). Notwithstanding these known limitations, the FTC has retained the testing method for four decades and has encouraged consumers to rely on its results because "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." C.A. App. 176 Ex. 203, at 5.

Respondents' claims represent an effort to second-guess the FTC's policy judgments by imposing state-law liability on PMUSA for using FTC-authorized descriptors to communicate to consumers the results of tar and nicotine testing under the FTC Method. Respondents' claims are barred by settled principles of implied conflict preemption because the imposition of state-law liability based on PMUSA's FTC-authorized conduct would "create[ ] an obstacle to the accomplishment and execution" of the FTC's low-tar policy. *De la Cuesta*, 458 U.S. at 156 (internal quotation marks omitted).

Respondents' claims allege that the descriptors authorized by the FTC—and, ultimately, the FTC Method itself—are deceptive and misleading under Maine law. The FTC, however, has made the determination that, despite its known limitations, the FTC Method provides a useful, standardized means of comparing different brands' tar and nicotine yields. The FTC has therefore declared the FTC Method to be the *only* methodology that tobacco companies may use to convey tar and nicotine information to the public, has designated the explanatory legend that must accompany the mandatory disclosure of FTC-rated tar and nicotine yields in cigarette advertising, and has repeatedly authorized the use of descriptors as a shorthand means of communicating testing results. Allowing respondents' claims to challenge PMUSA's FTC-authorized statements as deceptive under Maine law would frustrate—and, indeed, directly conflict with—the FTC's policy judgments.

B. The First Circuit's Reasons For Rejecting Implied Preemption Are Erroneous

The First Circuit gave three principal reasons for concluding that respondents' claims are not impliedly preempted: (1) the FTC lacks a coherent policy on tar and nicotine claims in cigarette advertising; (2) the FTC has never issued a formal rule with respect to the FTC Method and the use of descriptors; and (3) a provision of the FTCA, 15 U.S.C. § 57b(e), deprives the FTC's consent orders regarding the use of descriptors of any preemptive force. Each of these rationales is flawed.

1. The First Circuit premised its rejection of PMUSA's implied preemption defense on its inability to "discern a coherent federal policy on low-tar claims." Pet. App. 54a. Its evaluation of the FTC's regulatory activity in this area is erroneous.

The FTC has pursued a decades-long policy of requiring tobacco companies to provide standardized tar and nicotine information to consumers and encouraging tobacco companies to develop low-tar cigarettes. *See supra* pgs. 4-13; J.A. 43a-176a. In furtherance of those objectives, the FTC has required tobacco companies to disclose tar and nicotine yields measured using the FTC Method in their advertisements and authorized them to use descriptors as a shorthand means of communicating testing results to consumers. The First Circuit discounted this longstanding FTC policy because it believed that the FTC "has not invariably allowed tar and nicotine claims that are supported by" the FTC Method. Pet. App. 52a. Specifically, the First Circuit pointed to two instances during the past 40 years when the FTC "has recognized that" tar and nicotine claims supported by

the results of the FTC Method "may nevertheless amount to unfair or deceptive acts or practices in certain circumstances." *Ibid.* Neither of these examples undermines the coherence or consistency of the FTC's low-tar policy.

In the first instance, the FTC determined that the FTC Method did not "measure accurately" the tar and nicotine yields of Barclay cigarettes because of the unique filter design of those cigarettes. 48 Fed. Reg. at 15,954. The FTC explained that the "Barclay filter . . . pose[d] a unique problem" because "[r]educed ventilation when smoking Barclay apparently occurs inevitably and cannot be avoided by informed consumers except by use of a cigarette holder." *Ibid.* The problem with the Barclay filter thus went beyond the FTC Method's inherent methodological inability to replicate the variability of individual smokers' behavior. The special filter used in Barclay cigarettes ensured that *no* smoker would actually receive the yields measured by the FTC Method (at least without using a holder). Rather than abandon the FTC Method, the agency responded to this "unique" situation by requiring the manufacturer to list an estimated range of numbers as the FTC-rated tar yield in Barclay advertisements. Contrary to the First Circuit's suggestion, this decision reinforces—rather than undercuts—the FTC's commitment to providing standardized tar and nicotine information to consumers measured using the FTC Method. Because the tar and nicotine yields of Barclay cigarettes could not be accurately compared to those of other cigarettes when expressed as a single, FTC-rated number, the FTC required that an estimated range of yields be listed in order to avoid consumer confusion and then brought an enforcement action against the manufacturer when it

began including tar and nicotine testing results from an independent laboratory in its advertisements. *See FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985).

The First Circuit's second example is equally unavailing. The court of appeals suggested that the FTC's low-tar policy lacks regulatory coherence because the agency challenged a representation by American Tobacco that "'consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. tar than by smoking a single pack of any other brand that is rated as having more than 10 mg. of tar.'" Pet. App. 51a n.26 (quoting *In re Am. Tobacco Co.*, 119 F.T.C. at 10). The FTC's objection was to the use of a "numerical multiple, fraction, or ratio" to suggest that—despite the FTC Method's methodological limitations—smokers would actually receive less tar from smoking ten packs of American Tobacco's cigarettes than from smoking one pack of the comparison brand. 119 F.T.C. at 10. In the same consent order, however, the FTC reaffirmed that representations that a brand is "low," "lower," or "lowest" in tar and nicotine are *not* misleading or deceptive if those representations are substantiated by the FTC Method and do not refer to smokers' actual tar and nicotine intake. *Ibid.* Like the Barclay case, then, the FTC's consent order with American Tobacco merely reinforces the agency's commitment to providing consumers with standardized tar and nicotine information measured using the FTC Method and its recognition of that methodology's inherent limitations.

2. In rejecting PMUSA's implied preemption defense, the First Circuit also emphasized the fact that the FTC "has never issued a formal rule specifically defining which cigarette advertising practices violate

the" FTCA. Pet. App. 46a. The court of appeals did not dispute that the FTC has regulated the tobacco industry's tar and nicotine claims through industry agreements, advisory opinions, policy statements, and consent decrees—including the 1967 policy statement and the 1971 and 1995 consent decrees authorizing the use of descriptors. *See* J.A. 368a; *In re Am. Brands*, 79 F.T.C. at 258; *In re Am. Tobacco Co.*, 119 F.T.C. at 11. It concluded, however, that none of these regulatory activities can impliedly preempt state-law claims that conflict with the FTC's regulatory objectives. Pet. App. 46a. This restrictive view of the FTC's power to preempt state law is flawed.

This Court has repeatedly held that agency activity other than formal rulemaking can have preemptive effect when it reflects a considered policy judgment by the agency. In *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), for example, the Court recognized that even an agency's decision *not* to engage in regulation can preempt state law. *Id.* at 64; *cf. Geier*, 529 U.S. at 885 (rejecting the argument that "a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking," is required before agency action can trigger implied preemption). Similarly, this Court's cases involving the "filed rate doctrine"—a species of preemption—typically accord preemptive effect to an agency's issuance of an order determining that a particular rate is just and reasonable, even though the agency has not memorialized that determination in a formal rule. *See, e.g., Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578-79 (1981). And in an *amicus* brief recently filed at this Court's invitation in *Wyeth* v. *Levine*, No. 06-1249, the Solicitor General explained that the FDA's decision to approve a new drug application, including

the drug's proposed labeling, triggers implied preemption of conflicting state-law requirements. *See* U.S. Cert. Br. 11 ("a jury's imposition of liability based on a drug's FDA-approved labeling would interfere with FDA's expert judgment").[12]

The First Circuit's exceedingly narrow understanding of an agency's authority to preempt state law directly conflicts with this precedent. It also significantly restricts agencies' otherwise broad regulatory discretion to determine whether to proceed through formal rulemaking or through a more efficient, informal regulatory procedure. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies") (internal quotation marks omitted; alteration in original). Those informal mechanisms—which carry with them many of the same procedural safeguards as formal rulemaking—are an essential component of the FTC's regulatory activity. *See, e.g.*, 16 C.F.R. § 2.34(c) (requiring a notice-and-comment period for FTC consent decrees). Indeed, former FTC Chairman Daniel Oliver explained in congressional testimony that the agency prefers to proceed by adjudication and other informal mechanisms because "rulemaking takes a very long time" and it is therefore "more efficient to

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[12] The lower courts have also repeatedly held that state law can be impliedly preempted by agency action other than formal rulemaking. *See, e.g., Gen. Motors Corp.* v. *Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) ("a consent order reflecting a reasonable policy choice of [the FTC] and issued pursuant to a congressional grant of authority may preempt state legislation"); *Feikema* v. *Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994); *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 5-6, 9-11, 14-15 (Cal. 2004).

bring a single case against the first offender in order to stop the practice before we go to rulemaking." J.A. 967a.

Even if this were not already a settled question, then, the First Circuit's conclusion would be flawed because it would compel agencies to engage in costly and time-consuming formal rulemaking to accomplish regulatory objectives that could be achieved more quickly and cost-effectively through adjudications, industry agreements, and other informal regulatory means.

3. The First Circuit's implied preemption analysis also relied on 15 U.S.C. § 57b(e), which is part of the FTCA provision authorizing the FTC to bring civil actions for violations of rules and cease-and-desist orders. Section 57b(e) states that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b(e). According to the First Circuit, this provision "raises an additional hurdle" to PMUSA's "implied preemption theory, at least insofar as that theory relies on the 1971 and 1995 consent orders," because the court could "think of no other purpose for this clause other than to allow further relief from unfair or deceptive acts or practices under state law even after the Commission has already challenged them through litigation under the FTC Act." Pet. App. 47a, 49a.

This reading of Section 57b(e) is flawed. The plain language of the provision indicates that it does nothing more than preserve the viability of state remedies where the FTC has made a determination that a defendant's conduct violates the FTCA. A parallel state-law action regarding that conduct would not conflict with federal law because state law would

merely provide an additional remedy for conduct that violated federal law. It hardly follows, however, that Section 57b(e) also preserves state unfair trade practices suits that are predicated on conduct that the FTC has mandated or authorized. Nothing in the language of Section 57b(e) suggests that the section was intended to create such a significant state-law impediment to the FTC's regulatory policies.

Indeed, this Court has made clear that the inclusion of a "savings" clause "does *not* bar the ordinary working of conflict pre-emption principles" or even impose a "'special burden'" on the proponent of conflict preemption. *Geier*, 529 U.S. at 869, 873 (emphasis in original). There is no more evidence in the text of Section 57b(e) than there was in the savings clause at issue in *Geier* that Congress meant to "save state-law . . . actions that conflict with" federal law. *Id.* at 869. As the Court in *Geier* made clear, although Congress has the power to preserve conflicting state law, such a scheme is extraordinary and hardly to be expected because it "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives" and could "permit[ ]" the federal law "to defeat its own objectives, or . . . to destroy itself." *Id.* at 872 (internal quotation marks omitted).[13]

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[13] Notably, Section 57b(e) does not read like a provision that saves state law from preemption. Congress knows how to draft such provisions and has done so in other statutes. *See, e.g.*, 6 U.S.C. § 1142(f) ("Nothing in this section preempts or diminishes any other safeguards against discrimination . . . provided by Federal or State law"); 15 U.S.C. § 4406(c) ("Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person").

At most, then, this narrow provision merely establishes that Congress did not intend to preempt the entire *field* of remedies for unfair and deceptive trade practices and that state-law remedies that are otherwise consistent with the federal regulatory framework are not preempted. *Cf. Am. Tel. & Tel. Co.* v. *Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (construing the savings clause in the Communications Act to "preserve[ ] only those rights that are not inconsistent with the statutory filed-tariff requirements"); *Pa. R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

* * *

As Congress recognized when enacting the Labeling Act, the relationship between smoking and health is a matter of exceptional importance to the Nation's public health. In order to ensure that the public receives consistent and comprehensible information about the health effects of smoking, Congress granted the FTC the authority to regulate health-related statements in cigarette advertising and expressly preempted the States' overlapping authority. For more than forty years, the FTC has carried out its regulatory mandate by policing deceptive health representations in cigarette advertising, requiring the dissemination of standardized tar and nicotine information to consumers, and encouraging the development of low-tar cigarettes. Respondents' state-law claims directly challenge health-related cigarette advertising representations regulated by the FTC, and are preempted both because they fall squarely within the language of the Labeling Act's express preemption provision and because they directly conflict with the FTC's longstanding tar and nicotine policy. A contrary conclusion would not only nullify

the Labeling Act's preemption provision and the FTC's policy judgments in this area, but would also obliterate the national regulatory uniformity necessary to ensure that consumers are able to make informed decisions about smoking-and-health issues.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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March 31, 2008

APPENDIX

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, provides in relevant part:

§ 1331. Congressional declaration of policy and purpose

It is the policy of Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

* * *

§ 1333. Labeling: requirements; conspicuous statement

(a) Required warnings; packages; advertising; billboards

(1) It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(2) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised (other than through the use of outdoor billboards) within the United States any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(3) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised within the United States through the use of

outdoor billboards any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.

SURGEON GENERAL'S WARNING: Pregnant Women Who Smoke Risk Fetal Injury And Premature Birth.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

* * *

(c) Rotation of label statement; plan; submission to Federal Trade Commission

(1) Except as provided in paragraph (2), the label statements specified in paragraphs (1), (2), and (3) of subsection (a) of this section shall be rotated by each manufacturer or importer of cigarettes quarterly in alternating sequence on packages of each brand of cigarettes manufactured by the manufacturer or importer and in the advertisements for each such brand of cigarettes in accordance with a plan submitted by the manufacturer or importer and approved by the Federal Trade Commission.

* * *

§ 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

* * *

§ 1336. Authority of Federal Trade Commission; unfair or deceptive acts or practices

Nothing in this chapter (other than the requirements of section 1333 of this title) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

The Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, provides in relevant part:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except for [certain entities] . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

* * *

(b) Nature of relief available

The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers and other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, recission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule vio-

lation or the unfair and deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

* * *

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

The Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5, § 205-A *et seq.*, provides in relevant part:

§ 207. Unlawful acts and conduct

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.

1. Intent. It is the intent of the Legislature that in construing this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 45(a)(1) of the Federal Trade Commission Act (15 United States Code 45(a)(1)), as from time to time amended.

2. Rules and regulations. The Attorney General may make rules and regulations interpreting this section. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C.

45(a)(1) (The Federal Trade Commission Act) as from time to time amended. Evidence of a violation of a rule or regulation made by the Attorney General shall constitute prima facie evidence of an act or practice declared to be unlawful by this chapter in any action thereafter brought under this chapter.

* * *

§ 213. Private remedies

1. Court action. Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207, subsection 2 may bring an action either in the Superior Court or District Court for actual damages, restitution and for such other equitable relief, including an injunction, as the court determines to be necessary and proper. There is a right to trial by jury in any action brought in Superior Court under this section.

* * *

RESPONDENT'S BRIEF

FILED
JUN 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

12

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC. AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, LORI A. SPELLMAN,
AND ALLAIN L. THIBODEAU,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

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QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act expressly preempts state-law claims that a cigarette company violated Maine's generally applicable prohibition on deceptive practices by falsely representing its cigarettes using the descriptors "light" and/or "lowered tar and nicotine."

2. Whether respondents' state-law claims based on the fraudulent use of such descriptors are impliedly preempted notwithstanding that the Federal Trade Commission has never authorized, encouraged, or required the use of such descriptors.

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Cigarette Labeling and Advertising — 1969 (Part 1): Hearings Before the H. Comm. on Interstate and Foreign Commerce, 91st Cong. (1969) 31

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ADMINISTRATIVE MATERIALS

Comments of Philip Morris Inc., *et al.*, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998), *available at* http://www.ftc.gov/foia/frequentrequests/TobaccoCoComments.pdf 6, 46

FTC, *Operating Manual*, *available at* http://www.ftc.gov/foia/ch08industryguidance.pdf 54

Notice of Proposed Rulemaking, *Advertising of Cigarettes*, 35 Fed. Reg. 12,671 (1970) 5-6

OTHER MATERIALS

Brief for the United States as Amicus Curiae, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Dec. 15, 2006) 47, 55, 56

Brief for the United States as Amicus Curiae Supporting Petitioners, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Feb. 26, 2007) 47, 53

Thomas M. Dyer & James B. Ellis, *The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 Geo. Wash. L. Rev. 330 (1972) 35, 36

Lawrence R. Fullerton & Jane E. Larson, *Using FTC Act Precedents in State Consumer Protection Cases*, 3-FALL Antitrust 24 (1988) 39

Stephanie W. Kanwit, *Federal Trade Commission* (2006) 34, 35, 36, 37

Earl W. Kintner & Christopher Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 Mercer L. Rev. 651 (1975) 36

William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724 (1972) 33, 39

Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439 (1964) 36-37

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (4th ed. 1997) 34, 39

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Proof Brief for the United States of America, *United States v. Philip Morris USA Inc.*, Nos. 06-5267 *et al.* (D.C. Cir. filed Nov. 19, 2007) 7

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Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225 (1976) 40, 54

For decades, Philip Morris has knowingly and falsely represented that certain brands of its cigarettes are "light" or have "lowered tar and nicotine," even while designing its cigarettes to ensure that smokers would not receive reduced levels of tar or nicotine. Respondents' claims challenging that conduct arise under Maine's generally applicable unfair-and-deceptive-trade-practices statute and are based on factual allegations substantially similar to those brought by the United States against Philip Morris and other cigarette companies. Unlike the government's case, respondents' claims seek remedies under state law for economic harms caused by Philip Morris's fraud.

Respondents' claims are not preempted by federal law. This Court has already held that the Federal Cigarette Labeling and Advertising Act ("Labeling Act") does not preempt generally applicable state-law duties not to deceive (such as the Maine statute at issue), where the claims are unrelated to the warning labels on packages. The Labeling Act preempts only targeted regulations that are aimed at and impose special burdens on cigarette companies. That holding follows from the text, history, and purposes of the Labeling Act, which show that Congress did not intend to create a cigarette-industry exemption from general state-law duties not to deceive.

Nor are respondents' claims impliedly preempted by Federal Trade Commission ("FTC") actions regarding tar and nicotine yields. The FTC has never authorized, encouraged, or required Philip Morris to use light descriptors — including as a shorthand for tar and nicotine yields — let alone to use descriptors fraudulently.

STATEMENT

1. The Labeling Act

In 1964, the Surgeon General of the United States issued a "bellwether publication" concluding that cigarette smoking was a public health hazard. JA718a; *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513 (1992); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001). Congress responded in 1965 by enacting the Federal Cigarette Labeling and Advertising Act ("1965 Act"). The statute's primary purpose was to ensure that "the public may be adequately informed that cigarette smoking may be hazardous to health." 1965 Act § 2(1), 79 Stat. 282. The 1965 Act, however, imposed only minimal requirements on cigarette companies: it provided that each package of cigarettes must bear a warning label that smoking "may" be a health hazard. *See id.* § 4, 79 Stat. 283. The Act did not regulate cigarette advertising.

Because the FTC and several States were poised to adopt regulations requiring other warning labels on cigarette packages, *Cipollone*, 505 U.S. at 513, the 1965 Act included a preemption provision stating that "[n]o statement relating to smoking and health, other than the statement required by ... this Act, shall be required on any cigarette package." 1965 Act § 5(a), 79 Stat. 283. A second part of that provision stated that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with provisions of this Act." *Id.* § 5(b), 79 Stat. 283. Those provisions addressed cigarette companies' concerns that States or the FTC would impose conflicting labeling requirements or would dictate special regulatory burdens targeted specifically

at cigarette companies' advertising. *See* H.R. Rep. No. 89-449, at 4, 9 (1965) ("1965 House Report"); S. Rep. No. 89-195, at 4 (1965). The 1965 Act was to sunset in 1969.

In April 1970, again in the face of proposed cigarette warning requirements by the FTC and some States, Congress enacted the Public Health Cigarette Smoking Act of 1969 ("1969 Act"). The 1969 Act reincorporated wholesale the statement of purpose of the 1965 Act, while slightly modifying other provisions. Congress strengthened the labeling requirement, changing the statement that cigarette smoking "may be hazardous" to "is dangerous." *See* 1969 Act § 2, 84 Stat. 88 (amending 1965 Act § 4). Congress also prohibited broadcast advertising of cigarettes after 1971. *See id.*, 84 Stat. 89 (adding new 1965 Act § 6). But rather than prohibiting the FTC from adopting regulations targeted at cigarette advertising, as it had done in the 1965 Act, Congress prohibited the FTC from "tak[ing] any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising." *Id.* (adding new 1965 Act § 7(a)). After 1971, Congress required the FTC to submit any cigarette rules to Congress six months before they could take effect. *Id.*

Congress made clear that this restriction on the FTC's ability to adopt targeted cigarette regulations did not "limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes." *Id.* (adding new 1965 Act § 7(b)). Moreover, although there was substantial doubt at the time whether the FTC had statutory authority to regulate cigarette companies at all through rulemaking as

opposed to adjudication. Congress took no position on the issue, expressly refusing to "affirm or deny the [FTC's] holding that it has the authority to issue trade regulation rules." *Id.* (adding new 1965 Act § 7(c)).

Congress modified the preemption provision to specify that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with [the 1965] Act." 1969 Act § 2, 84 Stat. 88 (amending 1965 Act § 5(b)). "The new subsection (b) did not pre-empt regulation by federal agencies, freeing the FTC to impose warning requirements in cigarette advertising." *Reilly*, 533 U.S. at 544 (citing *Cipollone*, 505 U.S. at 515). Like the 1965 Act, the 1969 Act contained no provisions regulating false or deceptive advertising by cigarette companies.

2. The FTC And Tar And Nicotine Yields

The Federal Trade Commission Act ("FTC Act") prohibits "unfair or deceptive acts or practices in or affecting commerce," directs the FTC to prevent persons from engaging in such acts or practices, and authorizes the FTC to prescribe rules to "define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. §§ 45(a)(1)-(2), 57a(a)(1)(B). Although the FTC's rulemaking authority extends to the marketing and sale of cigarettes, no FTC regulations govern the cigarette industry.

In the 1950s, the FTC began investigating inaccuracies in cigarette advertising about tar and nicotine. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). That inquiry was triggered by the industry's new advertising emphasis: "In response to the emerging scientific evidence that

cigarette smoking posed a significant health risk to the user, ... major cigarette manufacturers began widespread promotion of filtered cigarettes to reassure smokers" about the health effects of smoking. National Inst. of Health, *The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes*, at iii (Aug. 1996). This new campaign reflected Philip Morris's decision to promote the image of a healthier cigarette (regardless of its basis in fact), to stem the inevitable economic losses that would follow as smokers quit smoking because of health concerns. *See* JA843a, 857a.

By the mid-1960s, "the FTC became concerned about the absence of a standard method for testing cigarette delivery of tar and nicotine." *Brown & Williamson*, 778 F.2d at 37. In 1966, the FTC sent letters to cigarette manufacturers explaining that factual statements regarding tar and nicotine content, if based on the "Cambridge Filter Method," would not be deemed deceptive so long as there were no express or implied representations that the levels of tar and nicotine reduced or eliminated health hazards. *See* JA478a. The Cambridge Method is a means of measuring the tar and nicotine that "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length." *Brown & Williamson*, 778 F.2d at 37.

In 1970, the FTC sought comment on a formal Trade Regulation Rule that would have made it "an unfair or deceptive act or practice ... to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of cigarettes]" as determined using the Cambridge Method. Notice of Proposed Rulemaking, *Advertising of Cigarettes*, 35 Fed.

Reg. 12,671. 12,671 (1970). The proposed rule did not address, or purport to concern, the use of descriptors such as "light" or "lowered tar." Later that year, five leading cigarette companies, including Philip Morris, voluntarily undertook to disclose in their advertising tar and nicotine data culled from FTC test results. *See* JA571a-572a. The FTC was not a party to that industry agreement. It subsequently suspended its rulemaking proceeding. *See Brown & Williamson*, 778 F.2d at 37.

In 1997, the FTC sought public comment on changes to the Cambridge Method. It also requested comment on whether to regulate light descriptors, explaining that it was "beginning the process" of examining such descriptors and that there are no "official definitions" for descriptors such as "low tar" and "light." JA291a-292a. Cigarette companies, including Philip Morris, filed joint comments with the FTC stating that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998) ("Philip Morris 1998 FTC Comments"), *available at* http://www.ftc.gov/foia/frequentrequests/TobaccoCoComments.pdf. The FTC took no action to promulgate a rule governing descriptors. In 2002, Philip Morris changed course and urged the FTC to "adopt a rule expressly authorizing the industry to continue to use [light] descriptors." JA1083a-1084a.

3. RICO Action Against Philip Morris

In 1999, the United States brought an action under the Racketeer Influenced and Corrupt Organization Act ("RICO") against Philip Morris and eight other

cigarette companies. The United States alleged that the cigarette companies "engaged in a decades long conspiracy to deceive the American public" about the health effects of cigarettes and that "they did so to retain and extend the mass market for their product." U.S. Br. at 2, *United States v. Philip Morris USA Inc.*, Nos. 06-5267 *et al.* (D.C. Cir. filed Nov. 19, 2007).

A central aspect of the United States' case against the cigarette companies (including Philip Morris) is that their use of light descriptors on cigarette packages and in advertising is fraudulent. The United States marshaled evidence that Philip Morris developed light cigarettes "to introduce a 'socially acceptable cigarette' that would 'be a welcomed alternative to quitting.'" *Id.* at 53. The United States charged that Philip Morris marketed its "low tar/light brands" to provide "'health reassurance[s]'" to consumers. *Id.* at 54. Those reassurances, the United States has proven at trial, are false: the "marketing of so-called 'light' cigarettes is a principal weapon in [cigarette companies'] attempts to mislead the public regarding the health risks of smoking." *Id.* at 146. In that litigation, moreover, Philip Morris argued that the RICO action was preempted as it sought to impose liability based on the FTC's supposed endorsement of descriptors. The government successfully rebutted that position by relying on, among other things, testimony of the FTC that it "does not have a view on the use of descriptors ... on cigarette packages or in cigarette advertising." JA462a.

After a nine-month bench trial, the district court entered a final judgment on August 17, 2006, making more than 4,000 factual findings and citing "overwhelming evidence" that the cigarette companies

engaged in a conspiracy to deceive the public. *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 27 (2006), *clarified on other grounds*, 477 F. Supp. 2d 191 (D.D.C. 2007), *appeals pending*, Nos. 06-5267 *et al.* (D.C. Cir.). The court found that Philip Morris and others "have marketed and promoted their low tar brands as being less harmful than conventional cigarettes," but "[t]hat claim is false." *Id.* at 430. In support, the court pointed to internal industry documents from the 1960s and 1970s demonstrating that cigarette companies knew that "low tar cigarettes do not actually deliver the low levels of tar and nicotine which are advertised," and thus that the cigarettes would not "provide any clear health benefit to human smokers." *Id.* at 431; *see id.* at 456-58, 461-67, 477-81, 488-92, 513-29 (reciting evidence specific to Philip Morris). (Such evidence is abundant in this record as well. *See* JA703a-704a, 843a-844a, 851a.)

4. Proceedings Below

a. Respondents, on behalf of themselves and a class of all similarly situated Maine consumers, brought suit in federal district court against Philip Morris USA Inc. and its parent company under Maine's Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 205-A *et seq.* ("MUTPA"), which prohibits "deceptive acts or practices in the conduct of any trade or commerce," Br. App. 6a.

Respondents' allegations are substantially similar to those that the United States has made against Philip Morris. The complaint alleges that, prior to 1971, Philip Morris recognized that smokers had become concerned about the health consequences of smoking, a development that posed a threat to Philip Morris's profits. *See* JA28a. In that context, beginning in 1971, Philip Morris designed and manufac-

tured a brand of cigarettes known as Marlboro Lights. Each package of Marlboro Lights sold by Philip Morris since 1971 bore the descriptors "Lights" and "Lowered Tar and Nicotine." *Id.* Respondents alleged that Philip Morris used these light descriptors "with the intention of communicating to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes." *Id.* (Respondents made similar allegations with respect to Cambridge Lights. *See* JA28a-29a.)

Respondents allege that Philip Morris knew that this message was "[f]alse[]." JA38a. Philip Morris knew that light cigarettes would not "deliver[] lowered tar and nicotine in comparison to regular cigarettes." JA32a. Philip Morris understood, based on "extensive research" conducted prior to launching its line of light cigarettes, JA31a, that smokers would compensate for reduced tar and nicotine levels through various "unconscious acts," with the result that they would receive "100% of the tar and nicotine that would be received by the smoker from the regular cigarette." JA30a. Indeed, Philip Morris "[i]ntentionally manipulat[ed] the design and content" of its light cigarettes "to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine." JA32a. Through this conduct Philip Morris "[f]alsely ... represent[ed]" that its product was light, lower in tar and nicotine, and safer than full-flavored cigarettes. *Id.* Those representations violate Maine's proscription on deceptive acts. *See* JA37a-39a.

Philip Morris moved for summary judgment, arguing, as relevant here, that respondents' claims were expressly preempted by the Labeling Act and impliedly preempted by the FTC's supposed approval of

Philip Morris's use of light descriptors. The district court granted the motion for summary judgment on the ground that respondents' claims were expressly preempted. *See* Pet. App. 103a-106a.

b. The First Circuit reversed. The court applied this Court's decision in *Cipollone*, noting that "[m]ost lower courts have ... treated the plurality opinion as controlling, as have the parties here, both on appeal and in the district court." Pet. App. 15a (citation omitted). The court stated that "[t]he parties agree that whether the [Labeling Act] expressly preempts [respondents'] claims depends on how best to categorize them by analogy to the ... causes of action considered in *Cipollone*." *Id.*

The court found that the "substance" of respondents' claims is that Philip Morris "falsely represented certain of its brands as 'light' or having 'lower tar and nicotine.'" *Id.* at 16a. Applying *Cipollone*, the court held that a fraud claim is not preempted "merely because it arises out of the adverse health consequences" of smoking; rather, the proper question is whether "'the legal duty that is the predicate'" of the claims is "'based on smoking and health.'" *Id.* at 18a (quoting 505 U.S. at 524). Because respondents' claims rest on a general duty under Maine law not to deceive consumers, they are not preempted under *Cipollone*. *See id.* at 20a-22a.

The First Circuit rejected the district court's holding that fraudulent-misrepresentation claims based on the use of "light" descriptors were preempted because "'Congress and the FTC never acted to restrict the tobacco companies from using these general descriptors.'" *Id.* at 24a. The court of appeals reasoned that, while the FTC's or Congress's failure to disapprove light descriptors may bear on implied

preemption, it has nothing to do with express preemption. *See id.* The First Circuit also rejected Philip Morris's argument that respondents have alleged only "'implied misrepresentations,'" which, in Philip Morris's view, constitute "preempted failure-to-warn or warning neutralization claims," rather than "'express' misrepresentations" that Philip Morris acknowledged would not be preempted. *Id.* at 23a-24a (emphasis omitted). The court saw no basis in *Cipollone* for "treat[ing] claims based on 'implied' as opposed to 'express' misrepresentations differently for purposes of [Labeling Act] preemption." *Id.* at 25a.

Turning to Philip Morris's implied preemption defense, the court found that, after the FTC suspended its rulemaking in 1971 following the cigarette companies' voluntary agreement, "the FTC has never issued a formal rule specifically defining which cigarette advertising practices violate the [FTC] Act and which do not." *Id.* at 46a. The absence of any formal action weighed against a finding of implied preemption. The court noted that the Solicitor General had recently "explain[ed] that the FTC 'has never promulgated definitions of terms such as "light" and "low tar"' and that its previous statements purporting to define them 'did not reflect an official regulatory position.'" *Id.* at 54a. On that record, the court could not discern "a coherent federal policy on low-tar claims" or any other FTC action that warranted preemption. *See id.* at 54a-55a.

SUMMARY OF ARGUMENT

I. The Labeling Act does not expressly preempt respondents' state-law fraud claims.

A. This Court held in *Cipollone* that § 1334(b) does not preempt state-law fraud claims unrelated to warning labels. The Court reaffirmed that holding in *Reilly*, explaining that, while § 1334(b) preempts "regulations targeting cigarette advertising," 533 U.S. at 549-50, it leaves "significant power" to States to adopt "[r]estrictions ... that apply to cigarettes on equal terms with other products," *id.* at 551-52.

Respondents' state-law fraud claims are predicated on a Maine statute that imposes a generally applicable duty not to deceive. Respondents allege that Philip Morris violated that duty by falsely depicting its product as "light" and having "lowered tar and nicotine." Because the duty not to deceive applies on equal terms to all products, respondents' claims are not preempted.

Philip Morris's alternative reading of *Cipollone* — under which only claims of express misrepresentation survive — is unconvincing. Fraud and misrepresentation claims do not distinguish between express and implied false messages, and not one word in *Cipollone* supports the view that only claims based on express misrepresentations escape preemption. In any event, respondents' complaint alleges express, affirmative misrepresentations by Philip Morris. Philip Morris used light descriptors to convey a direct message to consumers regarding both the relative heath risks and the tar and nicotine content of its light cigarettes. Philip Morris knew those messages were false.

B. There is no justification for this Court to reexamine *Cipollone*. The circuit split on which Philip

Morris sought certiorari turns on whether the FTC has expressly authorized Philip Morris's use of light descriptors. Because the FTC has never done so, this Court can resolve the circuit conflict on express preemption on that basis. Philip Morris has not carried the heavy burden of establishing that this Court should go further and reexamine *Cipollone*'s statutory holding.

C. *Cipollone* and *Reilly* correctly construed the Labeling Act.

1. Section 1334(b)'s text supports the conclusion that the Labeling Act does not preempt state-law fraud claims of general applicability. Although the term "requirement" encompasses state statutory and common-law duties, *see Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), the duty (and the elements of that duty) — and not its application by a jury to a set of facts — constitutes the "requirement," *see Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). Maine's generally applicable prohibition on consumer fraud is therefore not a "requirement ... based on smoking and health." Any perceived ambiguity in the Labeling Act would be resolved against Philip Morris's position, because the presumption against preemption would preclude an expansive reading of § 1334(b) given the States' profound interests in enforcing generally applicable laws relating to fraud.

The history and purposes of the Labeling Act confirm the text's plain meaning. Cigarette companies did not ask Congress for, and did not receive, a cigarette-industry exemption from generally applicable state-law duties. Congress, in fact, was careful *not* to impose the result that Philip Morris seeks by crafting a "narrowly phrased" preemption provision

to avoid broadly preempting "police regulations." S. Rep. No. 91-566, at 12 (1969) ("1969 Senate Report").

Furthermore, nothing in the Labeling Act evinces Congress's intent to give cigarette companies an immunity from state laws relating to false advertising. Neither the 1965 Act nor the 1969 Act regulates deceptive advertising by cigarette companies. Particularly given Congress's concern about the industry's false representations about cigarettes, it is untenable to suppose that Congress *sub silentio* created the broad immunity that Philip Morris asserts.

2. Philip Morris concedes that Congress did not intend to insulate cigarette companies from liability for fraud. Philip Morris instead erroneously maintains that Congress meant to preempt state laws of general applicability, leaving the task of policing false claims in advertising to the FTC exclusively.

First, Philip Morris's position cannot be reconciled with the uniquely interdependent relationship between the FTC's regulatory scheme and private state-law remedies. Starting in 1966, the FTC encouraged States to adopt deceptive-practices statutes (such as Maine's) to serve as adjuncts to FTC enforcement. That distinctive history of co-existence between state-law remedies and the FTC Act makes it implausible that Congress would have intended to invest exclusive authority in the FTC.

Second, in 1970, the FTC had only limited law-enforcement authority that was widely perceived to be inadequate to protect consumers from deceptive advertising and other harms. It is inconceivable that Congress intended to confer on so weak an agency the sole authority, to the exclusion of the States, to police the cigarette industry's advertising practices.

3. Philip Morris's broad reading of § 1334(b) is unpersuasive. The Labeling Act's subsidiary goal of uniformity does not trump its primary goal of ensuring that consumers receive "adequate information" regarding smoking. State-law fraud claims further that end. In addition, state deceptive-practices statutes are modeled on and follow the FTC Act, contributing to uniformity. If state-law claims were ever to undermine uniformity, the FTC would be well-positioned to preempt such claims through industry-wide regulation of light descriptors.

Nor does the structure of the Labeling Act support broad preemption. Each version of the Act focused on the warning label on cigarette packages, not false and deceptive advertising.

Finally, this Court's precedent does not establish that it is irrational to read the Labeling Act as leaving untouched general state-law duties not to deceive. Preemption decisions of this Court interpreting other statutes with different texts, histories, and purposes do not provide a reliable guide to interpreting the Labeling Act.

II. Respondents' state-law fraud claims are not impliedly preempted.

A. The FTC has never adopted a rule relating to light cigarettes, and has never authorized, encouraged, or required the use of light descriptors, a fact that the Solicitor General recently confirmed. The government's official position renders this case the opposite of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and makes clear that Philip Morris cannot prevail on its implied preemption defense.

Two FTC consent orders with other companies do not support Philip Morris's position. The text of the FTC Act, decisions of this Court, and the FTC's

longstanding practice make clear that FTC consent orders do not function as industry-wide standards. Besides, Philip Morris could not avail itself of the safe harbor supposedly created by those orders because it has never disclosed tar and nicotine yields on cigarette packages.

Nor does the FTC's 1967 letter to a broadcasting trade association establish that the agency made a regulatory choice to authorize and/or encourage the use of light descriptors. That letter did not even mention light descriptors, did not authorize representations regarding safety, required that any claims be fully substantiated, and does not represent an affirmative regulatory decision to promote descriptors. In all events, the letter bears no indicia of formal agency decision-making that would support a claim of federal preemption of state law.

B. Philip Morris's assertion that the FTC has required the use of the Cambridge Method and the disclosure of factual tar and nicotine yields is both factually incorrect and legally irrelevant. Respondents challenge neither the Cambridge Method nor factual statements of yields based on it. In any event, the FTC's longstanding position is that the FTC has never required use of the Cambridge Method or the disclosure of tar and nicotine yields.

ARGUMENT

I. THE LABELING ACT DOES NOT PREEMPT RESPONDENTS' FRAUD CLAIMS

A. Under This Court's Precedent, Respondents' Fraud Claims Are Not Preempted

1. *Cipollone* held that fraud claims based on generally applicable state laws are not preempted

In *Cipollone*, this Court held that § 1334(b) did not preempt state-law claims alleging fraudulent misrepresentation regarding the health effects of cigarettes when such claims are not based on the warning on cigarette labels. A plurality of four Justices concluded that § 1334(b) did not exempt cigarette companies from generally applicable state-law duties not to deceive consumers. "The central inquiry" in deciding whether a state law is "based on smoking and health," the plurality reasoned, is whether the "predicate" of "the legal duty" "constitutes a 'requirement or prohibition based on smoking and health.'" 505 U.S. at 523-24. Applying that principle to the "intentional fraud and misrepresentation" claims before it, the plurality found that such claims did not come within the scope of § 1334(b) because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive." *Id.* at 528-29.

The plurality's conclusion rested on four rationales. First, "in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* at 529. Second, having "explicitly reserved" the FTC's authority to police deceptive advertising, Congress indicated that it "intended the [preemption provision] to be construed narrowly, so as not to proscribe the

regulation of deceptive advertising." *Id.* Third, "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, non-uniform, and confusing' standards"; rather, they rest "on a single uniform standard: falsity." *Id.* Fourth, interpreting the 1969 Act to preempt fraud claims "would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." *Id.* at 529 n.27.

In a concurring opinion, Justice Blackmun, joined by Justices Kennedy and Souter, concluded more broadly that the 1969 Act does not "provide[] the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims." *Id.* at 531. They were "unwilling to believe that Congress, without any mention of state common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct." *Id.* at 542.

Because the plurality's conclusion — that the 1969 Act does not preempt state-law fraud claims unrelated to warning labels — is a "narrow[er] ground[]" than the rationale of the concurring Justices — that the 1969 Act does not preempt any state-law damages claims — "the holding of [this] Court" in *Cipollone* is that the Labeling Act did not extinguish such state-law fraud claims. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted); *see Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007) ("[w]hen there is no majority opinion, the narrower holding controls" and constitutes "clearly established law") (internal quotations omitted).

2. *Reilly* reaffirmed *Cipollone*'s distinction between state laws aimed at cigarette marketing and state laws of general applicability

Reilly involved a preemption challenge to "comprehensive [state] regulations governing the advertising and sale of cigarettes." 533 U.S. at 532. This Court held that those cigarette-specific regulations fell within the scope of § 1334(b) because "the regulations expressly target cigarette advertising." *Id.* at 547. In response to criticism that its holding would "displace state regulation of the location of cigarette advertising," the Court explained that "[t]here is a critical distinction ... between generally applicable ... regulations ... and regulations *targeting* cigarette advertising." *Id.* at 549-50 (emphasis added). Targeted regulation, the Court said, "squarely contradicts the [Labeling Act]." *Id.* at 550. "States remain free," however, "to enact generally applicable ... regulations." *Id.*

The Court grounded that distinction in the purpose of § 1334(b): to protect cigarette companies from discriminatory state legal duties inapplicable to other commercial actors. The Court explained that, although § 1334(b) prevents States from adopting "special requirements or prohibitions" applicable only to cigarette companies, the provision's language "leaves significant power in the hands of States to impose generally applicable ... regulations." *Id.* at 551. "Restrictions ... that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision." *Id.* at 551-52. Congress, the Court said, did not intend to afford "cigarette advertisers" "special treatment" by

creating a broad cigarette-company exemption from "general [state] regulations." *Id.* at 551.

3. Because respondents' claims are based on violations of a generally applicable state-law duty not to deceive, they are not preempted

Respondents allege that Philip Morris violated Maine's generally applicable statutory prohibition against deceptive acts by all trade and commercial actors. The MUTPA provides broadly that "deceptive acts or practices in the conduct of any trade or commerce are ... unlawful." Br. App. 6a. Respondents allege that Philip Morris violated that generally applicable duty by "intentionally market[ing]" light cigarettes as "less harmful or safer" and lower in tar and nicotine "than regular" cigarettes through the use of descriptors "Lights" and "Lowered Tar and Nicotine." JA28a-29a. Those representations were false: Philip Morris "knew that ... the consumer would receive the same delivery of tar and nicotine from the 'lights' as from regular cigarettes," JA30a, and that such cigarettes were not "less harmful or safer" than regular cigarettes, JA29a. Respondents' claims, moreover, have nothing to do with the warning label on cigarette packages.

Respondents' fraud claims fit comfortably within the category of state-law fraud claims that, under *Cipollone* and *Reilly*, are outside the Labeling Act's preemptive reach. Indeed, respondents' fraud claims are indistinguishable from the "intentional fraud and misrepresentation" claims — which sought damages arising from lung cancer — in *Cipollone*. The claims here, like those in *Cipollone*, "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive."

505 U.S. at 528-29. A conclusion that Philip Morris is exempt from the duty not to deceive — a duty that Maine law applies equally to all commercial actors — would countermand *Reilly*'s teaching that Congress did not "intend[]" to "afford[]" "cigarette advertisers" a "special" exemption from "generally applicable ... restrictions." 533 U.S. at 551-52.[1]

4. Philip Morris's alternative reading of *Cipollone* is unpersuasive

To evade a straightforward application of *Cipollone* and *Reilly*, Philip Morris proposes an alternative reading of *Cipollone*, under which "it is inherent 'falsity' that distinguishes state-law requirements based on the 'duty not to deceive' from state-law requirements 'based on smoking and health.'" Br. 38-39. According to Philip Morris, the plurality meant to preempt state-law fraud claims based on statements "that might create a false impression," while preserving state-law fraud claims based on "inherently false statements." Br. 39. That argument is unavailing: *Cipollone* drew no distinction between inherently and potentially deceptive statements, so there is no support for Philip Morris's distinction; and, even if Philip Morris's notion of "inherent" deception were the governing standard, respondents' claims would readily satisfy it.

a. *Cipollone* provides no support for the distinction that Philip Morris seeks to draw. The plurality stated that the "central inquiry" under § 1334(b) is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'require-

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[1] Unlike the targeted advertising regulations in *Reilly*, Maine's proscription on fraud is not "intertwined with the concern about cigarette smoking and health." 533 U.S. at 548.

ment or prohibition based on smoking and health.'" 505 U.S. at 523-24. "[F]raudulent-misrepresentation" claims not related to warning labels are not preempted because those claims rest on "the duty not to deceive." *Id.* at 528-29. A duty not to deceive encompasses both express and implied, and both false and deceptive, representations. *See* Restatement (Second) of Torts § 526(c) (1977). As the court below explained, "[u]nder general principles of tort law, either an express or an implied statement can give rise to a claim for fraudulent misrepresentation." Pet. App. 25a. Even "[a] representation that the maker knows to be capable of two interpretations, one of which he knows to be false and the other true is fraudulent if it is made ... with the intention that it be understood in the sense in which it is false." Restatement (Second) of Torts § 527(a). False advertising laws accordingly have long made actionable statements that are neither literally nor necessarily false. *See, e.g.*, JA230a-231a (collecting cases); 15 U.S.C. § 55(a). Not one word in the *Cipollone* plurality suggests an intent to depart from that settled understanding of fraudulent and deceptive advertising claims.

b. Even if there were some basis for Philip Morris's theory, the supposed distinction between potentially and inherently false statements would not cause respondents' state-law fraud claims to be preempted because they satisfy Philip Morris's "inherent falsity" standard. Respondents allege that Philip Morris, knowing that light cigarettes were neither safer nor healthier than full-flavored cigarettes, nevertheless packaged its cigarettes using descriptors designed intentionally to express the "[f]alse[]" message (JA32a) that these cigarettes were, in fact, "less

harmful or safer" (JA28a, 29a). *See also* JA718a-719a. In addition, Philip Morris's representation that light cigarettes would deliver "lowered tar and nicotine in comparison to regular cigarettes" was false. JA32a. As the Monograph 13 Report prepared by the National Cancer Institute found, "[i]nternal tobacco company documents demonstrate that the cigarette manufacturers recognized the inherent deception of advertising that offered cigarettes as 'Light' or 'Ultra-Light.'" JA897a-898a. Light descriptors, in other words, expressly conveyed an inherently false message.

Philip Morris seeks to evade the inherent falsity of its messages by mischaracterizing respondents' claims as conceding "that descriptors are an accurate shorthand for conveying ... tar and nicotine testing results" using the Cambridge Method. Br. 40. Respondents do not allege that light descriptors were an FTC-approved "shorthand" for Cambridge Method results or that the descriptors conveyed to consumers *any* message regarding the Cambridge Method. Philip Morris used light descriptors to convey a message "that [light cigarettes] were less harmful or safer than regular ... cigarettes," JA28a, 29a, and that such cigarettes would "deliver[] lowered tar and nicotine in comparison to regular cigarettes," JA32a. Respondents allege that those messages were false, not potentially misleading.

To the extent Philip Morris's argument is that consumers understood light descriptors to denote Cambridge Method test results rather than messages about safety or health or tar and nicotine levels when smoked, that argument is premature. What consumers understood "light" (and other descriptors) to mean is a question of fact on which Philip Morris

has neither submitted evidence nor moved for summary judgment. *See* Pet. App. 34a (Philip Morris "did not seek summary judgment on" the ground that the descriptors "accura[tely]" convey Cambridge Method test results). It therefore cannot obtain preemption based on a factbound argument that the descriptors were actually understood by consumers as a "shorthand" for Cambridge Method results. *See, e.g.*, JA820a (what descriptors "mean to members of the public is an empirical question that can be revealed by careful survey research"), 828a ("Many consumers use [descriptors] as a guide to the riskiness of particular brands of cigarettes.").[2]

Philip Morris also argues that respondents' fraud claims are preempted under *Cipollone* because they constitute "warning-neutralization" claims. Br. 40-41. But the *Cipollone* plurality explained that a preempted warning-neutralization claim "is predicated on a state-law prohibition against statements" that "neutralize[] the effect of federally mandated warning labels." 505 U.S. at 527. Respondents' claims have nothing to do with the warning on cigarette packs. To treat all health-related fraud claims as warning-neutralization claims cannot be squared with *Cipollone*'s treatment of similar allegations and its conclusion that an "intentional fraud and misrepresentation" claim unrelated to warning labels is not preempted because "[t]he predicate of this claim is a state-law duty not to make false statements." *Id.* at

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[2] Indeed, given that the FTC has never defined descriptors (as evidenced by, among other things, official FTC testimony) and that Philip Morris has never disclosed yields or mentioned the Cambridge Method on cigarette packages, *see infra* p. 52, Philip Morris's position that descriptors are a shorthand for test results is difficult to take seriously.

528. As the court below correctly held, "[a]ccepting Philip Morris's argument ... would extend the preemptive reach of the [Labeling Act] to virtually all fraudulent misrepresentation claims," ignoring "*Cipollone*'s explicit holding that those claims survive preemption." Pet. App. 28a.[3]

B. There Is No Reason For This Court To Reexamine *Cipollone*

Philip Morris concludes its preemption discussion with a request to "reexamine" — and presumably overrule — *Cipollone*. Br. 43. That request should be rejected.

First, this Court can resolve the circuit split on which Philip Morris sought certiorari by deciding that the FTC has not approved the use of light descriptors. In its petition, Philip Morris relied entirely on the divide between the Fifth and First Circuits with respect to express preemption. *See* Pet. 10. The Fifth Circuit has held that, "[w]hile claims based on 'fraud by intentional misstatement' are not preempted" under *Cipollone*, "the use of FTC-approved descriptors cannot constitute fraud." *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 391-92 (5th Cir. 2007). The court reasoned that "[t]o hold that [cigarette companies'] use of the FTC-approved terms relating to the FTC-approved measurement system constitutes affirmative misstate-

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[3] Philip Morris's attempt (at 42-43 n.10) to manufacture a preemption defense by recharacterizing respondents' fraud claims as failure-to-warn claims likewise has no merit. Respondents have alleged that Philip Morris made affirmatively false claims, not that it breached a duty to provide consumers with more information. *See* JA38a; *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (Minn. 1989) (fraud is "based on a duty to tell the truth, not on a duty to warn").

ment" would undermine federal objectives. *Id.* at 392. The First Circuit, by contrast, correctly held that such analysis confuses express and implied preemption issues, and that the FTC has never sanctioned the use of light descriptors. *See* Pet. App. 24a.

The circuit split on which Philip Morris sought certiorari thus turns entirely on diverging understandings of the FTC's actions with respect to light cigarettes. Even Philip Morris's Question Presented rests on the premise that respondents are challenging "FTC-authorized statements." Br. i. Once this Court finds that the FTC has neither authorized nor encouraged the use of light descriptors by Philip Morris, the circuit split on express preemption is resolved. *See infra* pp. 45-54. There is no cause to go further and to reexamine *Cipollone*.

Second, and in any event, Philip Morris has not carried the heavy burden of establishing that *Cipollone*'s interpretation of § 1334(b) warrants reexamination. This Court "has said often and with great emphasis that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (internal quotations omitted). "*[S]tare decisis* in respect to statutory interpretation has 'special force,'" because "'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008) (quoting *Patterson*, 491 U.S. at 172-73). Statutory precedent may be overruled only in extraordinary circumstances, where there has been an "intervening development of the law," where precedent serves as a "positive detriment to coherence," or where precedent, "tested by experience, has been found to be inconsistent with the sense of justice." *Patterson*, 491 U.S. at 173-74

(internal quotations omitted); *see Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality) ("the rule of law demands that adhering to our prior case law be the norm" such that "[d]eparture from precedent is exceptional, and requires 'special justification'").

Even if there were reason to question the correctness of *Cipollone*'s statutory interpretation — there is none, *see infra* pp. 28-44 — this Court's criteria would all weigh against reexamining the decision. In the 16 years since *Cipollone*, Congress has done nothing to call into question *Cipollone*'s central holding that cigarette companies have no exemption from state-law prohibitions against fraud. Nor have any decisions of this Court undermined the rationale of *Cipollone*. On the contrary, *Reilly* reaffirmed *Cipollone*'s core analytical framework. Revisiting *Cipollone* is especially inappropriate given that the arguments advanced by Philip Morris were apparent to the Court when it decided *Cipollone*. *See CBOCS West, Inc. v. Humphries*, No. 06-1431, at 10 (U.S. May 27, 2008) ("[I]t is too late in the day in effect to overturn the holding in that case ... on the basis of a linguistic argument that was apparent, and which the Court did not embrace at the time.").

Furthermore, although courts may occasionally differ on how *Cipollone*'s framework should be applied to particular allegations against cigarette companies, there is nothing approaching judicial inconsistency or confusion that warrants a reexamination of *Cipollone*. *See* Pet. App. 22a-23a (collecting cases for the view that "courts have routinely (though not uniformly) concluded that the [Labeling Act] does not preempt fraudulent misrepresentation claims arising out of false statements made in advertising").

Finally, Philip Morris cannot plausibly suggest that *Cipollone* "has been found to be inconsistent

with the sense of justice." *Patterson*, 491 U.S. at 174 (internal quotations omitted). Since *Cipollone*, the United States has brought RICO claims against Philip Morris for engaging in a decades-long conspiracy. *See supra* pp. 6-8. That litigation has brought to light substantial evidence of Philip Morris's participation in a conspiracy to defraud the American public, including through light descriptors. Overruling statutory precedent to immunize such conduct from state-law liability would not promote any common-sense notion of "justice."

C. *Cipollone* And *Reilly* Correctly Interpreted The Labeling Act

Although Philip Morris has failed to justify its invitation to reexamine *Cipollone*, a reexamination would fortify, not subvert, the Court's holding.

1. Congress did not preempt state-law fraud claims

a. The text of § 1334(b) confirms this Court's conclusion in *Cipollone* and *Reilly* that the Labeling Act does not preempt respondents' state-law fraud claims. The most natural reading of § 1334(b) is that a general state-law duty not to deceive is beyond the provision's preemptive scope.

Section 1334(b) states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." Although the term "requirement" encompasses state statutory and common-law duties, *see Riegel*, 128 S. Ct. at 1008 ("[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties"), it is the *duty* — not a jury's

application of the duty — that is the relevant "requirement," *see Bates*, 544 U.S. at 445 ("A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.").

The grammatical structure of § 1334(b) compels that conclusion: the phrase "based on smoking and health" modifies "requirement or prohibition," not "imposed." *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972) ("Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote."); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (meaning of a statute is "mandated" by its "grammatical structure"). Maine's general prohibition on consumer fraud is not, by its terms, a "requirement ... based on smoking and health." Nor does it become such a requirement merely because a jury finds that a cigarette company has violated that general prohibition by making fraudulent representations that relate to "smoking and health."

Even if there were ambiguity in the text or grammatical structure of § 1334(b) — and there is none — this Court's interpretation of the preemption clause must be "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Because this Court decides preemption questions beginning with a "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985), preemption may be found only when "that was the clear and manifest purpose of Congress."

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (internal quotations omitted). Ambiguities, in other words, are resolved against rather than in favor of preemption.

That presumption applies with full force here. Protecting the public against fraudulent business practices has long been a core focus of state consumer-protection law. *See California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) ("Given the long history of state ... statutory remedies against ... unfair business practices, it is plain that this is an area traditionally regulated by the States.") (footnote omitted); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (regulations "designed to prevent the deception of consumers" lies "well within the scope of California's police powers"). This Court has also recognized that States have "a substantial interest in protecting [their] citizens from misrepresentations that have caused them grievous harm." *Belknap, Inc. v. Hale*, 463 U.S. 491, 511 (1983).

Maine's prohibition against deceptive business practices is a prototypical exercise of generally applicable commercial law. This Court's "basic presumption against pre-emption," *Bates*, 544 U.S. at 449, accordingly precludes an expansive reading of § 1334(b). Had Congress intended to give cigarette companies preemptive dispensation from Maine's generally applicable rule prohibiting fraudulent business practices, "it surely would have expressed that intent more clearly." *Id.*

b. The history and purposes of the Labeling Act strengthen the conclusion that § 1334(b) does not preempt generally applicable state laws grounded in States' traditional police powers.

The Labeling Act's legislative history establishes that cigarette companies did not ask for, and did not receive, a cigarette-industry exemption from generally applicable state-law duties to refrain from false advertising. Congress adopted the Labeling Act in the wake of the substantial health concerns generated by the 1964 Surgeon General's Report and a fear by some that agencies and States would overreact, imposing draconian laws singling out cigarette companies. Members of the North Carolina delegation, for example, called for a preemption clause based on the need to prevent States from enacting laws that "single out cigarettes for special prohibitive treatment" and that give rise to "selective discrimination." *Cigarette Labeling and Advertising — 1969 (Part 1): Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 27 (1969) (statement of Rep. L.H. Fountain on behalf of North Carolina delegation). In 1969, the cigarette industry itself asked for "an appropriate preemption provision" so that "[c]igarette advertising [would] not be singled out for punitive regulation." *Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm. of the S. Comm. on Commerce*, 91st Cong. 80 (1969) (statement of Joseph F. Cullman, Philip Morris Chairman, on behalf of eight major cigarette companies). Philip Morris's chairman stressed that "[c]igarette advertising should not be the target of discriminatory regulation." *Id.*

The legislative history contains no evidence that cigarette companies sought, or that Congress considered creating, a cigarette-company exemption from generally applicable state laws. "[T]hat Congress did not, even *consider* the issue readily disposes of any argument that Congress unmistakably intended" to

create such an exemption. *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996) (plurality) (it would have been "spectacularly odd" for Congress to create broad immunity from "traditional common-law remedies" without "even ... hint[ing]" at that outcome). The evidence in fact suggests that Congress was careful to *avoid* the very result that Philip Morris seeks. The 1969 Senate Report (at 12) explains that the Labeling Act's preemption provision was "narrowly phrased" to ensure that it "would in no way affect the power of any State ... with respect to ... police regulations."

Furthermore, even if § 1334(b) could be construed to reach some duties of general applicability (such as a duty to warn or not to neutralize warning labels), nothing in the Labeling Act's text, history, or purposes evidences a congressional intent to give cigarette companies an immunity from state-law duties relating to fraudulent advertising. Although Congress prescribed the appropriate warning to be provided on cigarette packages, it did nothing in either the 1965 Act or the 1969 Act to address or to regulate print and non-broadcast advertising or promotion by cigarette companies.[4] Absent meaningful federal regulation of advertising or promotion, it would have been odd for Congress to have extinguished all state-law fraud claims unrelated to warning labels, leaving cigarette companies alone effectively unregulated in

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[4] Although Congress banned electronic advertising after 1971, *see* 15 U.S.C. § 1335, Congress anticipated that cigarette companies would shift their advertising resources to print advertising. *See* 1969 Senate Report at 11. (Those concerns were well-founded. *See* JA585a-586a.). Congress did nothing in the 1969 Act to regulate deceptive claims in such advertising.

this area. *Cf. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503-04 (1988). Nothing in the Labeling Act suggests that Congress intended to endow cigarette companies — and only cigarette companies — with an effective "license to lie" to consumers. *Forster*, 437 N.W.2d at 662.

2. The Labeling Act cannot sensibly be read to invest in the FTC exclusive authority to police deceptive advertising

Philip Morris acknowledges that "Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health." Br. 28. It insists, however, that Congress intended to preempt generally applicable state-law remedies for deceptive business practices and to "allocate[] responsibility for policing health-related claims in cigarette advertising and promotion to the FTC," and to the FTC alone. *Id.* That hypothesis is fundamentally mistaken.

First, a conclusion that Congress intended to give the FTC exclusive authority to police deceptive advertising cannot be reconciled with the uniquely interdependent relationship between the FTC's regulatory scheme and private state-law remedies. State unfair- and deceptive-practices statutes (such as Maine's) serve a critical role as adjuncts to the FTC's enforcement mechanisms. Beginning in 1966 and owing to the FTC's "crucial and probably inherent limitations," the FTC has "strongly endorsed and emphasized the need for complementary state law enforcement work." William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729 n.10 (1972). With the FTC's encouragement, "[a]ll fifty states and the District of Columbia have enacted at least one statute ... aimed at preventing

consumer deception." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 41 (4th ed. 1997) ("NCLC-*UDAP*"). These state laws "incorporat[e] the FTC Act concepts of deception" and are "important" in redressing "marketplace misconduct and abuse of consumers." *Id.* "[T]he FTC urged states to adopt their own little-FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels." Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 16 (2005).

Philip Morris says (at 28-29) that it is "not unusual" for Congress to "provid[e] a single federal agency with the authority to oversee an industry's advertising practices." Whatever the usual practice may be, however, the relationship between the FTC and state law is distinctive. The FTC envisions an "overlapping" enforcement regime to remedy "problems in the marketplace" that "exceed the [FTC's] enforcement capabilities." *United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003). This unique "history of co-existence between the FTC Act and other statutes, both state and federal, directed at fraudulent ... advertising" shows why the Labeling Act cannot sensibly be read to vest exclusive authority in the FTC to police fraud in cigarette advertising. *Id.* at 79; *see also* Stephanie W. Kanwit, *Federal Trade Commission* § 26:3, at 26-12 to 26-13 (2006) (noting that FTC "works closely" with States "to coordinate enforcement").

Second, it is implausible that Congress, in 1970, intended to invest in the FTC exclusive authority to superintend all deceptive advertising by cigarette companies. Even today, the FTC, though "one of the

smallest ... administrative agencies ever created," Kanwit § 1:1, at 1-1, is charged with enforcing "an enormous number of laws," *id.* § 1:2, at 1-3; 16 C.F.R. § 0.4 (listing statutes); *see also* Kanwit § 22:1, at 22-3 ("the breadth" of FTC's mandate to police "advertising practices" is "almost unmanageable"). When Congress enacted the 1969 Act, the FTC faced far greater limitations than it does today.

Congress did not approve FTC rulemaking authority until six years after the 1969 Act. *See* Kanwit § 3.9, at 3-23. Prior to 1962, and "[f]or the first half-century of its operation, the FTC limited its method of enforcement ... to the adjudicatory process" and repeatedly disclaimed "power to issue substantive rules." Thomas M. Dyer & James B. Ellis, *The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 Geo. Wash. L. Rev. 330, 332 (1972). Although the agency reversed course in 1962 and asserted authority to promulgate rules, that "assertion" was "the subject of controversy both within and without the [FTC]," and there was "virtual unanimity" among legal commentators that such rulemaking authority "d[id] not exist." *Id.* at 333-34.

Doubts about the FTC's authority to adopt industry-wide rules were aired in debates over the 1969 Act,[5] and the Act's text makes clear that Congress did not intend to settle the debate. *See* 1969 Act § 2, 84 Stat. 89 (adding new 1965 Act § 7(c)) ("[n]othing in this Act shall be construed to affirm or deny the

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[5] *See, e.g., Cigarette Labeling and Advertising: Hearings Before the S. Comm. on Commerce*, 89th Cong. 252 (1965) (statement of Bowman Gray, R.J. Reynolds Tobacco Co. Chairman) (arguing that FTC "does not have the authority to issue this trade regulation rule" and companies would "oppose [the rule] in the courts").

[FTC's] holding that it has the authority to issue trade regulation rules"). Congress's failure to affirm the FTC's authority in the 1969 Act "increase[d] uncertainty surrounding the [FTC's] claimed authority." Dyer & Ellis, 41 Geo. Wash. L. Rev. at 344.

At a time when the FTC lacked settled authority to regulate on an industry-wide basis, it is exceedingly unlikely that Congress would have intended to displace long-established and generally applicable state-law remedies and to assign exclusively to the FTC the substantial task of overseeing deceptive advertising practices by the cigarette industry. Congress could not plausibly have anticipated that the FTC, in the exercise of such exclusive authority, would police false advertising solely through its complaint process. In 1970, FTC cease-and-desist orders were universally recognized as ineffective. "Prior to 1975, the [FTC] could only recover civil penalties from a ... corporation which violated a cease and desist order that had been previously issued against it" — meaning that parties had "two bites at the apple" and that cease-and-desist orders could not be used to police non-parties. Earl W. Kintner & Christopher Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 Mercer L. Rev. 651, 681 (1975) (internal quotations omitted).

Nor could the FTC seek preliminary injunctions. *See* Kanwit § 3:8, at 3-21. It was thus powerless to halt false advertising until after a final cease-and-desist order, and "by the time the [FTC's] complaint and hearing processes [would] grind through to completion, an advertiser [could] obtain full use and benefit from a false ad, and thereafter happily settle for a cease and desist order." Ira M. Millstein, *The*

Federal Trade Commission and False Advertising, 64 Colum. L. Rev. 439, 493 (1964). Even then, cease-and-desist orders were not self-enforcing but required resort to a federal district court for enforcement. *See* 15 U.S.C. § 57b. Moreover, the FTC lacked authority to represent itself in federal court and was forced to rely on the Department of Justice to bring its enforcement actions. *See* Kanwit § 3:8, at 3-21 to 3-22. The FTC also lacked statutory authority "to award damages to those victimized by false advertising." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 999 (D.C. Cir. 1973); *see* Kanwit § 3.9, at 3-25. It was precisely because of these crippling limitations that Congress overhauled the FTC's authority in 1975. *See American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985) (Congress understood FTC was "hampered as an effective force" because it had to "rely solely on the cease and desist order procedure for enforcement") (internal quotations omitted).[6]

Accordingly, in enacting the 1969 Act — a statute designed to combat the profound public health consequences of smoking — Congress evidenced no intent to invest exclusive authority in the FTC to police false advertising and to preempt state-law fraud remedies that serve important compensatory and deterrence goals.[7] And it is implausible to suppose

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[6] Congress recognized "the sole enforcement weapon available to the FTC to police ... consumer frauds" was the "cease and desist order," but such orders had been "decried" as "inadequa[te]" for "decade[s]." S. Rep. No. 93-151, at 9 (1973).

[7] *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It would have been perfectly rational for Congress not to preempt common-law claims, which — unlike most administrative and legislative regulations — necessarily perform an important

that Congress intended to hand over the task of policing deceptive advertising by cigarette companies (an industry that Congress understood posed a grave threat to the public health) to the FTC exclusively at a time when the FTC's authority and effectiveness were universally recognized as deficient.

3. Philip Morris's expansive reading of the preemption provision is untenable

a. In defense of its broad reading of the Labeling Act's preemptive scope, Philip Morris first points (at 29) to the Act's goal, set forth in § 1331(2), of preventing "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." But Congress's concern with uniformity was subordinate to its goal of ensuring that consumers receive "adequate information" regarding smoking and health. *See* 1965 House Report at 1 ("principal purpose" of Act is to ensure that consumers are adequately informed); *Lohr*, 518 U.S. at 490-91 (plurality) ("safety" was "primary issue motivating the [Medical Device Amendments'] enactment"; protecting the industry was a secondary concern). State-law fraud claims further that paramount aim by deterring false representations in cigarette advertising. *Cf. Bates*, 544 U.S. at 451 (holding that "[p]rivate remedies ... would seem to aid, rather than hinder," federal law).[8]

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remedial role in compensating accident victims."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

[8] Congress understood that pursuit of the Labeling Act's primary goal of promoting dissemination of accurate information might come at a cost to the statute's secondary goals. *See* 15 U.S.C. § 1331(2) ("national economy" should be "protected *to the maximum extent consistent with*" policies of the Act) (emphasis added); *see also Silkwood*, 464 U.S. at 256 ("It may be that the award of damages based on the state law of negligence ... is

Moreover, Philip Morris substantially overstates the potential for disuniformity arising from the state-law claims at issue. *Cipollone*'s statement that "state-law proscriptions on intentional fraud rely only on a single, uniform standard" of "falsity," 505 U.S. at 529, well captures the category of state deceptive-practices statutes at issue here. These statutes share unique similarities because most were "greatly influenced by the Unfair Trade Practices and Consumer Protection Act of 1967, model legislation developed by staff attorneys at the FTC and a Committee of the Council of State Governments." Lovett, 46 Tul. L. Rev. at 750; *see* Lawrence R. Fullerton & Jane E. Larson, *Using FTC Act Precedents in State Consumer Protection Cases*, 3-FALL Antitrust 24, 25 (1988) ("[c]ourts interpreting state UDAP statutes have relied extensively on precedents under the FTC Act for legal standards for ... 'deception'"). Because these statutes (including Maine's) incorporate federal standards, the FTC has the practical ability to shape and influence their application, thereby contributing to uniformity.[9]

Philip Morris points to no actual evidence of disuniformity or consumer confusion. Instead, it simply asserts that "[a]llowing respondents' suit to proceed would generate consumer confusion about tar and nicotine claims in cigarette advertisements and

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regulatory ..., but that regulatory consequence was something that Congress was quite willing to accept.").

[9] *See* NCLC-*UDAP* at 131 ("[m]ost state UDAP statues are modeled after the FTC Act ... and, because of this parentage, ... declare that it is the intent of the legislature that ... courts will be guided by the interpretations given by the [FTC]"; consequently, "courts show great deference to FTC decisions") (internal quotations omitted).

obliterate the national regulatory uniformity that the Labeling Act was designed to establish." Br. 29-30. But state-law fraud claims against cigarette companies have co-existed with the Labeling Act for nearly 40 years, with no evidence of the serious harms that Philip Morris imagines. *See Bates*, 544 U.S. at 451-52 (noting that Court has "been pointed to no evidence that such tort suits led to a 'crazy-quilt' of [statutory] standards or otherwise created any real hardship for manufacturers").

More fundamentally, in the unlikely event that state-law fraud claims were to generate consumer confusion or contribute to disuniformity without countervailing public benefit, the FTC would be equipped to preempt future claims by adopting binding, industry-wide rules regulating the use of light descriptors or cigarette advertising more broadly. The FTC has "legal authority within ordinary administrative constraints to promulgate agency rules and to determine the pre-emptive effect of those rules in light of the agency's special understanding of whether (or the extent to which) state requirements may interfere with federal objectives." *Bates*, 544 U.S. at 454 (Breyer, J., concurring) (internal quotations omitted); *Sprietsma*, 537 U.S. at 65.[10] In the absence of such preemptive rules, however, state-law fraud claims remain available to supplement FTC enforcement and to fulfill the remedial function of compensating victims of fraud. *See Sprietsma*, 537 U.S. at 70 ("[a]bsent a contrary decision by the Coast

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[10] *See* Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 240 (1976) (FTC may preempt "state ... activities" that are "counter-productive"); *Katharine Gibbs Sch. v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979).

Guard, the concern with uniformity does not justify the displacement of state common-law remedies").[11]

b. Philip Morris's arguments (at 25-29) regarding the Labeling Act's "structure" are equally flawed.

Philip Morris first points (at 25-26) to Congress's intent to establish a "comprehensive" federal program. But Congress's "'comprehensive program' was" in fact "directed at the relatively narrow specific issue of regulation" of warnings proposed by the FTC on packages. *Banzhaf v. FCC*, 405 F.2d 1082, 1089 (D.C. Cir. 1968). And the statutory reference to "comprehensive" "is meaningful only after [a court] discover[s] what subject matter is comprehended." *Id.* at 1090 n.26. As explained, Congress did not undertake in the 1965 Act or the 1969 Act comprehensively to regulate or police deceptive cigarette advertising. The singular focus of each version of the Act was on the warning label on cigarette packages. *See supra* pp. 2-4. The Labeling Act's reference to "comprehensive" accordingly does not establish Congress's intent to preempt generally applicable state-law fraud claims relating to statements in advertising and promotion unrelated to warnings.

Philip Morris also suggests (at 26-27) that the absence of a state-law savings clause is evidence of an intent to preempt. In light of the presumption against preemption, however, the absence of a provision expressly preempting state-law fraud claims is

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[11] The FTC did not conclude that state-law damages actions are preempted in a 1988 letter to a member of Congress, as Philip Morris suggests (at 30). A previous letter in that exchange is clear that the FTC was discussing only preemption of positive enactments, not statutory or common-law "liability" over which the FTC had no "jurisdiction." Ex. 203, at 6 (attached to Philip Morris's Summ. J. Mot. (D. Me. filed Oct. 3, 2005)).

far more probative of Congress's intent than is the absence of a state-law savings clause.[12] Indeed, the most plausible explanation for the lack of such a savings clause is that Congress did not believe that § 1334(b) could reasonably be understood to preempt generally applicable state-law duties.

c. Finally, Philip Morris argues that it would be irrational to permit "an exception to the Labeling Act's preemptive reach for the application of the general duty not to deceive." Br. 36. In support of that claim, Philip Morris relies most prominently on this Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). But *Morales*, which was decided before *Cipollone* and *Reilly*, does not bear on the proper interpretation of the Labeling Act. The statute at issue in that case — the Airline Deregulation Act of 1978 ("ADA") — expressly preempted the States from "enact[ing] or enforc[ing] any law ... relating to rates, routes, or services of any air carrier." *See id.* at 383. The decision in *Morales* turned on the breadth of the ADA's phrase "relating to." *See id.* at 384 (noting that the term "relating to" has a "broad scope," has an "expansive sweep," and is "conspicuous for its breadth") (internal quotations omitted). "[T]he sweep of the 'relating to' language" led the Court to conclude that the provision could not be read to preempt "only state laws specifically addressed to the airline industry." *Id.* at 386.

Section 1334(b) lacks the breadth of the ADA's preemption provision. It reaches only those state-law requirements that are "based on smoking and

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[12] Congress certainly knows how to craft provisions that expressly preempt state-law damages actions. *See, e.g.*, 12 U.S.C. § 2259; 17 U.S.C. § 301(a); 25 U.S.C. §§ 1723(a)(1), 1753(d); 29 U.S.C. § 1144(a), (e)(1).

health," not laws that when "enforce[d] ... relat[e] to" smoking and health. A generally applicable state-law prohibition against deceptive practices is not, in any normal sense of the phrase, "based on" smoking and health. *See Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201, 2212 (2007) ("'based on' indicates a but-for causal relationship and thus a necessary logical condition"). That a jury might apply the prohibition in a case "relating to" smoking or health does not mean that the general prohibition itself is "based on" smoking or health.

Congress's dissimilar choice of language in these two preemption provisions is understandable in light of the two statutes' differing purposes. In the ADA, Congress "determin[ed] that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality ... of air transportation services.'" *Morales*, 504 U.S. at 378 (first alteration added). It chose expansive preemptive language "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* In the Labeling Act, by contrast, the cigarette companies sought protection only from discriminatory state requirements targeted specifically at cigarette marketing. They did not seek, and Congress had no need to enact, a cigarette-industry exemption from generally applicable consumer-protection laws. *See Reilly*, 533 U.S. at 551-52.[13]

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[13] *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) — also an ADA case — followed *Morales*'s lead and is similarly inapposite. Furthermore, subsequent to *Morales*, Congress ratified this Court's reading of the ADA, *see Wolens*, 513 U.S. at 246 (O'Connor, J., concurring in judgment in part and dissenting in part), which renders ADA decisions an even less reliable guide to interpretation of the Labeling Act. This Court's decision in

This Court's decision in *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008), moreover, casts substantial doubt on Philip Morris's use of *Morales*. In *Rowe*, this Court held that a state law regulating delivery services was preempted by a federal statute that regulates the motor carrier industry and that "borrowed" the ADA's "relating to" preemption language. *Id.* at 993. In reaching that conclusion, the Court emphasized that it was *not* holding that the federal statute "generally pre-empts state public health regulation: for instance, state regulation that broadly prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public." *Id.* at 997. The law at issue regulating the delivery services, however, was "not general" and did not "affect truckers solely in their capacity as members of the general public"; rather, it was "aim[ed] directly at the carriage of goods." *Id.* at 997-98. *Rowe* thus supports the common-sense conclusion that even the most inclusive preemption language may leave room for state laws of general applicability that do not target (or "aim directly" at) a particular industry.

II. RESPONDENTS' FRAUD CLAIMS ARE NOT IMPLIEDLY PREEMPTED

The FTC has never made a regulatory decision to authorize or encourage the use of light descriptors and has never required cigarette companies to use the Cambridge Method or to disclose tar and nicotine yields. Philip Morris nonetheless maintains that respondents' state-law fraud claims are impliedly pre-

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Riegel also involved a broad "relat[ing] to" provision in a statute whose purposes and history differ significantly from those of the Labeling Act. 128 S. Ct. at 1003.

empted because, "if allowed to proceed, they would present an obstacle to the FTC's longstanding policy of encouraging consumers to rely on the standardized tar and nicotine information conveyed by the FTC Method and promoting competition among tobacco companies in the development of low-tar cigarettes." Br. 45. That argument has no merit.

A. The FTC Has Neither Authorized Nor Encouraged The Use Of Light Descriptors

1. The FTC has broad authority to adopt regulations "defin[ing] with specificity acts or practices which are unfair or deceptive." 15 U.S.C. § 57a(a)(1)(B). In exercising that authority, the FTC has issued only a limited number of trade regulation rules carrying the force of law. *See* 16 C.F.R. Pts. 408-460. And not a single one of those pages concerns cigarettes. *See id.* Pt. 408 ("Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking") (left blank). Philip Morris's implied preemption defense thus falters at the threshold because the FTC has neither regulated nor affirmatively encouraged Philip Morris's use of light descriptors.

That conclusion is evident from the FTC's 1997 request for public comments regarding regulation of light descriptors. *See* JA267a-295a. In that notice, the FTC stated that "[c]igarette manufacturers use a number of descriptive terms ... in advertising and labeling information about their cigarettes," that "[t]here are no official definitions for these terms," and that the Ad Hoc Committee of the President's Cancer Panel had recommended that such descriptors be regulated. JA291a-292a. The FTC invited public comment on whether "there [is] a need for official guidance with respect to the terms used in

marketing lower rated cigarettes? If yes, why? If no, why not?" JA292a; *see also* JA462a (testimony of FTC Deputy Director of Bureau of Consumer Protection Peeler) ("The FTC does not have a view on the use of descriptors ... on cigarette packages or in cigarette advertising."); *Philip Morris*, 449 F. Supp. 2d at 925 n.88 (finding, based on FTC testimony, that "FTC does not impose, regulate, or require [the use of descriptors]"; "[h]ow those terms are applied, and on which brands, is entirely up to the tobacco companies") (internal quotations and alterations omitted). The FTC's request for comment, coupled with its subsequent failure to complete the proceeding, refutes Philip Morris's assertion (at 47) that the FTC has "authorized the use of tar and nicotine descriptors in cigarette advertising as a shorthand means of communicating tar and nicotine information to consumers."

Even more telling is the prior position of cigarette companies themselves. Most major cigarette companies, including Philip Morris, filed joint comments in response to the FTC's 1997 notice, stating that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Philip Morris 1998 FTC Comments at 94. By 2002, Philip Morris had changed its mind: it urged the FTC to "adopt a rule expressly authorizing the industry to continue to use [light] descriptors." JA1083a-1084a. The FTC's proposed regulation of light descriptors in 1997, the companies' position that there was no need for such regulation, Philip Morris's subsequent request for regulation, and the FTC's failure to adopt any regulations on the subject are each impossible to square with Philip Morris's current contention that the FTC

has specifically authorized or encouraged cigarette companies to use light descriptors.

Although the absence of FTC authorization of light descriptors is manifest from that regulatory history, the Solicitor General recently confirmed — consistent with sworn testimony by the FTC — that the FTC has not "exercised comprehensive control over [Philip Morris's] advertising of light cigarettes." U.S. *Amicus* Br. at 7, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Dec. 15, 2006) ("U.S. *Watson* Cert. Br."). "The FTC has never promulgated definitions of terms such as 'light' or 'low tar.'" *Id.* at 4; *see* U.S. *Amicus* Br. at 3-5, *Watson v. Philip Morris Cos.*, No. 05-1284 (U.S. filed Feb. 26, 2007) ("U.S. *Watson* Merits Br.").[14]

This case is therefore the opposite of *Geier*. In that case, the Department of Transportation had adopted formal rules governing automobile safety and had "consistently over time" warned of the "interference" that state-law claims would pose to federal regulatory objectives regarding automobile safety. 529 U.S. at 883. The Department further told the Court "through the Solicitor General" that the regulatory history evidenced the agency's "policy judgment" about how best to promote automobile safety. *Id.* at 881. Here, the Solicitor General has explained that the FTC has never required, authorized, or promoted the use of light descriptors, and certainly not when Philip Morris knew and intended that use of descriptors would convey a false message. Respondents'

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[14] The Solicitor General also rejected the claim that the marketing of light cigarettes was undertaken by Philip Morris to further federal policy: "[i]n marketing its cigarettes as 'light' ..., [Philip Morris] acted on its own." U.S. *Watson* Cert. Br. 8-9; *see* U.S. *Watson* Merits Br. 18.

state-law fraud claims cannot "impede the FTC's low-tar policy," as Philip Morris argues (at 46), when the FTC's official position is that no such policy exists. *See Sprietsma*, 537 U.S. at 68.

2. Philip Morris nevertheless insists (at 11) that "[t]he FTC has repeatedly endorsed the use of descriptors," citing as evidence (at 11-13) two FTC consent orders with other cigarette companies and a 1967 letter from the FTC to a broadcasting trade association. Those sources offer no support for Philip Morris's assertion.

a. The 1971 and 1995 consent orders do not constitute industry-wide authorization to use light descriptors. An FTC consent order has no legal effect on non-parties and does not establish any generally applicable agency policy. That is clear from the statutory language, this Court's precedents, and the FTC's consistent administrative practice.

First, Congress specified in the FTC Act that the legal effect of FTC consent orders is limited to those who are party to the decrees. Before 1994, the FTC Act provided that, "[i]f the [FTC] determines ... that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the [FTC] may commence a civil action to obtain a civil penalty ... against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (1988). In 1994, Congress amended that provision to codify, with respect to civil penalties, the FTC's longstanding practice of not according precedential effect to consent orders. The provision now states: "[i]f the [FTC] determines ... that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then

the [FTC] may commence a civil action to obtain a civil penalty ... against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (emphasis added). Congress thereby determined that FTC consent orders are a unique category of agency orders that may not be used to establish industry-wide standards.[15]

That conclusion is strengthened by 15 U.S.C. § 57b(e), which provides that FTC enforcement remedies "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." As the court below correctly held, that provision reflects Congress's intent that FTC enforcement should not displace parallel state-law remedies. *See* Pet. App. 47a-50a. It follows that an FTC consent order, which cuts short the enforcement process, cannot be viewed as preempting state-law actions against non-parties.

Second, this Court has confirmed that an FTC consent order has no legal effect on those who were not parties to it. In *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), du Pont challenged a district court's order requiring divestiture by pointing to FTC consent decrees in similar cases in which divestiture was not required. This Court rejected the argument, reasoning that "the circumstances surrounding such negotiated agreements are

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[15] The legislative history confirms that conclusion. The House Report stated that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue "after all factual and legal issues have been fully adjudicated." *Id.*

so different that they cannot be persuasively cited in a litigation context." *Id.* at 330 n.12. The teaching of *du Pont* is straightforward: because FTC consent orders reflect a negotiated compromise, they are neither binding on nor available as a legal safe harbor for non-parties. *See United States v. Armour & Co.*, 402 U.S. 673, 680-82 (1971) ("[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms" and "cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve").[16]

Third, the FTC has consistently held that consent orders are not "controlling case precedent." *In re Chrysler Corp.*, 87 F.T.C. 719, 742 n.12 (ALJ decision 1975, adopted as modified by full Commission 1976). That is so because "[consent] orders are negotiated by the parties" and "are not based on any finding of violation, a necessary predicate to an adjudicated

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[16] *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959), does not, as Philip Morris's *amici* contend, point to a different result. *See* Ex-FTC Staff Br. 8. The Court there found support for its statutory interpretation in the FTC's "consistent administrative construction" of the Act, exemplified by *In re Ed Hamilton Furs, Inc.*, 51 F.T.C. 186 (1954), and reinforced by more than a hundred subsequent cease-and-desist orders based on that case. 359 U.S. at 391 & n.6. Although styled a "Stipulation for Consent Order," the order ending the *Ed Hamilton Furs* proceeding was, in substance, a cease-and-desist order. The defendant stipulated to the record, withdrew its answer to the FTC's complaint, and, most importantly, "agree[d] that the order ... shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon." 51 F.T.C. at 193-94. That language does not appear in the 1971 and 1995 consent orders.

order." *Chrysler Corp.*, 87 F.T.C. at 742 n.12; *see In re Trans Union Corp.*, 118 F.T.C. 821, 864 n.18 (ALJ decision 1993, affirmed as modified by full Commission 1994) (a "consent agreement [with one party] is binding only between the [FTC] and [that party]").[17] Indeed, when the FTC intends to use the consent process to achieve industry-wide results, it obtains separate decrees with all cigarette companies. *See In re Lorillard*, 80 F.T.C. 455 (1972).

Furthermore, even if the FTC consent orders were viewed as creating an industry-wide safe harbor, Philip Morris could not seek shelter in that harbor. The 1971 consent order is clear that certain descriptors may be used only when "the statement is accompanied by a clear and conspicuous disclosure" of tar and nicotine yields. JA698a.[18] Respondents' claims

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[17] The FTC's position on the legal effect of its consent orders is longstanding. *See, e.g., In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) ("[A] consent order entered into by the [FTC] is not an adjudication on the merits of a matter and is not binding. ... The courts and the [FTC] have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties[.]"); *In re Berger*, 56 F.T.C. 1000, 1003 n.3 (ALJ decision, adopted as modified by full Commission 1960) ("[t]he orders issued in each of these cases were based on consent agreements" and thus "cannot be considered as legal precedents"); *In re Federal Employees' Distrib. Co.*, 56 F.T.C. 550, 574 (ALJ decision, adopted by full Commission 1959) (holding that a consent order entered under agreement of the parties "is not a precedent in other cases for any purpose").

[18] Indeed, the 1971 consent order's prohibition on the use of low-tar representations absent disclosure of yields also undermines Philip Morris's assertion that descriptors, standing alone, are a "shorthand" for Cambridge Method results. The FTC's determination that American Brands could not use descriptors

are based in part on Philip Morris's use of descriptors on cigarette packages. *See* JA28a. Philip Morris has never included yields on its cigarette packages.[19] And, regardless of what the consent orders authorize, they certainly do not entitle Philip Morris to make intentionally false representations to the public. *See* JA32a.

b. The FTC's 1967 letter to the National Association of Broadcasters similarly fails to establish that the agency made a regulatory choice to authorize industry-wide use of light descriptors. That letter did not discuss, let alone purport to define or encourage, cigarette companies' use of light descriptors. The letter stated only that the FTC would not at that time challenge factual statements of the "tar and nicotine content of cigarettes." JA368a. The letter was clear, however, that, "no matter how relatively low [a cigarette's] tar and nicotine content no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer.'" JA369a. In addition, the letter stated that the basis for any low-tar comparison must be "fully and fairly stated." *Id.* Whatever protective umbrella the 1967 letter might be thought to provide, it cannot help Philip Morris because the company ignored both of those stated limitations: Philip Morris falsely represented to the public that its light cigarettes were safer, and it neither fully nor fairly stated the basis for its low-tar comparison — indeed, it has never

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without test yields establishes that the FTC did not view descriptors as the same as yields.

[19] *See, e.g., Aspinall v. Philip Morris Cos.*, No. Civ. A. 98-6002, 2006 WL 2971490, at *5 (Mass. Super. Ct. Aug. 9, 2006) ("[I]t is undisputed that the tar and nicotine yields have never been included on Marlboro light packages.").

included tar and nicotine yields on its cigarette packages.

In addition, even if the 1967 letter could be read to mean that the FTC would not challenge the use of descriptors, nothing in the regulatory history suggests that the FTC's non-action was tied to an affirmative regulatory program of *promoting* the use of descriptors in advertising. It defies common sense to suggest that a decision not to pursue remedies against certain conduct is tantamount to encouraging that conduct. The government has rejected such an interpretation of the regulatory history. *See* U.S. *Watson* Merits Br. 21 ("the FTC has [not] requested ... tobacco companies to ... advertise their cigarettes using [light] descriptors"). Thus, setting aside that the 1967 letter has nothing to do with descriptors — indeed, the letter predates petitioners' introduction of light cigarettes by four years — the letter does not embody the type of "affirmative policy judgment" to encourage the use of descriptors that would support implied preemption. *Sprietsma*, 537 U.S. at 67 (internal quotations omitted); *see id.* ("intentional and carefully considered" decision not to regulate "does not convey an 'authoritative' message of a federal policy").

Finally, Philip Morris's reliance on the letter is misplaced because it is not "law" that would form the basis for preemption. *See* U.S. Const. art. VI, cl. 2 ("the *Laws* of the United States ... shall be the supreme Law of the Land") (emphasis added). To be sure, "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Thus, in

certain circumstances, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws." *Id.* at 63-64 (internal quotations omitted).

For an agency rule to have the "force and effect of law," however, it typically must be adopted in compliance with the rulemaking requirements of the Administrative Procedure Act ("APA"). *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96, 301 (1979) (internal quotations omitted). The standard is particularly apt with respect to the FTC. When Congress granted the FTC rulemaking authority in 1975, it was "careful[]" to include "procedural protections" above and beyond those required by the APA to prevent broad disruption of state law. Verkuil, 1976 Duke L.J. at 247; *see* 15 U.S.C. § 57a(b)-(d). Because the 1967 letter does not come close to reaching the degree of formality achieved through rulemaking (or adjudication) — and, indeed, comes from a time when the FTC's rulemaking authority was in serious doubt — the letter cannot support broad federal preemption of state law.[20]

B. The FTC Has Not Required The Use Of The Cambridge Method Or The Disclosure Of Tar And Nicotine Yields

Philip Morris also says that the FTC has "required tobacco companies to disclose tar and nicotine yields" based on the Cambridge Method. Br. 47. In fact,

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[20] Even had the FTC intended the letter to provide industry-wide guidance, formal FTC industry guidance "does *not* have the force or effect of law and is not legally binding on the [FTC] or on the public in an enforcement action" and thus could not have had preemptive effect. FTC, *Operating Manual*, Ch. 8, § 3.2 *available at* http://www.ftc.gov/foia/ch08industryguidance.pdf.

the FTC has never required cigarette companies to use the Cambridge Method or to disclose tar and nicotine yields. *See* JA203a ("[n]o [FTC] rule or order requires the cigarette manufacturers to disclose" tar and nicotine ratings). Cigarette companies disclosed those yields pursuant to a *voluntary* 1970 agreement among the companies themselves that had nothing to do with light descriptors. The FTC was not a party to that agreement, and it lacks the legal authority to enforce it. *See* JA442a.

The D.C. Circuit's decision in *Brown & Williamson* confirms that the FTC could not have required the companies to use the Cambridge Method. At issue was a district court injunction requiring that Brown & Williamson, in its marketing of light cigarettes, "justify the advertisement of results from a different system of testing which it considers superior to the FTC system." 778 F.2d at 44. The court invalidated that provision of the injunction, reasoning that, "[b]ecause the FTC has not adopted its system of testing pursuant to a *Trade Regulation Rule* under section 18 of the FTC Act, one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." *Id.* (emphasis added, citation omitted).

Respondents' position and the decision below accord with positions taken by the Solicitor General in *Watson*: "[t]he FTC has not required [Philip Morris] to use the Cambridge Method to determine tar and nicotine levels or to report the results of those tests in its advertising." U.S. *Watson* Cert. Br. 9. The Solicitor General also rejected Philip Morris's reliance on the 1970 voluntary agreement, stating that it is improper to "treat[] the [cigarette] companies'

agreement as if it were the equivalent of an FTC regulation." *Id.*[21]

More fundamentally, even if the FTC could be understood to have required such disclosures or use of the Cambridge Method, that would have no bearing on this case. Respondents allege that Philip Morris made "[f]alse[]" claims that certain of its cigarettes are "'light' and/or deliver[] lowered tar and nicotine." JA32a; *see* JA31a. Respondents challenge descriptors, not the Cambridge Method or *factual* statements of tar and nicotine yields based on that method. Thus, Philip Morris's implied preemption theory misses the central claim of respondents' case.

* * *

In *Cipollone*, this Court held that Congress did not intend to preempt state-law actions for frauds committed by cigarette companies in the marketing of cigarettes. In asking this Court to overrule *Cipollone*, Philip Morris asks for immunity from longstanding state deceptive-practices statutes. Given the well-documented deceptions by cigarette companies over many decades to lull consumers into smoking so-called "light" cigarettes notwithstanding the health risks, and given the absence of legally binding FTC actions that would displace state-law damages

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[21] The views expressed by former FTC employees in an *amicus brief* on behalf of Philip Morris should be accorded little weight in light of the FTC's official views of its regulatory history in sworn testimony. *See Geier*, 529 U.S. at 883. This Court recently rejected the arguments made in a similar brief by many of the same former FTC employees, holding that "[n]othing" in the evidence cited by the ex-FTC employees supported their assertion that the FTC had "delegated testing responsibility" to cigarette companies. *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2310 (2007).

actions, respondents' claims to recompense consumers for the economic consequences of Philip Morris's fraud should be permitted to proceed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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June 11, 2008

REPLY BRIEF

101

Supreme Court, U.S.
FILED
AUG 11 2008
OFFICE OF THE CLERK

(21)

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Where, as here, a "statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). The Labeling Act's express preemption clause provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(b).

The complaint in this case alleges that PMUSA violated state law by "'intentionally market[ing]' light cigarettes as 'less harmful or safer' . . . 'than regular' cigarettes through the use of descriptors 'Lights' and 'Lowered Tar and Nicotine.'" Resp. Br. 20 (quoting J.A. 28a-29a). Respondents thus seek to impose state-law requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes. Accordingly, the question presented in this case could be recast as: If the Labeling Act's express preemption provision does not preempt *this* claim, what does it do?

Respondents' principal argument is that the "Labeling Act preempts only targeted regulations that are aimed at and impose special burdens on cigarette companies." Resp. Br. 1. But nothing in the *text* of the Labeling Act supports respondents' proffered distinction between state laws that "target[ ]" cigarette companies and those that reach them even if aimed more broadly. It is therefore understandable, perhaps, that their 57-page brief devotes but a scant two paragraphs to the text of the clause at issue. *See* Resp. Br. 28-29. Moreover, this Court has squarely

rejected respondents' proposed distinction in construing the express preemption provisions of the Labeling Act and other federal statutes. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001); *see also Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1010 (2008); *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995). And for good reason: The distinction urged by respondents would open an "utterly irrational loophole" in the preemptive reach of federal law. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992). These authorities destroy respondents' position—which is undoubtedly why they are compelled to misquote *Reilly*, mischaracterize *Morales*, and relegate *Riegel* and *Wolens* to a footnote. *See* Resp. Br. 19, 42-44 & n.13.

Respondents are unable to cite even a single decision of this Court that supports their position that the Labeling Act preempts only specifically targeted state laws, while preserving identical requirements or prohibitions imposed through the application of state laws of general applicability. Indeed, their only authority is the plurality decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), but the *Cipollone* plurality necessarily *rejected* respondents' proffered distinction when it concluded that the Labeling Act preempts failure-to-warn claims and warning-neutralization fraud claims based on generally applicable state-law duties. In any event, the *Cipollone* plurality's alternative preemption framework was criticized by a *majority* of the Court at the time and has never since been applied by this Court. Applying that framework here—especially in the distorted manner suggested by respondents—would require the Court not only to disavow its subsequent construction of the Labeling Act's preemption provision in *Reilly*, but also to construe that provision *differ-*

ently from the express preemption provisions of every other federal statute. In contrast, adherence to the plain text of the Labeling Act and the express preemption jurisprudence to which the full Court now subscribes (as exemplified most recently in *Riegel*) compels reversal of the decision below.

I. RESPONDENTS' CLAIMS ARE EXPRESSLY PREEMPTED

The Labeling Act was enacted "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to *any* relationship between smoking and health." 15 U.S.C. § 1331 (emphasis added). Because respondents' state-law claims fall squarely within the Labeling Act's plain language and run smack into the "Federal program" it established, their claims are expressly preempted.

A. Respondents' Claims Are Preempted Under Ordinary Principles Of Express Preemption

Respondents seek to eviscerate the Labeling Act's preemption provision by arguing that it "preempts only targeted regulations that are aimed at and impose special burdens on cigarette companies." Resp. Br. 1. This reading of the Labeling Act is impossible to reconcile with the statute's language, structure, or purpose.

1. The Labeling Act preempts state-law "requirement[s] or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion of" cigarettes. 15 U.S.C. § 1334(b). Respondents acknowledge that "the term 'requirement'" as used in the Labeling Act "encompasses state statutory *and* common-law duties." Resp. Br. 13 (emphasis added).

Respondents' concession that Congress intended to preempt "common-law duties" "based on smoking and health" is fatal to their express preemption argument. Resp. Br. 28-29. There are *no* common-law duties—in *any* State—that "are aimed at and impose special burdens on cigarette companies." *Id.* at 1. The common law is used to regulate health-related representations in cigarette advertising *only* when generally applicable state-law duties are applied by a judge or jury to factual allegations that are premised on the relationship between smoking and health. Respondents' concession that the Labeling Act preempts at least *some* common-law duties therefore establishes that the statute's preemptive reach extends beyond duties that specifically target cigarette companies. *See Riegel*, 128 S. Ct. at 1010 (refusing to limit the express preemption provision of the Medical Device Amendments to state-law duties that specifically target medical devices because there are "no common-law duties that relate solely to medical devices").

Moreover, *Reilly* forecloses respondents' reading of the Labeling Act. The cigarette advertising regulations held to be preempted in *Reilly* had been promulgated by the state attorney general "pursuant to his authority" under the generally applicable Massachusetts Unfair Trade Practices Act (533 U.S. at 533)—a point that respondents conspicuously omit from their discussion of *Reilly*. The fact that in this case a jury, rather than a state attorney general, would apply a materially identical state unfair trade practices statute to regulate smoking-and-health matters does not alter the preemption analysis. *Compare Morales*, 504 U.S. at 391 (Airline Deregulation Act preempts an attorney general's application of an unfair trade practices statute to regulate air-

line advertising), *with Wolens*, 513 U.S. at 228 (Airline Deregulation Act preempts a jury's application of an unfair trade practices statute to regulate airline advertising).

Nowhere in their discussion of *Reilly* do respondents (or their *amici*, including the state attorneys general) explain why a jury should be granted greater authority than a state attorney general to regulate cigarette advertising under an unfair trade practices statute. If the Maine attorney general were to rely on the Maine Unfair Trade Practices Act to issue a regulation prohibiting the use of descriptors in cigarette advertising, respondents would have to concede (given *Reilly*) that such a regulation would be preempted by the Labeling Act. Yet, respondents contend that if a Maine judge or jury were to rely on the same statute to issue a judgment against PMUSA based on its use of descriptors, such an application of state law would not be preempted. This Court has repeatedly declined to draw such an "implausible" and "perverse distinction" between executive and judicial power in the express preemption setting. *Riegel*, 128 S. Ct. at 1008; *see also Wolens*, 513 U.S. at 228.

Respondents contend that the Court in *Reilly* endorsed their untenable "distinction between state laws aimed at cigarette marketing and state laws of general applicability." Resp. Br. 19. *Reilly* did no such thing. Indeed, respondents' reading of *Reilly* is pieced together using selective (and misleading) excerpts of the opinion's language. Thus, while respondents assert that *Reilly* drew a "'critical distinction . . . between generally applicable . . . regulations . . . and regulations *targeting* cigarette advertising'" (*ibid.* (quoting *Reilly*, 533 U.S. at 549-50) (alterations and emphasis added by respondents)), the "critical

distinction" that the Court *actually* drew was between "generally applicable *zoning* regulations . . . and regulations targeting cigarette advertising." 533 U.S. at 549-50 (emphasis added). The Court explained that the preempted regulations targeting "youth exposure to cigarette advertising"—though enacted under a generally applicable statute—were "intertwined with the concern about cigarette smoking and health" and therefore "based on smoking and health." *Id.* at 548. In contrast, "generally applicable *zoning* restrictions" are based on "state interests in traffic safety and esthetics" and therefore not preempted. *Id.* at 551 (emphasis added). Needless to say, no zoning laws are at issue in this case.[1]

Respondents' reading of *Reilly* is also inconsistent with this Court's repeated conclusion in other cases that federal law preempts a generally applicable state-law duty when it is applied to facts encompassed by the terms of an express preemption provision. That conclusion was most recently reiterated in *Riegel*, where the Court held that the Medical Device Amendments to the Food, Drug, and Cosmetic

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[1] Equally unfounded is respondents' suggestion that *Reilly* endorsed the proposition that all "'[r]estrictions . . . that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption clause.'" Resp. Br. 19 (quoting 533 U.S. at 551-52). The language omitted by respondents makes clear that the Court was *actually* referring to "[r]estrictions *on the location and size of advertisements* that apply to cigarettes on equal terms with other products." *Reilly*, 533 U.S. at 551-52 (emphasis added). Such restrictions are not preempted when applied to cigarette advertising because their application is not "motivated by concerns about smoking and health." *Id.* at 550. Tellingly, the regulations held to be preempted in *Reilly* applied "on equal terms" to cigarettes *and* smokeless tobacco products. *Id.* at 534.

Act—which prohibit States from "establish[ing] . . . with respect to a [medical] device . . . any requirement . . . which relates to the safety or effectiveness of the device" (21 U.S.C. § 360k(a))—preempted a jury's application of generally applicable state common-law duties to an allegedly defective medical device. 128 S. Ct. at 1010. And this Court's holding in *Wolens* that state-law claims challenging airline advertising under the Illinois Consumer Fraud and Deceptive Business Practices Act were preempted by the Airline Deregulation Act—which precludes States from enacting laws that "relat[e] to [air carrier] rates, routes, or services" (49 U.S.C. App. § 1305(a)(1))—leaves no doubt that this principle applies with equal force to claims based on generally applicable fraud duties. 513 U.S. at 228; *see also id.* at 237 (Stevens, J., concurring in part and dissenting in part) ("The duty imposed by the Consumer Fraud Act is to refrain from committing fraud in commercial dealings—it is the 'duty not to deceive'").[2]

Respondents are correct that "Maine's general prohibition on fraud is not, by its terms, a 'requirement . . . based on smoking and health.'" Resp. Br. 29. It is equally the case, however, that the "general common-law duties" invoked by the *Riegel* plaintiff did not specifically "'relate[ ] to the safety or effectiveness of the [medical] device'" at issue (128 S. Ct.

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[2] The Solicitor General agreed that the state-law claims in *Riegel* and *Wolens* were expressly preempted. *See* Br. of the United States as *Amicus Curiae* at 6-7, *Riegel* (No. 06-179); Br. of the United States as *Amicus Curiae* at 12, *Wolens* (No. 93-1286). The Solicitor General does not suggest that a different express preemption analysis should apply here. On the contrary, the Solicitor General avoids taking any position on the express preemption question in this case.

at 1003 (quoting 21 U.S.C. § 360k(a)) and that the generally applicable fraud provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act invoked by the *Wolens* plaintiffs did not specifically "'relat[e] to [airline] rates, routes, or services.'" 513 U.S. at 223 (quoting 49 U.S.C. App. § 1305(a)(1)). As in *Riegel* and *Wolens*, respondents' claims are nevertheless preempted because they seek to enforce a generally applicable state-law duty against factual allegations encompassed by the terms of an express preemption provision. *See also Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 48 (1987) (holding that a generally applicable fraud in the inducement cause of action asserting improper processing of a claim for employee benefits was preempted because the claim "relate[d] to an[ ] employee benefit plan" within the meaning of ERISA's preemption provision).[3]

Rather than meaningfully address the holdings or analysis of *Riegel* and *Wolens*, respondents consign those cases to a footnote. Resp. Br. 43 n.13. They try to justify this blinkered approach by declar-

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[3] Contrary to respondents' suggestion (at 44), *Rowe* v. *New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008), which was decided the same day as *Riegel*, is entirely consistent with this conclusion. The Court held in *Rowe* that the Federal Aviation Administration Authorization Act of 1994 (FAAAA)—which preempts state laws "related to a price, route, or service of any motor carrier" (49 U.S.C. § 14501(c)(1))—preempts state laws that have a "direct connection with motor carrier services." 128 S. Ct. at 996 (internal quotation marks omitted). *Rowe* did not involve the application of a generally applicable state law to motor carriers, and its holding is consistent with the conclusion that the FAAAA would preempt a jury's application of a generally applicable statute—such as a state unfair trade practices statute—to factual allegations that "relate[ ] to a price, route, or service of a[ ] motor carrier."

ing, conclusorily, that "[p]reemption decisions of this Court interpreting other statutes with different texts, histories, and purposes do not provide a reliable guide to interpreting the Labeling Act." *Id.* at 15; *see also id.* at 42 (arguing that *Morales* "does not bear on the proper interpretation of the Labeling Act"). There is nothing unique, however, about the text of the Labeling Act's preemption provision—except, perhaps, for its broad, unqualified language. *Cf. Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 446-47 (2005) (contrasting the restrictive language of FIFRA's preemption provision with the expansive language of the Labeling Act). Respondents' inability to square their theory of this case with the holdings in *Riegel* and *Wolens* is a tacit concession that the result they seek cannot be reconciled with the mainstream of this Court's express preemption jurisprudence.

In those rare cases where Congress wants to shield state laws of general applicability from any possibility of federal preemption, it does so explicitly. *See, e.g.*, 25 U.S.C. § 1723(a)(1) ("nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian . . . which is pursued under any law of general applicability that protects non-Indians as well as Indians"); 29 U.S.C. § 1144(b)(4). The Labeling Act's preemption provision contains no textual indication that Congress wanted to create a categorical exemption for every state law of general applicability. On the contrary, the Labeling Act's unequivocal proscription on state-law "requirement[s] or prohibition[s] based on smok-

ing and health" includes *all* state laws, whether classified as general or specific.[4]

2. The structure of the Labeling Act confirms that the statute preempts all state-law claims challenging health-related representations in cigarette advertising. "Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern." *Reilly*, 533 U.S. at 571. As part of this "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health" (15 U.S.C. § 1331), the Labeling Act expressly prohibited States from imposing their own advertising and promotional requirements "based on smoking and health" and explicitly preserved the "authority of the Federal Trade Commission with respect to unfair or decep-

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[4] *Bates* reinforces this conclusion. There, the Court held that FIFRA, 7 U.S.C. § 136v(b), preempts generally applicable "common-law rule[s]," including "fraud and negligent-failure-to-warn" claims, "that would impose a labeling requirement that diverges from those set out in FIFRA." *Bates*, 544 U.S. at 446, 452. Contrary to respondents' assertion (at 28-29), the Court's statement that "an event, such as a jury verdict, that merely motivates an optional decision is not a requirement" (544 U.S. at 445) offers no support for their effort to restrict the Labeling Act to laws that specifically target cigarette advertising. *Bates*'s conclusion that FIFRA preempts some generally applicable fraud and failure-to-warn claims conclusively forecloses respondents' reading of this language. The passage instead explains why FIFRA's preemption provision—which is limited to state-law "requirements for labeling or packaging"—does not reach express warranty and design defect claims, even though "a finding of liability on these claims [could] induce [the defendant] to alter [its] label." *Ibid.* (internal quotation marks omitted).

tive acts or practices in the advertising of cigarettes." *Id.* § 1336.

Respondents attempt to obscure the features of this "comprehensive Federal program" by contending that the "singular focus of each version of the [Labeling] Act was on the warning label on cigarette packages." Resp. Br. 41. But that argument ignores the statute's explicit—and much broader—prohibition on the imposition of state-law "advertising or promotion[al]" requirements. 15 U.S.C. § 1334(b). It is also flatly contradicted by this Court's own recognition that, when "enact[ing] the current pre-emption provision, Congress did *not* concern itself solely with health warnings for cigarettes." *Reilly*, 533 U.S. at 547 (emphasis added). "In the 1969 amendments," the Court continued, "Congress banned electronic media advertising of cigarettes" and, "to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC." *Id.* at 548.

Respondents are wrong to suggest that, at the time Congress amended the Labeling Act's preemption provision, the FTC lacked the regulatory tools to police health-related representations in cigarette advertising. Resp. Br. 34. In fact, the FTC had been closely regulating health claims in cigarette advertising since the 1920s (*see* Pet. Br. 28 n.8 (citing examples)), and it has continued to bring that regulatory authority to bear on the tobacco industry since the enactment of the Labeling Act.[5]

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[5] *See, e.g.*, *Santa Fe Natural Tobacco Co.*, 65 Fed. Reg. 26,211 (May 5, 2000); *In re Alternative Cigarettes, Inc.*, 65 Fed. Reg. 26,208 (May 5, 2000); *In re R.J. Reynolds Tobacco Co.*, 64 Fed. Reg. 13,205 (Mar. 17, 1999); *In re Am. Tobacco Co.*, 119 F.T.C. 3 (1995); *In re R.J. Reynolds Tobacco Co.*, 54 Fed. Reg. 41,342

It is no answer to say, as respondents and some of their *amici* do, that the FTC (like all government agencies) might elect—as a matter of enforcement discretion, because of resource constraints, or for other reasons—not to pursue such regulation. That is a necessary corollary to Congress's decision to vest exclusive enforcement authority at the federal level. *See Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 376-77 (2000). In any event, the federal government remains actively involved in all aspects of tobacco-control policy. In the short time since the Court granted certiorari in this case, for example, the FTC has proposed to rescind its longstanding guidance on the use of FTC Method results in cigarette advertising (Proposal to Rescind FTC Guidance Concerning the Current Cigarette Test Method, 73 Fed. Reg. 40,350 (July 14, 2008) [hereinafter FTC Proposal]), and the House of Representatives has passed a bill that, if enacted, would impose additional restrictions on tobacco advertising, including a ban on the descriptors "light" and "low tar." H.R. 1108, 110th Cong. (2008). Regardless of whether either of these proposals is adopted, they each demonstrate that the policymaking organs of the federal government remain actively involved in the "comprehensive Federal program" governing cigarette advertising. 15 U.S.C. § 1331. State-law "regulation-by-litigation," as exemplified by this lawsuit, is nei-

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[Footnote continued from previous page]

(Oct. 6, 1989). In addition to its administrative enforcement powers, the FTC also has the authority to file suit on behalf of consumers injured by a defendant's deceptive advertising practices and to recover relief that includes "the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b).

ther a necessary nor an appropriate adjunct to those federal efforts.

Respondents further contend that the Labeling Act should not be read to displace state-law regulation of health-related claims in cigarette advertising because the FTC "encourage[d]" States to enact Little FTC Acts that complement the federal agency's regulation of unfair trade practices. Resp. Br. 33, 34 (internal quotation marks omitted). But this sheds no light on the question whether the Labeling Act precludes actions brought under these state statutes. Far more probative is the fact that Congress—though undoubtedly aware of the States' consumer protection legislation when enacting the Labeling Act—expressly preserved the FTC's authority to regulate deceptive health representations in cigarette advertising without including a comparable savings clause for the States' authority under their Little FTC Acts, whether exercised by regulation or court decision.

3. Preemption of respondents' state-law claims also promotes the Labeling Act's dual objectives of "adequately inform[ing]" the public "about any adverse health effects of cigarette smoking" and preventing the proliferation of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331. As evidenced by the dozens of cases filed across the country challenging the use of descriptors under state law (and the inconsistent results reached in those cases (*see* Pet. Br. 30)), allowing the States to regulate descriptors would generate conflicting standards regarding the circumstances in which tobacco companies can use such statements to communicate tar and nicotine information to consumers. These diver-

gent state-law regulatory requirements would inevitably foster consumer confusion and prevent tobacco companies from conducting advertising and promotional campaigns on a national basis.

Respondents suggest that "Congress's concern with uniformity" in the Labeling Act "was subordinate to its goal of ensuring that consumers receive 'adequate information' regarding smoking and health." Resp. Br. 38. But the Labeling Act's dual objectives are interrelated. To ensure that consumers receive a single, clear message about smoking and health, Congress mandated warning labels that must appear on every cigarette package, prohibited the States from requiring their own warning labels, expressly preempted state regulation of health representations in cigarette advertising, and explicitly preserved the authority of the FTC to regulate such health-related representations. Allowing respondents' claims to proceed would lead to precisely the disuniformity in health information and advertising regulation that Congress sought to prevent. 15 U.S.C. § 1331.

B. Respondents' Claims Are Also Preempted Under The Alternative Preemption Framework Articulated By The *Cipollone* Plurality

Unable to cite a single opinion of this Court that compels, or even supports, affirmance of the decision below, respondents rest their entire case on the alternative preemption framework articulated by the *Cipollone* plurality. That framework, however, will not bear the weight that respondents seek to place on it.

1. Respondents' claims are preempted under the framework developed by the *Cipollone* plurality be-

cause, in their complaint, respondents concede that the descriptors "light" and "lowered tar and nicotine" accurately convey the results of tar and nicotine testing under the FTC Method and thus are not inherently false. J.A. 30a; *see also* U.S. Br. 28-29 (descriptors are "'literally true' insofar as they state the tar yield to the smoking machine"). Respondents instead contend that descriptors are *potentially* misleading to consumers who do not know that these statements are based on a government-mandated testing methodology that is not capable of accounting for the variability in human smoking behavior. J.A. 29a. According to the *Cipollone* plurality, state-law challenges to such potentially misleading health representations are "based on smoking and health" and therefore preempted. 505 U.S. at 529.[6]

Respondents profess an inability to find anything in the *Cipollone* plurality's opinion that draws a dis-

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[6] Respondents' attempt (at 23) to recharacterize their claims as alleging that descriptors "were false, not potentially misleading," is unavailing because it is the substance of the allegations in a party's complaint—rather than the label attached to those allegations in the complaint or *post hoc* reformulations of those allegations in a brief—that determines whether a claim is preempted. *See Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004). Respondents are therefore incorrect to contend (at 23) that it would be "premature" to consider whether descriptors are inherently false or, at most, potentially misleading. Their complaint concedes that descriptors accurately convey the results of testing under the FTC Method (J.A. 30a), and therefore establishes for purposes of the preemption inquiry that descriptors are not inherently false. *See Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007) (holding on summary judgment that state-law claims challenging the use of descriptors are preempted under the *Cipollone* framework because the plaintiffs had acknowledged that descriptors accurately convey the results of FTC Method testing).

tinction between inherently false and potentially misleading statements. Resp. Br. 22. But this distinction is apparent from both the language of the opinion and the claims asserted by the *Cipollone* plaintiff. His preempted fraud claim based on a warning-neutralization theory alleged that the defendants had used statements and imagery in their advertisements to "neutralize[ ] the effect of federally mandated warning labels"—such as images of "contentment, glamour, romance, youth, [and] happiness." *Cipollone*, 505 U.S. at 527 (internal quotation marks omitted). His non-preempted fraudulent misrepresentation claim alleged that the defendants had made "intentional misstatement[s]" about the health effects of smoking in their advertisements. *Id.* at 529. Thus, while the statements and imagery underlying the warning-neutralization claim were not inherently false, they were nevertheless presented in a manner that potentially misled consumers by "minimiz[ing] the health hazards associated with smoking." *Id.* at 527. In contrast, the statements challenged by the plaintiff's fraudulent misrepresentation claim were allegedly characterized by outright "falsity" regarding the health risks of smoking. *Id.* at 529.

Respondents suggest that the *Cipollone* plurality concluded that the Labeling Act does "not preempt state-law claims alleging fraudulent misrepresentation regarding the health effects of cigarettes when such claims are not based on the warning on cigarette labels." Resp. Br. 17. Respondents make no attempt, however, to explain why the *Cipollone* plurality would have endorsed a preemption framework that preserves state-law fraud claims "unrelated to the warning labels on packages" (*id.* at 1) while preempting fraud claims that are "based on the warning

on cigarette labels." *Id.* at 17. Nothing in the language, structure, or purpose of the Labeling Act—which preempts *all* state-law advertising or promotional "requirement[s] . . . based on smoking and health"—supports this distinction.

Moreover, even under respondents' reading of the plurality opinion in *Cipollone*, their claims would be preempted because they *are* "related to [the] warning labels" on cigarette packages. Resp. Br. 22. Like the preempted fraud claim based on warning neutralization in *Cipollone*, which alleged that the defendants used "statements in advertising and promotional materials . . . to minimize the health hazards associated with smoking" (505 U.S. at 527 (plurality opinion)), respondents' claims allege that PMUSA "introduced Marlboro Lights and Cambridge Lights into the market with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking and thereby allow them to continue to smoke cigarettes." J.A. 28a-29a. Because the substance of respondents' claims is that PMUSA failed to disclose information about the limitations of the FTC Method and used the descriptors "light" and "lowered tar and nicotine" to minimize consumers' concerns that smoking could result in the serious health consequences identified in the warning labels, those claims "relate[ ] to the warning labels" and are therefore preempted even under respondents' reading of the *Cipollone* plurality opinion.

2. If respondents' claims are not preempted under the preemption framework set forth by the *Cipollone* plurality, then this Court should reconsider that framework. An interpretation of the Labeling Act's express preemption provision that did not reach respondents' challenge to the use of tar and

nicotine descriptors would conflict with the statute's text, structure, and purpose, and with this Court's subsequent express preemption decisions in *Reilly*, *Riegel*, and *Wolens*.

Respondents are wrong to suggest that "there is nothing approaching judicial inconsistency or confusion that warrants a reexamination of *Cipollone*." Resp. Br. 27. As a majority of the Court predicted at the time (*Cipollone*, 505 U.S. at 543-44 (opinion of Blackmun, J.); *id.* at 555 (opinion of Scalia, J.)), the preemption framework articulated by the *Cipollone* plurality has fostered widespread and persistent confusion among lower courts attempting to distinguish between those fraud claims that the plurality deemed preempted and those fraud claims it concluded were not preempted. *See, e.g.*, *Pearson* v. *Philip Morris Inc.*, 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 19) ("the *Cipollone* rubric [is] extremely difficult to apply"); *Wakeland* v. *Brown & Williamson Tobacco Corp.*, 996 F. Supp. 1213, 1221 n.13 (S.D. Ala. 1998) (recognizing "the difficulty the courts have encountered in applying *Cipollone*").

Contrary to respondents' argument (at 26), the disagreement among lower courts turns not "on diverging understandings of the FTC's actions with respect to light cigarettes" but on whether state-law claims challenging the use of tar and nicotine descriptors in cigarette advertising are "based on smoking and health" within the meaning ascribed to that language by the *Cipollone* plurality. *Compare Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392, 395 (5th Cir. 2007) (holding that state-law consumer fraud claims challenging the use of descriptors constitute "'implied misrepresentation'" neutralization claims preempted under the *Cipollone* plurality's preemption framework), *with* Pet. App.

32a ("we do not see anything in *Cipollone*'s discussion of warning neutralization claims that equates them with 'implied misrepresentation' claims as *Brown* does"). Indeed, respondents presented the same artificially narrow characterization of the conflict between the First and Fifth Circuits as a basis for denying certiorari (Br. in Opp. 30), and the Court "necessarily considered and rejected that contention" when it granted review. *United States* v. *Williams*, 504 U.S. 36, 40 (1992).

In light of the lower courts' profound difficulty implementing the *Cipollone* plurality's preemption framework—and the tension between the plurality's analysis and the express preemption principles endorsed by a majority of this Court in *Reilly*, *Riegel*, and *Wolens*—there would be a compelling basis for reexamining that framework if the Court were to conclude that respondents' claims are not preempted under the plurality's analysis. And the framework articulated by the *Cipollone* plurality would not fare well on reexamination.

As respondents point out (at 17-18), the approach to Labeling Act preemption developed by the *Cipollone* plurality rested on four pillars. Each of them, however, is unsound.

In concluding that the Labeling Act does not preempt some categories of fraud claims, the *Cipollone* plurality first suggested that "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." 505 U.S. at 529. But the Labeling Act preempts *all* state-law "requirement[s] or prohibition[s] based on smoking and health"—whether based on fraud or any other state-law duty. There is no clear-statement requirement restricting the preemption of fraud-

based duties to statutes that explicitly mention "fraud." *See Wolens*, 513 U.S. at 228; *Bates*, 544 U.S. at 452-53; *Pilot Life*, 481 U.S. at 48.

Second, the *Cipollone* plurality reasoned that, by "explicitly reserv[ing] the FTC's authority" to police deceptive advertising, Congress "indicate[d] that" the preemption provision should "be construed narrowly, so as not to proscribe the regulation of deceptive advertising." 505 U.S. at 529. This "explicit[] reserv[ation]" of authority applies, however, only to *federal*—not state—authority to police deceptive advertising. Thus, while the Labeling Act was not intended to shield tobacco companies from the regulatory repercussions of engaging in deceptive advertising, it vested regulatory oversight in the FTC by explicitly preserving the agency's authority to regulate deceptive cigarette advertising and expressly preempting the States' overlapping authority.

Third, the *Cipollone* plurality observed that "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards." 505 U.S. at 529. But that is decidedly not the case, as evidenced by the conflicting results that courts have reached in determining whether the use of descriptors violates state unfair trade practices statutes. *See* Pet. Br. 30. It was to prevent the proliferation of precisely such conflicting state-law standards that Congress prohibited States from regulating health-related representations in cigarette advertising. 15 U.S.C. § 1331.

Fourth, and finally, the plurality suggested that the preemption of fraud claims "would conflict both with the background presumption against preemption" and with the Labeling Act's legislative history. *Cipollone*, 505 U.S. at 529 n.27. But the Labeling

Act's legislative history confirms that the statute was intended to "prohibit[ ] health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 91-566, at 1 (1969). In any event, neither a so-called assumption against preemption nor snippets of legislative history can trump the Labeling Act's broad language prohibiting States from imposing *any* "requirement or prohibition based on smoking and health . . . with respect to" cigarette advertising. Indeed, the Court regularly construes the language of an unambiguous express preemption provision without resorting to either an assumption against preemption or legislative history. *See Riegel*, 128 S. Ct. 999; *Watters* v. *Wachovia Bank, N. A.*, 127 S. Ct. 1559 (2007).

Respondents' express preemption argument therefore fails at every turn. Under the ordinary express preemption principles applied in *Reilly*, *Riegel*, and *Wolens*, respondents' claims are expressly preempted because they seek to apply the general state-law duties established by the Maine Unfair Trade Practices Act to factual allegations that are unquestionably "based on smoking and health." Those claims are also preempted under the alternative preemption framework applied by the *Cipollone* plurality. If they are not, then there would be a compelling basis for this Court to reject that preemption framework in favor of the principles set forth in this Court's more recent express preemption jurisprudence.

II. RESPONDENTS' CLAIMS ARE IMPLIEDLY PREEMPTED

Respondents' claims are also impliedly preempted because they would "stand[ ] as an obstacle to the accomplishment and execution" of the FTC's

longstanding low-tar policy. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995).

Respondents and the Solicitor General are wrong when they contend that the FTC has never authorized descriptors. The FTC concedes that it issued guidance to the tobacco industry in 1966 that a "factual statement of the tar and nicotine content . . . of the mainstream smoke from a cigarette would not be" deceptive if substantiated by FTC Method testing. J.A. 478a; *see also* FTC Proposal, 73 Fed. Reg. at 40,351. A year later, the FTC, in response to inquiries regarding the permissible range of "factual statements of . . . tar and nicotine content" (J.A. 366a), issued a policy statement informing the industry that a "cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public." *Id.* at 369a. In accordance with this explicit authorization, PMUSA introduced Marlboro Lights in 1971 and marketed them as having "lowered tar and nicotine" in comparison with regular Marlboros when measured using the FTC Method. In a series of consent decrees, the FTC subsequently reaffirmed that descriptors may be used to communicate FTC Method results to consumers. *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).[7]

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[7] The fact that PMUSA did not disclose tar and nicotine yields on its cigarette packages does not detract from the preemptive force of those decrees. As this Court has recognized, the FTC lacks the authority to require the disclosure of tar and nicotine yields on cigarette packages. *See Reilly*, 533 U.S. at 542 ("In the preemption provision [of the Labeling Act], Congress unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in § 1333") (citing 15 U.S.C. § 1334(a)).

Apparently not content to let the regulatory record speak for itself, the FTC attempts in its recent *Federal Register* notice to reinterpret its guidance regarding "factual statement[s] of . . . tar and nicotine content" as applying only to numerical representations of FTC-rated tar and nicotine yields. FTC Proposal, 73 Fed. Reg. at 40,352 n.6. But no amount of *post hoc* rationalization by the FTC can alter the fact that descriptors—which have functioned as a shorthand reference to the results of testing under the FTC Method—unquestionably constitute "factual statements of tar and nicotine yields based on the [FTC Method]." *Id.* at 40,351. The FTC's policy statement defining the range of permissible "factual statements," the agency's annual reports to Congress defining the term "low tar" as 15.0 milligrams or less of tar (J.A. 587a n.8, 604 n.11), and the FTC's long-standing decision not to take enforcement action regarding descriptors used in conformity with the agency's guidance leave no doubt that descriptors were so understood by the agency for more than forty years.

The FTC's effort to rewrite this regulatory history may be attributable to the fact that the United States government is the plaintiff in a long-running RICO-fraud suit against the tobacco industry. *See United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *appeal docketed*, No. 06-5267 (D.C. Cir.). The FTC's comprehensive regulation of that industry for many years is obviously inconvenient for the government's litigating position in that case. In an apparent attempt to bolster the federal government's litigating position in that lawsuit, the FTC has prepared a revisionist history of its regulatory role. The Solicitor General's brief, likewise, appears to have been prepared with a keen eye

on preservation of the government's posture and position in the RICO action. The Court should view this litigation-driven strategy with more than the usual dose of skepticism. *Cf. Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 n.30 (1987).

Ultimately, respondents' claims constitute a direct attack on descriptors and the FTC Method. Because the FTC designated that methodology as the exclusive means of disseminating tar and nicotine information, compelled cigarette manufacturers to disclose those test results in all print advertising, and authorized the use of descriptors as a shorthand means of communicating the results to consumers, respondents' claims challenge the very foundation of the FTC's low-tar policy and are impliedly preempted by that policy. *Cf. Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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August 11, 2008

AMICUS CURIAE BRIEF

File Date:
June 18 2008

No. 07-562

In the Supreme Court of the United States

ALTRIA GROUP, INC., ET AL., PETITIONERS

v.

STEPHANIE GOOD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Federal Trade Commission has authority to prevent "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. 45(a)(2), and the Federal Trade Commission Act expressly provides that its remedies "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law," 15 U.S.C. 57b(e). The United States will address the following question:

Whether guidance statements and consent orders issued by the Federal Trade Commission impliedly preempt a state-law tort claim based on a cigarette manufacturer's allegedly fraudulent use of the descriptors "Light" and "Lowered Tar and Nicotine" to characterize its cigarettes when the manufacturer allegedly knew that the cigarettes, as smoked by a human smoker, would deliver as much tar and nicotine as so-called "full flavor" cigarettes.

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In the Supreme Court of the United States

No. 07-562

ALTRIA GROUP, INC., ET AL., PETITIONERS

v.

STEPHANIE GOOD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Petitioner contends, *inter alia*, that respondents' claims are impliedly preempted because they would frustrate the policies of the Federal Trade Commission (FTC) concerning the disclosure of cigarette tar and nicotine yields. That argument is grounded on petitioner's assertions that the FTC "has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results." Br. 2. The United States has a substantial interest in the proper understanding of the scope and effect of the FTC's actions. That is particularly true where, as here,

a party claims that the FTC's actions have the effect of displacing state law.[1]

STATEMENT

A. Statutory Background

1. The Federal Trade Commission Act (FTC Act), 15 U.S.C. 41, *et seq.*, empowers the FTC, as relevant here, to prevent the use of "unfair or deceptive acts or practices," 15 U.S.C. 45(a)(2). The Commission's jurisdiction is not limited to any particular segment of the economy, but instead extends, with limited exceptions, to all unfair or deceptive practices "in or affecting commerce," *ibid.*

The FTC Act authorizes the Commission to adopt two different types of rules: "interpretive rules and general statements of policy," 15 U.S.C. 57a(a)(1)(A), and "rules which define with specificity acts or practices which are unfair or deceptive acts or practices," 15 U.S.C. 57a(a)(1)(B). As to the latter category only, called "trade regulation rules," 16 C.F.R. 1.7, the FTC Act imposes detailed procedural requirements. See 15 U.S.C. 57a(b) and (c), 57b-3(a)(1). Violation of a trade regulation rule "constitute[s] an unfair or deceptive act or practice in violation of section 45(a)(1)," 15 U.S.C. 57a(d)(3), and can be enforced through a civil action, 15 U.S.C. 45(m)(1)(A) (civil penalties for knowing rule violations); 15 U.S.C. 57b(a)(1), (b) (action to redress injury to consumers). Interpretive rules, which do not undergo the same procedural process, are not enforceable in their own right. *Ibid.*; *FTC Operating Manual* (June 25, 2007) ch. 8.3.2. <http://www.ftc.gov/foia/adminstaffmanuals.shtm> (industry guide "does *not* have the force

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[1] Petitioner Altria Group, Inc., is the parent of petitioner Philip Morris USA Inc. References to "petitioner" are to Philip Morris.

or effect of law and is not legally binding on the Commission or on the public in an enforcement action").

2. Federal and state laws prohibiting unfair or deceptive practices operate in a complementary fashion. See 16 C.F.R. 0.17. The FTC Act has no express preemption provision, and, in the mid-1960s, the FTC encouraged States to adopt similar legislation. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 16-17 (2006) (Scheuerman). In 1970, the Commission, together with the Committee on Suggested State Legislation of the Council of State Governments, issued a model Unfair Trade Practices and Consumer Protection Law. *Ibid.* Within three years, 43 States had adopted some version of the FTC-proposed legislation. *Id.* at 17-18. The FTC works closely with its state counterparts in enforcing their complementary prohibitions on unfair or deceptive practices. When the FTC closes its own investigation without taking enforcement action, it may refer the matter to state or local officials "for such action as may be warranted under state or local law." *FTC Operating Manual*, ch. 14.2.3.9.

The FTC Act does not create a private right of action for injured consumers. *Holloway* v. *Bristol-Myers, Corp.*, 485 F.2d 986 (D.C. Cir. 1973). The model legislation prepared by the FTC did, however, include a private state-law cause of action for damages. Scheuerman, *supra*, at 17. And when, in 1975, Congress authorized the FTC to seek remedies for consumer injuries pursuant to 15 U.S.C. 57b, it specified that those remedies are "in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law," 15 U.S.C. 57b(e).

The Maine Unfair Trade Practices Act (MUTPA), Me. Rev. Stat. Ann. tit. 5, § 205-A *et seq.* (West 2002), declares, in words substantially identical to Section 45(a)(1), that "unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful," *id.* § 207 (West Supp. 2007). MUTPA provides that construction of the provision is to "be guided by the interpretations" given to the FTC Act by the FTC and federal courts. *Id.* § 207(1) (West Supp. 2007). MUTPA provides a private right of action for consumers injured by unfair or deceptive acts or practices. *Id.* § 213(1) (West 2002).

B. Regulatory Background

1. The Cambridge Filter Method

In the 1950s, the FTC became concerned that tobacco companies' advertising claims were misleading consumers. See *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). In 1955, the Commission published Cigarette Advertising Guides that advised manufacturers of the Commission's view that it would be unfair or deceptive to make representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence. See *Cigarette Advertising Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (2004). In 1966, following the Surgeon General's report on the cancer-causing properties of tar, J.A. 650a, the FTC sent letters to cigarette manufacturers stating that, "[o]n the basis of the facts now available," the Commission had determined that "a factual statement of the tar and nicotine content (expressed in milligrams)" would not be in violation of the 1955 Guides or the FTC Act. 6 Trade Reg. Rep. (CCH) ¶ 39,012.70. The Commission made clear, however, that

the new guidance applied only if (1) "no collateral representation[s] (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards," and (2) the statement was supported by "tests conducted in accordance with the Cambridge Filter Method." *Ibid.* The Cambridge Method uses a smoking machine that takes a 35 milliliter puff of two seconds' duration every 60 seconds until the cigarette is smoked to a specified butt length. J.A. 485a. The tar and nicotine collected by the machine are then weighed and measured. *Ibid.* On August 1, 1967, the FTC announced in a press release that it would begin its own testing program utilizing the Cambridge Method. *Ibid.*

In October 1967, the FTC responded to an inquiry by the National Association of Broadcasters (NAB) with a letter explaining "the Commission's current enforcement policy in regard to statements of, and representations relating to tar and nicotine content of cigarettes." J.A. 368a. The letter stated that, "*[a]s a general rule*, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized" Cambridge Method. *Ibid.* (emphasis added). The FTC emphasized, however, that there was "no reliable evidence that the health hazards of cigarette smoking are thereby eliminated or avoided," and "[h]ence, no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer.'" J.A. 369a. The Commission further advised that any inter-brand comparisons of tar

and nicotine content must be "factual, fair, and not misleading." *Ibid.*

In 1970, the Commission proposed a trade regulation rule that would require manufacturers to disclose tar and nicotine yields as determined by the Cambridge Method. 35 Fed. Reg. 12,671 (1970). In response, petitioner and other leading cigarette manufacturers submitted a "voluntary program" in which they agreed "to disclose 'tar' and nicotine content in cigarette advertising." J.A. 899a-900a. That private agreement prompted the FTC to suspend indefinitely the rulemaking proceedings, 36 Fed. Reg. 784 (1971), which were never reinstituted.

2. Deceptive use of Cambridge Method results that do not correspond to relative yields to human smokers

When the FTC issued its guidance in 1966 indicating that it would not regard as deceptive factual statements of tar and nicotine content determined according to the Cambridge Method, it did so, it later explained, on the understanding that such disclosures would "provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62 Fed. Reg. 48,158 (1997). The FTC recognized that "[n]o two human smokers smoke in the same way"; that "[s]ome take long puffs (or draws); some take short puffs," and that such "variation affects the tar and nicotine quantity in the smoke generated." J.A. 487a (8/1/1967 press release). Indeed, the FTC noted, smoking behavior "varies with the same individual under different circumstances even within the same day," such as whether the smoker is talking, listening, reading a book, or watching television. *Ibid.*

Despite that variation, the FTC believed standardized test results could provide useful information to the consumer because it would indicate "whether he will get more [tar] from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." J.A. 607a-608a (statement to FTC of Clyde L. Ogg, developer of Cambridge Method). Although the FTC understood that any benefit of shifting to a cigarette with a lower Cambridge Method rating could be "negated if this shift were accompanied by an increase in the number of cigarettes consumed, or in the length of each cigarette used," an ad-hoc group of scientists convened by the Surgeon General advised that "[t]here is evidence that, by-and-large, this does not occur; that the shift to low 'tar' and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption." J.A. 648a (enclosure to 1/10/1967 letter from HEW Secretary John Gardner to Senator Warren G. Magnuson).

In the ensuing years, the Commission made clear its view that advertising claims based on Cambridge Method results can be deceptive when those results do not reflect the relative tar yields of cigarette brands to actual human smokers. In the 1980s, the Commission determined, 48 Fed. Reg. 15,953, 15,954 (1983), and the District of Columbia Circuit affirmed, that advertising the Cambridge Method results for Barclay cigarettes was, "although literally true, inherently deceptive," *Brown & Williamson*, 778 F.2d at 41. Because human smokers compressed the cigarette's ventilation channels but the smoking machine did not, the Barclay "yield[ed] substantially more tar than other" equally rated cigarettes "when smoked by humans." *Id.* at 38; see *id.* at

42. In 1995, the Commission likewise found that American Tobacco's "represent[ation], directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands" was deceptive, despite the fact that it was an accurate ratio of Cambridge Method results, because, "[i]n truth and in fact, consumers will not necessarily get less tar" due to "such behavior as compensatory smoking." *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995).

3. The FTC's efforts to understand, and petitioner's efforts to conceal, smoker compensation

a. The Barclay inquiry raised a larger concern that had been noted but believed to be unsupported by the evidence when the FTC first considered the Cambridge Method: to what extent do smokers engage in "compensatory smoking behavior, including hole blocking," and "does behaviorally reduced air dilution affect the relative rankings of various brands"? 48 Fed. Reg. at 15,955. The Commission requested comments on those questions, *ibid.*, but petitioner failed to disclose its own studies demonstrating compensatory behavior, and instead sought to cast doubt on whether it occurred.

Whereas the FTC initially believed that, in most instances, the Cambridge Method results provided a meaningful basis for smokers to compare the amount of tar and nicotine they would receive from one brand versus another, see p. 7, *supra*, petitioner's undisclosed internal research showed otherwise. Although the FTC was unable to simulate "actual human smoking," J.A. 486a, petitioner had developed by 1974 a "Smoker Simulator" that allowed the company to "duplicate[] exactly the smoking behavior of a given individual with a given

cigaret[te]," J.A. 915a. A 1975 report for petitioner, based on the Smoker Simulator, confirmed that smoke intake did not, in fact, vary between "light" and "full flavor" cigarettes. J.A. 701a-704a. "[T]he dilution and the lower [resistance to draw] of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's," such that, "[i]n effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery." J.A. 704a.

The 1975 study confirmed what petitioner's Vice President of Corporate Research and Development reported as early as August 1967: "[T]he smoking machine data appear to be erroneous and misleading" because, unlike the machine, a "human smoker * * * appears to adjust to the diluted smoke" of a ventilated cigarette "by taking a larger puff so that he still gets about the same amount of equivalent undiluted smoke," thereby "defeating the purpose of dilution." See *United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 462 (D.D.C. 2006) (quoting 8/11/1967 memorandum).[2]

Although petitioner's 1975 research showed that smoking a cigarette "normally considered lower in delivery" did "not achieve any reduction in smoke intake," J.A. 704a, petitioner did not share that information with the FTC in response to its 1983 request for comments. Rather, petitioner urged that compensatory smoking behavior was not relevant. See J.A. 660a (C. Lee Peeler,

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[2] A 1972 internal memorandum of R.J. Reynolds similarly noted that a "low tar" cigarette "offers zero advantage to the smoker" who "will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine." *Philip Morris*, 449 F. Supp. 2d at 467.

National Cancer Inst., Monograph 7, *Historical Overview*) (*Historical Overview*). Petitioner further asserted, in connection with the Barclay investigation, that its own cigarettes were not subject to vent blockage, *Brown & Williamson*, 778 F.2d at 37, even though its internal research showed that such blockage did occur, see *Philip Morris*, 449 F. Supp. 2d at 462 (quoting 7/28/1967 memorandum stating that "some of [the ventilation holes] are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis").[3]

b. Decades after petitioner's own studies, as independent research into compensation behavior increased, health groups and others began to question whether Cambridge Method results mislead consumers about the relative risks of smoking cigarettes with various tar and nicotine ratings. J.A. 335a. Accordingly, in 1994, the FTC asked the National Cancer Institute (NCI) to convene a conference to consider the cigarette testing methodology and possible modifications or alternatives. 62 Fed. Reg. at 48,159. In 1997, after receiving the NCI's report, the FTC solicited public comment on the prevalence of vent blocking and compensation and on possible changes to the Cambridge Method. See *id.* at 48,159-48,162.

In response, Philip Morris and three other major tobacco companies submitted joint comments in 1998.

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[3] Petitioner similarly failed to inform the Commission of its evidence demonstrating vent blocking by smokers' lips in response to a 1977 inquiry whether "a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use." 43 Fed. Reg. 11,857 (1978) (indicating that no responses were received to the inquiry).

See *Comments of Philip Morris Inc., et al., On the Proposal Entitled FTC Cigarette Testing Methodology* (Joint Comments), FTC File No. P944509 (filed Feb. 5, 1998) <http://www.ftc.gov/foia/frequentrequests/TobaccoCoComments.pdf>. The Joint Comments opposed any change to the Cambridge Method and attacked the literature on compensation, without disclosing that petitioner's own research had long since confirmed the phenomenon. The Joint Comments described "compensatory smoking" as a "hypothesized" phenomenon as to which the "evidence * * * is highly equivocal," and asserted that "current knowledge about [compensatory] behaviors is too sparse to be usable for modeling purposes," Joint Comments 43-44. They argued that compensation was not a "sufficiently common or documented phenomenon that consumers should be alerted to its existence." *Id.* at 89.[4]

4. FTC proceedings regarding descriptors

The FTC also sought comments in 1997 on the use of cigarette "descriptors" such as "'low tar,' 'light,' 'medium,' 'extra light,' 'ultra light,' 'ultra low,' and 'ultima.'" 62 Fed. Reg. at 48,163. The Commission observed that "[t]here are no official definitions" of those terms and sought comments on whether "there [is] a need for official guidance with respect to the terms" as well as whether "the descriptors convey implied health claims." *Ibid.* In response, petitioner stated that it was "not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Joint Comments 94.

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[4] These contentions echoed comments petitioner submitted to the NCI in 1994 and to FDA in 1996. See, *e.g.*, *Philip Morris*, 449 F. Supp. 2d at 502, 504.

In 2002, petitioner filed a petition requesting the Commission "to promulgate rules governing * * * the use of descriptors, such as 'light' and 'ultra light[.]'" J.A. 1044a. The petition urged the Commission to require tobacco companies to disclose the "average tar and nicotine yields of cigarette brands"; define and "regulate the use of descriptors such as 'light' and 'ultra light'"; and mandate "the use of disclaimers with respect to the average tar yield and the health effects of 'low yield' cigarettes." J.A. 1043a-1044a, 1082a-1085a. That petition remains pending.

C. Proceedings Below

1. Respondents purchased Marlboro Lights and Cambridge Lights in Maine. J.A. 26a (First Amended Compl. ¶ 3). They allege that petitioner used the descriptor "Lights" on the packages of both brands, and the phrase "Lowered Tar and Nicotine" on the Marlboro Lights packages, in order to communicate to consumers that "light" brands were "less harmful or safer" than regular brands. J.A. 28a-29a (¶¶ 14-17). Respondents allege that petitioner knew, however, that consumers would receive the same delivery of tar and nicotine from "light" brands as from regular brands, see J.A. 30a-31a (¶¶ 25-29), and that the representations were thus false and misleading in violation of MUTPA. See J.A. 37a, 38a (¶¶ 53, 54(a)).

The district court entered summary judgment for petitioner, holding that respondents' claims were expressly preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.* (Labeling Act). Pet. App. 63a-106a.

2. The First Circuit vacated and remanded for further proceedings. Pet. App. 2a-62a. The panel rejected

petitioner's express preemption defense as inconsistent with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 528-529 (1992) (plurality). See Pet. App. 10a-37a. The court also rejected petitioner's implied preemption argument, explaining that "Lights" and "Lowered Tar and Nicotine" representations were not affirmatively authorized by the FTC. The court observed that the FTC has never promulgated a trade regulation rule addressing this issue. Pet. App. 46a. And, assuming *arguendo* that FTC actions short of formal rulemaking could be preemptive, the court determined that there would be no such preemption here. *Id.* at 50a-51a.

The court rejected petitioner's attempt to divine from various FTC actions a "policy" to permit manufacturers to claim that brands are "Lights" or have "Lowered Tar and Nicotine" as long as the brands measure less than 15 milligrams of tar under the Cambridge Method, regardless of their relative yield to actual smokers. Pet. App. 51a, 54a. The court observed that the FTC had cautioned against "collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) . . . , expressly or by implication, as to reduction or elimination of health hazards." *Id.* at 6a (quoting 3/25/1966 FTC Press Release). In addition, the court noted that the Commission has on occasion challenged representations about tar or nicotine content as deceptive even though they were supported by Cambridge Method testing. *Id.* at 51a (discussing *Brown & Williamson* and *In re American Tobacco Co.*). Accordingly, the court concluded that the FTC "has not invariably allowed tar and nicotine claims that are supported by the Cambridge Filter Method, but has recognized that such claims may nevertheless amount to unfair or decep-

tive acts or practices in certain circumstances." *Id.* at 52a.

SUMMARY OF ARGUMENT

Petitioner's implied preemption argument should be rejected because it is based on a mischaracterization of the scope and effect of the FTC's actions concerning cigarette advertising.

1. The premise of petitioner's implied preemption claim is that a state law tort claim based upon petitioner's allegedly deceptive use of descriptors such as "light" or "lowered tar and nicotine" would frustrate the purposes of the FTC's regulatory policies. The FTC disagrees; the Commission does not view respondents' lawsuit as undermining the FTC's policies in any way.

In the 1960s and 1970s, the FTC encouraged the adoption of complementary state enforcement mechanisms, including private rights of action for damages, which the FTC Act does not provide. The Commission's regulatory actions generally set a floor below which private conduct cannot sink, rather than a ceiling that precludes States from adopting more demanding standards.

With respect to cigarettes, in particular, none of the actions on which petitioner's preemption argument relies preempts state lawsuits such as this. In the FTC Act, Congress specifically provided that, while trade regulation rules constitute enforceable federal law, interpretive rules and general statements of policy instead assist industries in understanding how the Commission interprets the prohibitions in the FTC Act itself. Petitioner does not contend that the FTC Act directly preempts respondents' claims, and there is no applicable trade regulation rule. Thus, the Commission's industry guidance and similar statements interpreting the Act do

not have preemptive effect. Petitioner's reliance on two consent orders is also misplaced. Because petitioner was not a party to those agreements, they do not create enforceable legal rights or obligations with respect to it.

2. Petitioner contends (Br. 2) that the FTC "has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results." Neither assertion is correct.

Although the FTC indicated, in industry guidance, that it would not regard factual statements of a cigarette's tar and nicotine yields according to the Cambridge Method as *per se* violations of the FTC Act, the Commission did not *require* such disclosures. Nor has the Commission affirmatively *authorized* the use of descriptors such as "light" and "lowered tar and nicotine"—terms that, as petitioner recognizes, lack any official definition. Although two consent decrees to which petitioner was not a party provide that use of such descriptors by themselves would not violate specific provisions of those orders, the Commission never gave affirmative endorsement to such descriptors, much less to their deceptive use as alleged in respondents' complaint. To the contrary, the Commission's enforcement actions demonstrate that the fraudulent use of descriptors, with the intent to create the false impression that the cigarettes would yield less tar to human smokers than full-flavor cigarettes, violates the FTC Act's prohibition against unfair or deceptive acts or practices.

Nor, contrary to petitioner's argument, does the Labeling Act grant the FTC exclusive authority with respect to cigarette advertising. The source of the FTC's authority regarding unfair or deceptive cigarette adver-

tising is the same as its authority over all other advertising—the FTC Act. Indeed, the Labeling Act states explicitly that it does not "expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. 1336.

3. Petitioner failed for decades to disclose to the FTC its internal research indicating that, due to compensatory behaviors, smokers receive as much tar from cigarettes with lower Cambridge Method ratings than so-called "full-flavor" cigarettes. After hiding its own research for years, despite the Commission's requests for information in light of growing concerns about compensation, petitioner now claims that the FTC has known about compensation for years and affirmatively decided that it does not warrant any change in the Cambridge Method. In fact, the absence of definitive action on that question to date reflects only the Commission's ongoing consideration of the issue. Its inaction (particularly insofar as it is based on petitioner's own failure to provide information to the FTC) does not constitute even a definitive interpretation of the federal Act, much less one that would bar application of state law.

ARGUMENT

RESPONDENTS' CLAIMS ARE NOT IMPLIEDLY PREEMPTED BY THE FEDERAL TRADE COMMISSION'S ACTIONS CONCERNING CIGARETTE ADVERTISING

A. Respondents' Claims Do Not Conflict With Any Policy Of The Commission, Much Less One Having The Preemptive Force Of Federal Law

1. The FTC Act does not expressly preempt state-law causes of action for unfair trade practices. Indeed, with respect to injured consumers, the Act's savings

clause expressly provides that the remedies set out in 15 U.S.C. 57b are "in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. 57b(c). Of course, even in the absence of an express preemption clause, state law may still be preempted under principles of conflict preemption. See, *e.g.*, *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987). Thus, as the courts of appeals have recognized, state law concerning unfair or deceptive trade practices would be displaced insofar as it conflicts with or stands as an obstacle to accomplishment of policies embodied in Commission action having the force of law. See, *e.g.*, *General Motors Corp.* v. *Abrams*, 897 F.2d 34, 39-40 (2d Cir. 1990); *American Fin. Servs. Ass'n* v. *FTC*, 767 F.2d 957, 989-990 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986); *Katharine Gibbs Sch. (Inc.)* v. *FTC*, 612 F.2d 658, 667 (2d Cir. 1979).

Yet, while conflict preemption is possible where the FTC has taken regulatory action, it is notable that neither petitioner nor its amici cite a single judicial decision holding that FTC action with respect to unfair or deceptive practices—in any sphere, not just as to cigarettes—did in fact preempt a particular state law. See *General Motors*, 897 F.2d at 41, 43 (State's more stringent Lemon Law did not frustrate FTC consent order); *American Fin. Servs.*, 767 F.2d at 989-990 (noting that FTC regulation prohibiting practices that certain States authorized did not present preemption question); *Katharine Gibbs*, 612 F.2d at 667 (invalidating FTC regula-

tion asserting broader preemptive effect than Supremacy Clause provides).[5]

The absence of cases finding conflict preemption reflects the cooperative relationship between the Commission and state consumer protection agencies noted above. See p. 3, *supra*. It also reflects the nature of the statutory provisions at issue. The fact that the FTC might not regard certain conduct as unfair or deceptive under the federal statute does not mean that it would necessarily undermine the FTC's policy objectives for a state regulator to take action against the same conduct under the State's own law. Indeed, when the FTC closes its own investigation without taking enforcement action, it may refer the matter to state or local officials "for such action as may be warranted under state or local law." *FTC Operating Manual*, ch. 14.2.3.1 (Illustration 1, model transmittal memorandum). Unlike those contexts in which a federal agency acts as a gatekeeper to the market and its approvals, embodying its own cost-benefit analysis, would necessarily be frustrated by a state agency or jury weighing costs and benefits differently, see, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (FDA's premarket approval of medical de-

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[5] The National Association of Manufacturers (NAM) brief cites (at 15) only an unpublished state administrative decision. The Ex-FTC Staff brief (at 32-33) cites *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), and *Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005), cert. denied, 127 S. Ct. 685 (2006), but neither case concerned implied preemption. *Brown* held the plaintiff's claims expressly preempted by the Labeling Act, 479 F.3d at 386, and *Price* concerned whether "as a matter of state law" FTC policies satisfied an exception from liability for conduct authorized by "agency policy and practice," 848 N.E.2d at 38. The court of appeals in this case rejected a similar defense under MUTPA, see Pet. App. 55a-61a, and that holding is not before this Court.

vices), the FTC's regulatory actions are more likely to set a floor below which trade practices cannot fall, and not a ceiling that precludes a more demanding state standard. Cf. *Royal Oil Corp.* v. *FTC*, 262 F.2d 741, 743 (4th Cir. 1959) (retailer of used oil could label product both as "reprocessed," as required by state law, and "previously used," as required by FTC); *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000) ("where federal law creates only a floor," there is no conflict preemption). As we demonstrate below, see pp. 21-31, the policy statements, consent orders, and other actions of the Commission relied upon by petitioner fail to establish that petitioner's alleged conduct was not deceptive under the FTC Act, much less that the Commission's accomplishment of that Act's objectives would be frustrated by a State declaring that conduct deceptive.

2. Petitioner's implied preemption argument also fails because, apart from two consent orders to which petitioner was not a party, the types of Commission actions on which they rely do not have the force of law. The Supremacy Clause makes the "Constitution, and the Laws of the United States" supreme. U.S. Const. Art. VI, Cl. 2. Accordingly, "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Federal agency action having the force of law may preempt inconsistent state requirements, just as a federal statute may. *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). State law may also be preempted by a federal agency's "inaction joined with action." *Isla Petroleum*, 485 U.S. at 503; see, *e.g.*, *Ray* v. *Atlantic Richfield*, 435 U.S. 151, 174-175, 178

(1978). But, at least as a general matter, "Executive Branch actions" that "express federal policy but lack the force of law" do not preempt state law. *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329-330 (1994) (dormant Foreign Commerce Clause).

It is particularly clear, in light of the careful distinctions that the FTC Act and the Commission's regulations draw between FTC actions that have the force of law and those that do not, that the types of agency action relied upon by petitioner in this case do not carry preemptive effect. As noted above, see pp. 2-3, *supra*, the FTC Act draws a clear distinction between "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices," and trade regulation rules. 15 U.S.C. 57a(a)(1)(A) and (B). Only trade regulation rules are subject to the Act's extensive procedural requirements, 15 U.S.C. 57a(b), 57b-3(a)(1), and only violations of such rules are declared violations of law, 15 U.S.C. 57a(d)(3), subject to judicial actions for civil penalties or to remedy injuries to consumers, see 15 U.S.C. 45(m)(1)(A), 57b(a)(1). The statute specifically denies enforcement under those provisions to an "interpretive rule." *Ibid.* See *FTC Operating Manual*, ch. 8.3.2 (industry "guide does *not* have the force or effect of law and is not legally binding on the Commission or on the public"). Thus, where the FTC has issued an interpretive rule, any enforcement action must be based on an alleged violation of the substantive provision of the Act itself (or a duly adopted trade regulation rule), as construed by the interpretive rule. Because the FTC Act itself has no applicable preemptive effect in this setting, and there is no trade regulation rule, it follows that industry guides and similar interpretive materials issued by the Commission have no preemptive effect.

The FTC Act similarly distinguishes between fully litigated cease and desist orders and orders entered into by consent. Although fully litigated cease and desist orders that establish that conduct is unfair or deceptive can, in limited circumstances, be enforced against persons who were not parties to the original order, consent orders are expressly excluded from such enforcement. 15 U.S.C. 45(m)(1)(B).[6]

In light of the carefully calibrated statutory scheme delineating the enforceability of FTC rules and orders, only trade regulation rules, litigated cease and desist orders, and consent orders (with respect to the parties subject to them) qualify as federal "law" that can preempt conflicting state law pursuant to the Supremacy Clause. Because, as we discuss further below, none of the FTC actions on which petitioner relies falls within any of those categories, petitioner's implied preemption argument must be rejected on that ground alone.

B. Petitioner Mischaracterizes The Scope And Effect Of The FTC Actions That It Claims Are Preemptive

Petitioner's implied preemption argument rests on the twin assertions that the FTC "has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as

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[6] A litigated order may be enforced against a non-party only if the person knew the act or practice was unfair or deceptive, 15 U.S.C. 45(m)(1)(B), and the person would be entitled to de novo determination by the court of disputed questions of fact as well as review of the Commission's legal determination in the earlier proceeding, 15 U.S.C. 45(m)(2). All orders, including consent orders, are enforceable against the party named in the order, 15 U.S.C. 45(*l*), 57b(a)(2).

shorthand references to those numerical test results." Br. 2; see also *id.* at 47, 49. Neither assertion is correct.

1. The FTC has not legally "required" tobacco companies to disclose tar and nicotine yields under the Cambridge Method. In support of its contrary contention, petitioner relies on industry guidance from 1966 and 1967, a voluntary agreement among industry members in 1970, a 1978 advisory opinion, and a 1983 court action. Br. 5-10, 47, 50. In none of those instances did the Commission "require" petitioner to disclose tar and nicotine yields, and, as the Commission's own enforcement actions demonstrate—and as common sense dictates—none of those actions remotely suggests an FTC policy favoring *deceptive* use of descriptors in cigarette advertising.

a. *1966 industry guidance.* The Commission's 1966 letter to cigarette manufacturers informed manufacturers that the FTC would not view "a factual statement of the tar and nicotine content (expressed in milligrams)" based on the Cambridge Method as violating the FTC Act or the 1955 industry guidance. J.A. 478a-479a. As a legal matter, such industry guidance "does *not* have the force or effect of law and is not legally binding." *FTC Operating Manual*, ch. 8.3.2. And as a factual matter, it did not "require" any action on the part of petitioner, but merely indicated that, based on "pertinent evidence available" at that time, the FTC would not regard a truthful factual statement of Cambridge Method results as "*per se* false and misleading." J.A. 392a-393a (4/11/1966 letter from FTC Chair Paul Rand Dixon to Senator Warren G. Magnuson). Moreover, the guidance made clear that it applied only if "no collateral representation[s] (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the

public) are made, expressly or by implication, as to reduction or elimination of health hazards." *Cigarette Advertising Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012.70 (Oct. 6, 2004). The complaint in this action is not based on petitioner's disclosure of Cambridge Method test results, but on allegations that petitioner fraudulently used descriptors such as "light" with the intent to convey that the cigarettes would yield less tar to human smokers than full-flavor cigarettes, and that petitioner knew that message to be untrue. See J.A. 30a-31a (First Amended Compl. ¶¶ 25-29).

The Commission's 1967 letter to the NAB (J.A. 366a-370a), which addressed statements of and representations about tar and nicotine content, likewise did not have the effect of law, nor did it "require" disclosures by petitioner. Although the letter stated that, "[a]s a general rule, *the Commission will not challenge* such statements or representations where they are shown to be accurate and fully substantiated" by the Cambridge Method, J.A. 368a (emphasis added), the letter did not "require" such disclosures. Moreover, the letter stressed that "no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer,'" and that any inter-brand comparisons "should be factual, fair, and not misleading." J.A. 369a. The conduct alleged by respondents—that petitioner's use of descriptors constituted fraudulent comparisons because petitioner knew its "light" cigarettes would not yield less tar to actual human smokers—is thus not covered by the guidance.

b. *1970 voluntary agreement.* Although in 1970 the FTC initiated proceedings for a trade regulation rule to require disclosure of tar and nicotine yields, those

rulemaking proceedings were suspended indefinitely after leading tobacco companies, including petitioner, agreed among themselves to provide such information in cigarette advertisements. See *Brown & Williamson*, 778 F.2d at 37. The FTC was not a party to that agreement. Rather, as the tobacco companies stressed six times in their two-page letter to the FTC, it was a "voluntary" program that was "in lieu of any formal Trade Regulation Rule." J.A. 899a-900a, 905a. Indeed, they informed the FTC that any enforcement mechanism would be "completely unacceptable to their member companies." J.A. 326a. As recently as 2002, petitioner's request for rulemaking reaffirmed that disclosures of Cambridge Method data under the 1970 program are "voluntarily" made. J.A. 1046a. The FTC likewise confirmed in 1987 congressional testimony that tobacco companies "are not required by law or regulation to use this FTC method." J.A. 946a. Moreover, the 1970 agreement concerned only federal statements of tar and nicotine yields, not descriptors, which are the subject of this suit.

c. *1978 advisory opinion.* An advisory letter issued by the Commission does not bind the recipient at all, but merely advises the recipient of the Commission's understanding of the FTC Act as applied to facts as represented by the recipient. See 16 C.F.R. 1.2(a), 1.3(b). In particular, the one-page 1978 opinion on which petitioner relies (Br. 10) did not "require" Lorillard to publish tar and nicotine results in its advertising at all; it advised Lorillard that, in the Commission's view, using figures other than from the Cambridge Method would lead to "consumer confusion" because it would depart from the measure consumers were accustomed to seeing. *Advisory Opinion Letter*, 92 F.T.C. 1035 (1978); see

Brown & Williamson, 778 F.2d at 43. But stating a view that it would be confusing to use results from a test different than the one consumers expected is not the same as "requiring" disclosure of standardized test results.

d. *1983 court action.* The 1983 court proceeding concerning Barclay cigarettes on which petitioner also relies (at 50-51) actually contradicts its argument. Far from "requiring" disclosure of Cambridge Method test results, the Commission sought to *enjoin* reference to those results because it was, in context, deceptive. The Commission challenged a "literally true" statement of Cambridge Method results for Barclay cigarettes as deceptive because the cigarette "yields substantially more tar * * * when smoked by humans" than the comparison of machine results would indicate. *Brown & Williamson*, 778 F.2d at 38, 41.

2. Petitioner's claim that the FTC "authorized" the use of descriptors such as "light" and "lowered tar and nicotine" fares no better. As support for that assertion, petitioner cites the 1967 NAB guidance letter and two consent orders. See Br. 12-13, 47 (citing *In re American Brands, Inc.*, 79 F.T.C. 255 (1971), and *In re American Tobacco Co.*, 119 F.T.C. 3 (1995)). As we have already discussed, the 1967 guidance to the NAB does not constitute federal law that can have preemptive effect, and, in any event, it expressly warned against brand comparisons that were "misleading" or otherwise not "fair." J.A. 369a.

Although an FTC consent order does constitute federal law that is enforceable against the parties to it, and that would preempt conflicting state law, see *General Motors*, 897 F.2d at 39, "a consent order is binding only on the parties to the agreement," *id.* at 36, and only such a party could assert a preemption defense based on the

order's requirements, see *id.* at 42. Because petitioner was not a party to the consent orders it cites, its reliance on those orders is misplaced. In any event, even with respect to the parties, the consent orders addressed advertising, not the statements on cigarette packages at issue in this case, and they did not affirmatively "authorize" the use of descriptors in the deceptive manner alleged by the complaint—much less do so in a way that would immunize their private choice to do so from all liability under state law. Compare *Geier*, 529 U.S. at 874-886.[7]

a. The 1971 consent order arose out of a charge that American Brands was advertising as low in tar brands that had higher-than-average tar ratings under the Cambridge Method. See *In re American Brands, Inc.*, *supra*. The order required American Brands to stop "advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of * * * the 'tar' and nicotine content" as measured under the Cambridge Method. 79 F.T.C. at 258. That decree enjoined, rather than authorized, conduct. And, as the Commission's later enforcement proceedings against the Barclay and Carlton advertisements demonstrate, the 1971 consent order cannot be read to authorize the use of such descriptors when, as respondents allege, the message thereby conveyed would be false or misleading. Moreover, as the court of appeals stressed, on the order's own terms, the

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[7] The Commission has included a provision in a consent decree with cigar manufacturers that expressly bars States from requiring different health warnings. See *In re Havatampa, Inc.*, No. C-3965 (F.T.C. Aug. 18, 2000) <http://www.ftc.gov/os/2000/08/havatampado.htm>.

conduct at issue in this case falls outside the scope of the "unless" clause, because "Philip Morris uses the terms 'light' and 'Lowered Tar and Nicotine' on the packages of Marlboro and Cambridge Lights *without* mentioning their tar and nicotine ratings." Pet. App. 57a.[8]

b. In the 1995 consent order, the Commission found that American Tobacco's "represent[ation], directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands" was deceptive, even though it was based on the results of Cambridge Method testing, because, "[i]n truth and in fact, consumers will not necessarily get less tar" due to "such behavior as compensatory smoking." *In re American Tobacco Company*, 119 F.T.C. at 4. The consent order required American to cease making such representations, directly or indirectly, "through the presentation of the tar ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand" *Id.* at 10. A proviso to the order indicated that "presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's

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[8] Petitioner seeks (at 52-53) to draw a comparison between FDA drug approval, which has preemptive effect, see U.S. Br. at 17-28, *Wyeth* v. *Levine*, No. 06-1249 (June 2, 2008), and the consent order's asserted "authorization" of descriptors. But the two situations are fundamentally different. There is no question that FDA "approval" has the force of federal law, because without that approval, it is a violation of federal law to introduce a new drug into interstate commerce. See 21 U.S.C. 355(a). By contrast, petitioner cannot seriously contend that the consent order with American Brands, which enjoined certain conduct, constituted comparable regulatory approval of descriptors that were otherwise unlawful.

brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and *shall not, in and of itself, be deemed to violate paragraph I or II of this order.*" *Id.* at 11 (emphasis added). That proviso did not authorize American to use the cited descriptors; it simply indicated that the presentation of Cambridge Method ratings, whether or not accompanied by the descriptors, would not "in and of itself" be deemed to violate the consent order. In any event, the proviso does not apply here for the independent reason that the cigarette package labels at issue in this case do not contain any Cambridge Method ratings. See Pet. App. 57a.

3. As the court of appeals observed, the "only policy" to emerge from the FTC's enforcement actions "is that certain tar and nicotine claims consistent with the Cambridge Filter Method test results can still amount to unfair or deceptive acts or practices." Pet. App. 52a-53a. In the Carlton case, it was misleading to imply that the ratio of two cigarettes' Cambridge Method ratings directly correlated to the ratio of human tar intake. In the Barclay case, the FTC charged that advertising the Cambridge Method results themselves was misleading because it did not correlate to human exposure. *Brown & Williamson*, 778 F.2d at 37-39.

Those enforcement proceedings demonstrate that if, due to design features (Barclay) or other compensatory smoking behavior (Carlton), Cambridge Method results do not offer a valid basis for comparing the relative tar yields of cigarettes "when smoked by humans," 778 F.2d at 38, implied representations about human exposure based on Cambridge Method results become deceptive. And they are fraudulent if done intentionally, even though they were "literally true" insofar as they state

the tar yield to the smoking machine. See Restatement (Second) of Torts § 527(a) (1977) (where maker of representation knows it is capable of both true and false interpretations, and makes it "with the intention that it be understood in the sense in which it is false," it is fraudulent); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924) ("Deception may result from the use of statements not technically false or which may be literally true."). Thus, the Commission's enforcement actions do not even evidence a policy of "authorizing" all technically true statements of Cambridge Method results, much less use of descriptors that rely on such results to imply false health benefits to smokers.

Finally, petitioner's assertion that the Commission has adopted a definitive policy under the FTC Act concerning descriptors is contrary to both the stated position of the Commission and petitioner's own prior admissions. As the FTC stated in its 1997 request for public comment, there are "*no official definitions*" for descriptive terms such as "light" and "low tar." 62 Fed. Reg. at 48,163 (emphasis added). Accordingly, the Commission asked whether there is "a need for official guidance with respect to the terms used in marketing lower rated cigarettes?" *Ibid.* In response, petitioner stated:

> The manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes.

Joint Comments 94. In 2002, petitioner filed a petition with the FTC, urging the Commission "to promulgate rules governing * * * the use of descriptors, such as 'light' and 'ultra light.'" J.A. 1043a. Having agreed in 1998 that its descriptors are unregulated, and having later urged the Commission to regulate them—a request

that has not been acted upon—petitioner cannot now contend that the descriptors actually received affirmative "authorization" from the FTC decades ago.

4. Petitioner seeks further support for its implied preemption argument from the Labeling Act, urging that it "granted the FTC the authority to regulate health-related statements in cigarette advertising and expressly preempted the States' overlapping authority." Br. 56. That argument is at odds with the plain terms and evolution of the statute.

The Labeling Act provides:

> Nothing in this chapter [other than the grant of authority concerning the rotation of Surgeon General warnings] shall be construed to limit, restrict, *expand, or otherwise affect* the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

15 U.S.C. 1336 (emphasis added). By its plain text, the Labeling Act is not the *source* of the FTC's authority to prevent deceptive cigarette advertising; that source is the FTC Act. Nor does the Labeling Act "expand" that authority.

Congress did, in 1969, limit the specific prohibition on legal requirements concerning cigarette advertising "based on smoking and health" to requirements "imposed under state law." See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 88. While that amendment removed a limitation on federal officers and agencies, including the Attorney General and the FTC, the amended provision, which does not even refer to federal agencies, does not "*grant*[]" any authority by them, and certainly does not do so with respect to the FTC exclusively. To the contrary, the

1969 amendments reaffirmed that the Labeling Act does not "expand, or otherwise affect" the FTC's authority with respect to cigarette advertising. 15 U.S.C. 1336.

Given the breadth of the FTC's responsibilities, it is unsurprising that Congress has not chosen to give the FTC alone responsibility for policing the cigarette industry's marketing practices. The FTC's jurisdiction is not narrowly trained on that industry; it extends to unfair or deceptive acts or practices "in or affecting commerce." 15 U.S.C. 45(a)(2). The FTC is thus unlike other agencies that may have mandates to oversee particular practices in particular industries. Compare, *e.g.*, *Riegel*, 128 S. Ct. at 1004-1005 (addressing FDA's responsibilities to evaluate medical devices for safety and efficacy). Nor does the FTC have the resources to oversee all relevant practices of the cigarette industry. Indeed, when it was proposed in Congress in 1988 that the FTC be required to test the constituent parts of cigarette smoke, the FTC objected, explaining that the Commission "is a law enforcement agency composed of attorneys and economists," "not a scientific body," and that it had closed its cigarette testing laboratory because the operation "was incompatible with the expertise and overall responsibilities of the agency." C.A. App. 301, Exh. 203.

C. The FTC's Failure To Modify the Cambridge Method Does Not Support A Finding Of Preemption

Petitioner also seeks support for its implied preemption claim from the FTC's failure to modify the Cambridge Method. It urges that the FTC "has been well aware of the FTC Method's inherent inability to replicate the variability of human smoking behavior and has repeatedly reevaluated the propriety of this testing procedure," yet has "retained the testing method for four

decades." Br. 47. Because, as we have demonstrated, the Commission's guidance concerning the Cambridge Method did not have preemptive effect, the Commission's failure to modify that guidance does not have preemptive force. In any event, petitioner's characterization of the Commission's conduct is inaccurate.

Petitioner contends that the Commission has been aware of smokers' tendency "to smoke 'light' cigarettes more intensely to compensate for lower nicotine yields" since the 1980s. Br. 10-11. Petitioner fails to note that, as late as 1998, petitioner represented to the Commission, which was seeking information on the issue, that "compensatory smoking" was a "hypothesized" and "weakly documented phenomenon" as to which the "evidence * * * is highly equivocal," and that "[t]he evidence that vent-blocking occurs is extremely limited and inconclusive." Joint Comments 43-44, 60, 82.[9] We now know that petitioner was well aware of the phenomena for decades. See pp. 8-9, *supra*. Petitioner cannot take advantage of the fact that it concealed its knowledge from the Commission by now asserting that the Commission knew all along that petitioner's denials regarding compensation were false. Because "all the relevant facts" were not "fully, completely, and accurately presented to the Commission," petitioner cannot take advantage of guidance the Commission gave (or refrained from rescinding) on that subject. 16 C.F.R. 1.3(b) (advi-

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[9] Petitioner's reference to compensation for "lower nicotine yields," Br. 11, reflects implicit recognition that it is the smoker's addiction to nicotine that drives compensatory behavior. But petitioner has expended considerable efforts to sow doubt about that fact as well. See *Philip Morris*, 449 F. Supp. at 272-274 (citing statements from 1994 through 2002).

sory opinions valid only if all relevant facts were disclosed).

Although, as petitioner notes, the Commission began enquiring about compensation in the early 1980s, the fact that it has not, to date, rescinded the 1966 guidance or modified the test method reflects the FTC's ongoing consideration of the issue, rather than a definitive and binding determination by the Commission that petitioner's use of descriptors is not deceptive, despite compensation behavior. For example, no definitive action was taken after the 1977 investigation due to an "absence of information." J.A. 655a (*Historical Overview*) (quoting 43 Fed. Reg. at 11,857). Likewise, a final determination based on the 1983 study "would have been premature" in light of the information then available. J.A. 661a. And the information-gathering process—which began with the convening of the NCI conference in 1994, proceeded to solicitation of comments in 1997, and continues with the study by the Department of Health and Human Services—has not been completed. The failure to take definitive action in such circumstances does not constitute a definitive and binding policy concerning the interpretation and enforcement of the federal Act, much less one that would bar the application of state law. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 60-62, 66-68 (2002) (failure to adopt propeller guard regulation for recreational boats, which had been under consideration for fourteen years, did not "convey an 'authoritative' message of a federal policy against propeller guards" but only that "available data did not meet the [statute's] 'stringent' criteria for federal regulation").

CONCLUSION

Petitioner's implied preemption claim should be rejected.

Respectfully submitted.

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JUNE 2008

AMICUS CURIAE BRIEF

FILED
JUN 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

19

No. 07-562

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC. AND PHILLIP MORRIS USA, INC.,
Petitioners,

v.

STEPHANIE GOOD, LORI A. SPELLMAN, AND ALLAIN L. THIBODEAU,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMERICAN MEDICAL ASSOCIATION, AMERICAN CANCER SOCIETY, INC., CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN LEGACY FOUNDATION, AMERICAN COLLEGE OF CHEST PHYSICIANS, ONCOLOGY NURSING SOCIETY, AND AMERICAN ACADEMY OF PEDIATRICS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (July 27, 1965) 22

Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970).....4

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968.....21, 35

Regulations

35 Fed. Reg. 12,671 (1970).....12

36 Fed. Reg. 784 (1971).....13

62 Fed. Reg. 48,158 (1997).....13, 20

62 Fed. Reg. 48,163 20

Administrative Materials

Centers for Disease Control and Prevention, *Smoking & Tobacco Use: Fact Sheet, Adult Cigarette Smoking in the United*

States: Current Estimates (updated Nov. 2007), http://www.cdc.gov/tobacco/data_statistics/factsheets/adult_cig_smoking.htm 32

Centers for Disease Control, *Cigarette Smoking-Attributable Morbidity – U.S., 2000*, MMWR Vol. 52(35) (Sept. 5, 2003) 32

Centers for Disease Control, *Fact Sheet: Tobacco Brand Preferences* (updated Apr. 2007), http://www.cdc.gov/tobacco/data_statistics/Factsheets/tobacco_brand_pref.htm 33

Centers for Disease Control, *Smoking Data Highlights—2006*, http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/2006.htm 33, 34

FTC, *FTC Cigarette Report For 2004 and 2005* (2007), *avaialble at* http://www.ftc.gov/reports/tobacco/2007cigarette2004-2005.pdf 15, 25

National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* (2001) ..... *passim*

U.S. Department of Health and Human Services, *The Health Consequences of Smoking, 2004* 31, 32

Other Authorities

American Lung Association, *Estimated Prevalence and Incidence of Lung Disease By Lung Association Territory*

(May 2008) 33

Campaign for Tobacco-Free Kids, The Toll of Tobacco in Maine, http://www.tobaccofreekids.org/reports/settlements/toll.php?StateID=ME 25, 26, 32, 33

Fagan Memorandum to Helmut Wakcham, Philip Morris Principal Scientist, *"Moral Issue on FTC Tar"* (Mar. 7, 1974) 19

Glantz, *et. al.*, *The Cigarette Papers*, Berkeley: University of California Press (1998), *available at* http://www.escholarship.org/editions/view?docId=ft8489p25j&chunk.id=d0e3989&toc.id=d0e3989&brand=eschol 11

Kornegay, President & Executive Director, The Tobacco Institute, Inc., Letter to FTC (Oct. 23, 1970) 13

Laurene, et al., Philip Morris Smoking Behavior Study Labelled SEX-1, Document No. 504208317-8360 (Mar. 17, 1971), http://tobaccodocuments.org/bliley_rjr/504208317-8360.html 11

Missouri Proxy Statement, *DEF 14A SEC Filing, filed by* Altria Group Inc. (Mar. 15, 2004), *available at* http://sec.edgar-online.com/2004/03/15/0001193125-04-042244/Section18.asp. 22

Partnership for a Tobacco-Free Maine, *About PTM: Facts*, Maine Department of Health and Human Services, Maine Center for Disease Control and Prevention, http://www.tobaccofreemaine.org/facts.html 26, 32, 33

Seligman, *Letter to CTR File, Subject: Meeting in New York – November 15, 1978*, Document No. 1003718428-8432 (1978), *available at* http://tobaccodocuments.org/landman/1003718428-8432.html 7

Smoak, Jr., M.D., Press Release, American Medical Association, *AMA Commends Report Exposing Dangers of Light Cigarettes* (Nov. 27, 2001) 35

Some Unexpected Observations on Tar and Nicotine and Smoker Behavior (Mar. 1, 1974 19

Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8*, BRITISH MED. J. 328:72 (2004) 31

World Health Organization Regional Office for Europe, *Regulation of Tobacco Products: An Update on European Developments 1999-2001* (Oct. 2001), http://www.euro.who.int/document/e74524.pdf 37

World Health Organization, *Framework Convention on Tobacco Control* (2003), http://www.who.int/tobacco/framework/download/en/index.html 37

INTERESTS OF *AMICI CURIAE*

Amici Curiae are non-profit public health organizations, health professionals, and medical societies that for decades have confronted the devastating health and economic consequences of tobacco use. Hence, *Amici* are especially qualified to assist this court in comprehending the gravity of Philip Morris' actions in deceptively producing and branding its so-called "Light" and "Lowered Tar and Nicotine" cigarettes, Marlboro Lights and Cambridge Lights.[1]

Amici,[2] **the American Medical Association, American Cancer Society, Inc., Campaign for Tobacco-Free Kids, American Heart Association, American Lung Association, American Public Health Association, American Legacy Foundation, American College of Chest Physicians, Oncology Nursing Society, and American Academy of Pediatrics**, share a common interest of ensuring that the tobacco industry is effectively restrained from continuing the type of misconduct that is at issue in this action. *Amici* seek to educate the American public regarding the widely-held misconception that smoking "light" or "lowered tar and nicotine" cigarettes is a safer alternative to smoking regular cigarettes. To this day, through their marketing and branding practices, Philip Morris and

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[1] Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than the *Amici Curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

[2] See Appendix "A" for Statements of Interest of *Amici Curiae*.

other companies continue to perpetuate this misconception in order to maintain and expand their consumer base.

Amici collectively address this Court in order to place the court of appeal's decision in its broader context, emphasizing that this is a case about fraud and deception and not about a failure to adequately warn. The consequences of the fraud and deception committed by Philip Morris are both broad and profound, and far beyond the regulatory purview of either the Federal Trade Commission or existing federal legislation. Philip Morris has not only committed a fraud upon the consumers of its "Lights" products, but the consequences of that fraud for the physical and economic health of the citizens of Maine and other states have been devastating, and will reverberate for decades to come. *Amici* urge this Court to be mindful of these real-world consequences of Philip Morris' fraud, and to understand that actions, such as the one brought by Petitioners here, are needed to redress the long-term damage caused by Philip Morris over the past four decades.

SUMMARY OF ARGUMENT

Philip Morris' "light" cigarettes were marketed in a way that led consumers to believe that they were safer than regular cigarettes. This deception was part of a carefully orchestrated and controlled plan initiated by Philip Morris and the other tobacco companies who followed Philip Morris' lead. That plan was designed to (and did) enable Philip Morris, along with the rest of the tobacco industry, to maintain and even increase its cigarette sales—and profits—by offering cigarettes marketed to provide "health reassurance" when compared with "regular" tobacco products. Philip

Morris developed and marketed Marlboro Lights cigarettes to create an "illusion" of a less dangerous cigarette when compared to regular Marlboro "Reds" even though there was no basis for the representation. At no time have Marlboro Lights or Cambridge Lights offered any actual reduction in risk when compared with their regular counterparts.

As the National Cancer Institute's Monograph 13[3] documents, consumers believed and acted upon Philip Morris' message: "advertising for [light] products led consumers to perceive . . . low-tar delivery products as safer alternatives to regular cigarettes." J.A.830a. At the same time, cigarette industry documents now demonstrate Philip Morris knew the opposite to be true. From the initiation of "lights" as a cigarette marketing device, "the cigarette manufacturers recognized the inherent deception of advertising that offered cigarettes as 'Lights.'" J.A.897a-898a.

Philip Morris first marketed Marlboro Lights cigarettes in 1971, at the time inventing the word "lights" as a descriptor for its cigarettes. Since their inception, Philip Morris has of its own volition deliberately marketed Marlboro Lights, and later Cambridge Lights, as either "lights" or "lowered tar and nicotine" in a manner never mandated by the FTC or subject to its control, authorization, or regulation. While formally alleging in its briefing to this court that these descriptors were only based upon the "Cambridge Filter Method" ("Cambridge Method"), for thirty years

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[3] National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 199 (2001) ("Monograph 13") (excerpts included at J.A.713a-898a; full report found at Court of Appeals App. 423-673 (hereinafter "C.A. App.")).

Philip Morris has never publicly articulated that alleged basis for naming specific brands "lights" nor did it ever include any FTC tar or nicotine numbers on any of its packaging, cartons, or package labels for Marlboro Lights and Cambridge Lights. At no point did the FTC require or authorize the use of the term "lights" with regard to any category of cigarettes, nor did the FTC establish standards that required or established a "lights" category. Nothing in the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970), as originally enacted or as subsequently amended, mandates or authorizes the use of such a term or countenances Philip Morris' deception.

The toll on the people of Maine and the American public generally of Philip Morris' consumer fraud has been tremendous. Marlboro Lights are now the number one selling cigarette brand in America. Yet, the National Cancer Institute and others have found that their rapid rise in popularity, as well as that of other "light" and "low tar" cigarettes, has not been met with any concomitant reduction in risk or disease. Moreover, tests of the smoke from Marlboro Lights have shown its condensate to be more mutagenic[4] than Marlboro "Reds." As a result, Philip Morris' own documents indicate that Marlboro Lights and other "light" cigarettes may have contributed to an increased risk of disease over regular cigarettes. It is for these reasons that a consensus of the American public health community, along with governments worldwide, has called for the end of the use of descriptors, such as "lights," on cigarette labeling.

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[4] Mutagenicity refers to the biologic activity that accompanies certain carcinogens.

ARGUMENT

I. Philip Morris Engaged in a Long-term Pattern of Conduct Designed to Mislead Its Consumers

A review of the history of the development and marketing of cigarettes with such descriptors as "lights" or "lowered tar and nicotine," including Marlboro Lights and Cambridge Lights, leads to the conclusion that this is a case about fraud and deception. The FTC has never regulated, much less required, any descriptor used by Philip Morris on its packaging. At all times, Philip Morris has chosen to use these descriptors in a way that deceived its consumers and potential consumers.

A. The Antecedents to the "Lights" Fraud Through the 1950s

In the 1940s and 1950s, scientific researchers began to publish studies that identified a causal relationship between cigarette smoking and various diseases, including lung cancer. As sales started to decline, the cigarette industry quickly recognized the adverse impact that this growing body of public health information had on the industry's economic viability. First, industry executives knew that if the American public understood that smoking caused cancer and other diseases, fewer people would start to smoke and more would quit. Second, those who did smoke (or had smoked) posed a potential threat of civil liability for the industry. Finally, the cigarette industry feared the prospect of stringent government regulations.

On December 15, 1953, tobacco executives held a meeting at the Plaza Hotel in New York City. The presidents of the five major U.S. cigarette

manufacturers at that time—Philip Morris, R.J. Reynolds, Brown & Williamson, Lorillard, and American—met with representatives of the public relations firm Hill & Knowlton. At the meeting, the attendees agreed that the studies linking cigarettes and disease, as well as the public's resulting concerns, were "worthy of drastic action." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 37 (D.D.C. 2006). As a result of this New York meeting, these companies issued what they called a "Frank Statement to Cigarette Smokers." The "statement" was published in 448 newspapers and aimed at approximately 43 million Americans. In particular, Philip Morris and the other tobacco companies represented the following to the American public: (1) "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business"; (2) "[T]here is no proof that cigarette smoking is one of the causes [of lung cancer]"; (3) "We always have and always will cooperate closely with those whose task it is to safeguard the public health"; and (4) "We believe the products we make are not injurious to health." *Philip Morris*, 449 F. Supp. 2d at 40. Every one of these statements was false.

The "Frank Statement" also promised that the Defendants would conduct independent research into tobacco use and health. *Id.* Defendants purported to conduct this research through a newly formed, industry-funded entity known as the Tobacco Industry Research Committee ("TIRC"), later renamed the Council for Tobacco Research ("CTR"). Under the cover of conducting research, TIRC/CTR served as a sophisticated public relations mechanism that enabled Philip Morris and the other tobacco companies to deny

and obscure the harms of smoking. *See, e.g., id.* at 40-62.[5]

Thus, instead of researching and publicly acknowledging the harmful effects of tar and nicotine, the industry launched a coordinated public relations campaign that misrepresented the state of the scientific evidence demonstrating the link between its products and serious disease. Philip Morris helped organize and set in motion this essential strategy of generating "controversy" about the scientific findings linking smoking to disease, and then adhered to this approach, without wavering, for the next half-century. Philip Morris executives further conspired with the other tobacco company executives through a "gentlemen's agreement" to ensure that the companies would not compete on the basis of health claims. In particular, they agreed: (1) to prohibit the development or marketing of a "safer" cigarette; and (2) not to perform biological research on the link between smoking and disease. *Philip Morris*, 449 F. Supp. 2d at 37-39. At the same time, they implemented a strategy to falsely reassure, and thereby deceive, the American public that there was still doubt regarding the evidence linking smoking and disease—that it was an "open question," *id.* at 38—even though their own studies since the early 1950s demonstrated that smoking posed tremendous risks to human health. *Id.* at 164-68.

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[5] Philip Morris executive Robert Seligman wrote the following historical account: "Bill Shinn [Shook, Hardy & Bacon attorney] described the history, particularly in relation to the CTR. CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry 'shield' in 1954." R.B. Seligman, *Letter to CTR File, Subject: Meeting in New York–November 15, 1978*, Document No. 1003718428-8432 at 8429 (1978), *available at* http://tobaccodocuments.org/landman/1003718428-8432.html.

B. The 1960s: The Prelude to the "Lights" Fraud—The "Tar Wars" and the "Cambridge Method"

The 1964 Surgeon General's Report established to everyone other than public representatives of the tobacco industry that smoking caused lung cancer, at least in males. At the same time, the Report increased public awareness of the health risks associated with smoking. However, instead of acknowledging the science in the Report, Philip Morris responded to the Report by trying to assuage health concerns while continuing to make sure that their products delivered sufficient amounts of nicotine when smoked by consumers. Monograph 13, J.A.843a.

Philip Morris and the other tobacco companies aggressively marketed their cigarettes as having less tar than competitors, resulting in what was referred to as the "tar derby" or "tar wars." In the mid-1960s, the FTC ended the "tar derby" by prohibiting tar and nicotine claims in advertising. J.A.836a. The FTC then issued a policy statement indicating that a factual statement of the tar and nicotine content based upon the "Cambridge Method" would not be treated as a violation of Section 5 of the FTC Act so long as there were no express or implied representations in advertisements that the represented level of tar or nicotine reduced or eliminated health hazards. *Philip Morris*, 449 F. Supp. 2d at 435-36.

This action resulted from the FTC's efforts, beginning in the 1950s, to conduct tests on smoke condensate, using a smoke-measuring machine method developed by the American Tobacco Company. Monograph 13, C.A. App. 602. This method "utilizes a smoking machine that takes a 35 milliliter puff of two

seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, 778 F.2d 25, 37 (D.C. Cir., 1985). The measurement is done by analyzing the residue left on pads in order to total the purported tar and nicotine yields of that particular cigarette brand. This method has also become generally known as "the FTC method" or "the Cambridge Filter System."

Numerous internal documents demonstrate that Philip Morris knew that the "Cambridge Method" measurements did not accurately reflect the actual amount of tar and nicotine ingested by human smokers or even the relative amount of tar and nicotine ingested by smokers of different cigarettes. *See, e.g., Philip Morris*, 449 F. Supp. 2d at 461. In an August 11, 1967, document, Helmut Wakeham, then Philip Morris Director of Research and Development, informed Paul Smith, then Philip Morris Vice President and General Counsel, that human smokers increased their smoke intake when switching from non-filter to filter cigarettes, and as a result they would receive the same amount of tar and nicotine from filter cigarettes as from non-filter cigarettes:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case. . . . In the smoking machine the puff volume is constant so that with dilution the

> quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human smoker who appears to adjust to the diluted smoke by taking a **larger puff** so that he still gets about the same amount of equivalent undiluted smoke. . . . The smoker is, thus, apparently defeating the purpose of dilution to give him less "smoke" per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appear to be erroneous and misleading. It has probably always been so for diluted smoke cigarettes, whether dilution is obtained by porous paper or holes in the filter.

Philip Morris, 449 F. Supp. 2d at 462 (emphasis in original).

Subsequently, Philip Morris's scientist, Dr. Jerry Whidby, has testified as summarized below:

> Product Opinion Laboratories was a facility established by Philip Morris to evaluate smokers' reaction to the cigarette brands Philip Morris was selling, as well as to Philip Morris' prototype cigarettes, and that he was not aware of any instance, at any time between when Dr. Wakeham wrote this document in 1967 and when

> [Dr. Whidby] left the company in 1998, in which Philip Morris informed the American public directly of Wakeham's conclusions that the FTC tar and nicotine yields are apparently 'erroneous and misleading,' and dilution filter cigarettes generated lower FTC yields than non-dilution cigarettes, but delivered about the same amount of smoke to smokers.

Id. (internal quotations omitted). Similarly, a 1969 Philip Morris report of a study of filter smokers' intake patterns stated that the FTC Method has "no practical value for predicting smoke intake."[6]

In September 1968, representatives from the major tobacco companies attended a meeting in Hilton Head, South Carolina. The minutes from this meeting show that all of the companies attending agreed to market "health-image" (health reassurance) cigarettes and "health-oriented (minimal biological activity) cigarette[s] to be kept on the market for those consumers choosing it."[7] At no time did the tobacco industry disclose to the FTC the results of its private research or the existence of its secret industry agreements, nor is there any evidence that the FTC

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[6] A. H. Laurene, *et al.*, *Philip Morris Smoking Behavior Study Labelled SEX-1*, Document No. 504208317-8360 at 8319 (Mar. 17, 1971), http://tobaccodocuments.org/bliley_rjr/504208317-8360.html.

[7] Stanton Glantz, *et. al.*, *The Cigarette Papers* 129 Berkeley: Univ. of California Press (1998), *available at* http://www.escholarship.org/editions/view?docId=ft8489p25j&chunk.id=d0e3989&toc.id=d0e3989&brand=eschol.

was aware of the results of this research or these agreements.

In response to the "tar wars," the FTC proposed to require tobacco manufacturers to disclose the tar and nicotine yields as determined by the "Cambridge Method". 35 Fed. Reg. 12,671 (1970). With knowledge of the deficiencies of the test results and their ability to manufacture products that scored low on the test but actually delivered tar and nicotine levels to consumers that bore no relationship to the test results, the five major tobacco companies, including Philip Morris, as well as three minor producers, entered into a private, voluntary agreement ("Voluntary Agreement") among themselves to disclose Cambridge Method test data in cigarette advertisements but not on cigarette packs. *Philip Morris*, 449 F. Supp. 2d at 435. By entering into this Voluntary Agreement, the companies avoided formal regulation of their cigarette advertising, and circumscribed the role of the FTC. *Id.*[8]

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[8] In its cover letter, Philip Morris, through The Tobacco Institute, Inc., made clear that the Voluntary Agreement was indeed voluntary and that Philip Morris did not acknowledge the authority of the FTC to institute regulations:

> In submitting the program embodied in the enclosed letter on behalf of these companies, [CTR has] been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

The Voluntary Agreement among the cigarette companies prompted the FTC to end its formal rule-making proceedings and any further investigation into the merits of the Cambridge Method test. *Philip Morris,* 449 F. Supp. 2d at 435; 36 Fed. Reg. 784 (1971). Because the FTC was not a party to the Voluntary Agreement, it never established the agreement's terms as a "Trade Regulation Rule" pursuant to 15 U.S.C. § 57a. As such, the agency has never had the authority to enforce it. *See FTC*, 778 F.2d at 37.

Thus, at the time Philip Morris voluntarily entered into the agreement with the FTC, it was well aware: (1) that smokers of dilution-based "low-tar" cigarettes did not actually receive less tar and nicotine; (2) that the test results did not provide meaningful information about the relative amount of tar and nicotine actually delivered to consumers by different tobacco products; and (3) that, therefore, the FTC measurements did not provide any useful information to consumers looking to reduce their tar and nicotine intake out of health concerns. The industry was also aware that one reason the FTC measurements were useless was because their cigarettes were being manufactured in such a way as to enable smokers to alter how they smoked by subconsciously "titrating" or "compensating" for the lower delivery of nicotine from

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> While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results . . . constitutes a violation of law.

Letter from Horace R. Kornegay, President & Executive Director, The Tobacco Institute, Inc., to FTC (Oct. 23, 1970), C.A. App. 675-76.

dilution-based low-tar cigarettes in order to achieve the consumers' required nicotine load. *See Philip Morris*, 449 F. Supp. 2d at 435-44.

C. The 1970s: The "Lights" Cigarette Fraud Is Initiated

Instead of developing and marketing a truly safer cigarette, in 1971, shortly after entering into the Voluntary Agreement, Philip Morris introduced Marlboro Lights cigarettes nationwide as "light," while including the phrase "lowered tar and nicotine" on all of its packaging. As acknowledged by Philip Morris' own internal documents, in labeling, designing, and marketing these cigarettes, Philip Morris intended that consumers would purchase "light" cigarettes perceiving them to have a health benefit when compared with regular Marlboro cigarettes. This representation to consumers was never associated with tar and nicotine testing, as Philip Morris never included tar and nicotine figures on the packages of Marlboro Lights cigarettes while representing on all of its packaging that these cigarettes were "light" and delivered "lowered tar and nicotine."[9]

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[9] Philip Morris has admitted that it never included tar and nicotine figures on its "light" cigarette packages, such as Marlboro Lights. *See Aspinall v. Philip Morris, Companies, Inc.*, No. 98-6002, 2006 WL 2971490 at *8 (Mass. Sup. Ct. Aug. 9, 2006). In Petitioners' Br., at 9, n.5, Philip Morris explains this by stating that: "The FTC has not extended this requirement to cigarette packages because, under 15 U.S.C. § 1334(a), only Congress has the authority to require a statement relating to smoking and health . . . on any cigarette package." Yet, Philip Morris ignores the fact that in 1971 it alone made the decision to describe Marlboro Lights as "lights" with "lowered tar and nicotine" included on all packaging. (In 2003, Philip Morris removed the term "lowered tar and nicotine" from Marlboro Lights immediately after the trial of *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 848

James Morgan, a future C.E.O. of Philip Morris USA, who was Director of Brand Management at Philip Morris at the time of Marlboro Lights' introduction, has admitted that the Marlboro Lights descriptors were invented and intended by Philip Morris to convey a health message. He has testified that:

> Philip Morris made a calculated decision to use the phrase "lowered tar and nicotine," even though its own marketing research indicated that consumers interpreted that phrase as meaning that the cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option.

Philip Morris, 449 F. Supp. 2d. at 513-14.

His admission is consistent with contemporaneous internal Philip Morris documents. For example, a May 1976 study prepared for Philip Morris by The Roper Organization, Inc., entitled "A Study of Smokers' Habits and Attitudes with Special Emphasis on Low Tar Cigarettes," stated:

N.E.2d 1 (2005).) Moreover, Philip Morris has never been restricted from placing tar and nicotine numbers on its packaging. In 2005, on various ultra-low tar products, such as those yielding 3 mg. tar or less, cigarette manufacturers have generally chosen to include tar and/or nicotine numbers on over 90% of these packs. Yet, at the 4-7 mg. tar level, only 1.2% of the packs contained a similar disclosure. *FTC Cigarette Report For 2004 and 2005* Table 8A (2007), *available at* http://www.ftc.gov/reports/tobacco/2007cigarette2004-2005.pdf ("*FTC Cigarette Report*").

> [T]his study shows that the smoking public is convinced that to the extent any brands are better for health, it is the low tar brands that are. . . . Low tar brand smokers cite as the most liked characteristic of their brand . . . as compared with smokers of flavor filters, they say it is "better for your health" and cite its "more effective filter. . . ." Brands Thought Better For Health - The low tar brands have cornered opinion that to the extent any brands are better for your health, they are.

Id. at 524-25.

At the same time, in order to deal with regulators and representatives of the public health community, Philip Morris designed its cigarettes to take advantage of the discrepancy between the Cambridge Method test and actual smoker intake. It intentionally designed its "lights" cigarettes to score low on the Cambridge Method, while enabling them to deliver more tar and nicotine to normal smokers based on the manner in which they were smoked. *Id.* at 462-63. Philip Morris was assisted in this effort by the development of its proprietary alternative testing machine, the human smoke simulator, that it used internally to test actual smoker nicotine and tar yield deliveries. *Id.* at 464.

A Philip Morris document, dated September 17, 1975, from Barbro Goodman to Leo Meyer, the Philip Morris Director of Research, reflects the depth of Philip

Morris's knowledge. *Id.* at 465. Specifically, Philip Morris was aware that "smokers got as much tar and nicotine from Marlboro Lights as from full-flavor Marlboros." C.A. App. 412-14. Philip Morris knew that "Marlboro Lights cigarettes were not smoked like regular Marlboros." *Id.* Its testing demonstrated that there were:

> [D]ifferences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers and Marlboro Lights smokers. . . . The panelists smoked the cigarettes according to physical properties; i.e., the dilution and the lower RTD of Marlboro Lights [subconsciously] caused the smokers to take larger puffs on that cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of Marlboro lights proportionally. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.[10]

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[10] As Dr. David M. Burns, an author of the 1981 Surgeon General's Report, has explained:

> [T]here are three things that are powerfully significant in this document: (1) It very clearly demonstrates that, in contrast to what we believed six years later when we wrote the 1981 Surgeon

Id.

Philip Morris did not, however, let moral qualms deter it from representing its "light" cigarettes as safer. As stated in a 1974 Philip Morris interoffice memorandum:

> Some concern has been expressed concerning the moral obligation of Philip Morris (and perhaps the tobacco industry) to reveal to the FTC the fact that some cigarette smokers may be getting more tar

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> General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We [in the public health community] believed they were. (2) [T]his is dated 1975, six years prior to the time the [1981] Surgeon General's Report reached its conclusion. And we did not have access to this information or comparable information. (3) [T]his study was done on a machine that mimicked actual smoking behaviors, that actually matched the behavior of the individual when the machine smoked the cigarette. In 1981, one of the recommendations that we made . . . was that this type of machine should be developed so that we could develop a better understanding of the relationship between delivery of tar and nicotine of these cigarettes when they were actually smoked. So . . . six years prior to the time we were reviewing that evidence for the Surgeon General, this information was available to Philip Morris.

Philip Morris, 449 F. Supp. 2d. at 466 (internal quotation marks omitted).

> than the FTC rating of that cigarette. You mentioned in your presentation at the Center on Tuesday, March 5, that such concern was voiced in N.Y. at your talk there. . . . I believe that there need be no such concern, at least from a position of morality.[11]

Another Philip Morris document, dated just six days before, stated under the heading "SUMMARY":

> People do not smoke like the machine [referring to the Cambridge Method]. . . . Generally people smoke in such a way that they get much more than predicted by machine. This is especially true for dilution cigarets [sic].[12]

After acknowledging that human smokers get much more tar than indicated by the Cambridge ("FTC Test") Method, the document stated in the "CONCLUSION" section: "The FTC standardized test should be retained: 1) It gives low numbers." J.A.930a.

Thus, based on information available to Philip Morris, but not the FTC, Philip Morris consciously exploited the use of the Cambridge Method in the 1970's to deceive government regulators and public health leaders. Specifically, it marketed its "light"

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[11] Memorandum from Raymond Fagan to Helmut Wakeham, Philip Morris Principal Scientist, *"Moral Issue on FTC Tar"* (Mar. 7, 1974), J.A.931a.

[12] *Some Unexpected Observations on Tar and Nicotine and Smoker Behavior* (Mar. 1, 1974), J.A.929a.

cigarettes as healthier than Marlboro Reds, all the while knowing that Marlboro Lights' design readily enabled smokers to receive as much tar and nicotine from Marlboro Lights as from Marlboro Reds.

D. The FTC and Philip Morris in the "Lights" Era

Since the invention of the term "lights" by Philip Morris and its introduction in 1971, the FTC has taken no regulatory action regarding "light" cigarette advertising; nor has it taken any regulatory action based on the Cambridge Method. In fact, rather than promulgate a trade regulation rule enshrining the Cambridge Method, the FTC ceased conducting its own testing of "light" cigarettes in 1987, closing its laboratory. 62 Fed. Reg. at 48,158.[13] This absence of action cannot be viewed as approval. The record is clear that the FTC has never required, authorized, approved, or regulated Philip Morris' use of the "lights" or "lowered tar and nicotine" descriptors.

In 1997, the FTC solicited public comment on whether it should regulate descriptors such as "light." 62 Fed. Reg. at 48,163 (J.A.291a-292a). The FTC stated in its request that "[t]here are *no* official definitions" for terms such as "low tar," "light," or "ultra light," but explained that "they appear to be used *by the industry* to reflect ranges of FTC tar ratings." J.A.292a (emphasis added). After soliciting comments, the FTC ultimately took no regulatory action.

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[13] The Tobacco Institute Testing Lab, an organization funded by major tobacco companies, took over the role of conducting the Cambridge Method tests after that. J.A.271a.

In 1999, the United States brought suit in federal district court under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against Philip Morris and tobacco-related entities, several of whom were signatories to the 1971 Voluntary Agreement. With respect to Philip Morris, the United States alleged, in part, that it had engaged in a decades-long unlawful conspiracy to deceive the American public about the health benefits derived from smoking "light" cigarettes, *Philip Morris*, 449 F. Supp. 2d. at 1, an action dramatically inconsistent with Philip Morris' assertion that the United States had regulated, controlled, and authorized its use of the term "light." Petr.'s Br. at 21.

Indeed, as the Government's RICO suit proceeded, in 2002 Philip Morris itself acknowledged that the FTC had never regulated the use of the term "lights" when it petitioned the FTC to promulgate a trade rule which would require tobacco companies to define and regulate the use of descriptors such as "light". Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002) J.A.1043a-1044a, 1083a-1085a. That petition was never acted upon by the FTC.

Immediately before the trial of *Price v. Philip Morris, Inc.*, Philip Morris further demonstrated that it has always had the power to add to or to alter its packaging of Marlboro Lights products without prior authorization from the FTC:

> In 2002 and 2003, PM USA periodically placed an onsert on its medium, mild, light and ultra light packaging. The onserts contained information . . . that there is no

> such thing as a safe cigarette, that low-tar cigarettes have not been proven to be less hazardous than other cigarettes and are not a substitute for quitting, that the amount of tar and nicotine that a smoker obtains from a cigarette depends on how the individual smokes the cigarette and that smokers may intake more tar and nicotine than is measured by the standard government test method.[14]

In sum, the FTC has neither compelled nor authorized Philip Morris to market or label its cigarettes as "lights" or "lowered tar and nicotine." Philip Morris has voluntarily marketed its cigarettes as "lights," because this marketing has proven highly profitable. The history of the development and marketing of cigarettes labeled as "lights" or "lowered tar and nicotine" leads to the conclusion that in its marketing of its cigarettes, Philip Morris at all times acted on its own.

E. The Federal Cigarette Labeling Act Was Never Designed to Permit the "Lights" Fraud

The federal government never intended to authorize Philip Morris to commit fraud, and the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (July 27, 1965), was never

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[14] Missouri Proxy Statement, *DEF 14A SEC Filing*, filed by Altria Group Inc., at 40 (Mar. 15, 2004), *available at* http://sec.edgar-online.com/2004/03/15/0001193125-04-042244/Section18.asp.

intended to immunize the tobacco industry when it did commit such fraud. Nor did this Court do so in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The court below was correct in its analysis:

> [T]he plurality held that "fraudulent misrepresentation claims that do arise with respect to advertising and promotion (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by [§ 1334(b)]. Such claims are predicated not on a duty "based on smoking and health" but rather on a more general obligation—the duty not to deceive." *Id.* at 528-29, 112 S.Ct. 2608. The plurality saw this result as consistent with the text, structure, and purpose of the FCLAA. *Id.* at 529, 112 S.Ct. 2608. First, the FCLAA "offered no sign that [Congress] wished to insulate manufacturers from longstanding rules governing fraud"—in fact, the Act "explicitly reserved the FTC's authority to identify and punish deceptive advertising practices. . . ." *Id.* Second, reading § 1334(b) to exclude fraud claims would not frustrate the FCLAA's stated goal of protecting commerce from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with

> respect to any relationship between smoking and health," 15 U.S.C. § 1331(2), because "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." 505 U.S. at 529, 112 S.Ct. 2608.

Good v. Altria Group, Inc., 501 F.3d 29, 35-36 (1st Cir. 2007).

II. The Tragic Results of the "Lights" Fraud

A. Philip Morris Was Able to Retain and Even Expand Its Consumer Base Through the Marketing of Marlboro Lights

Philip Morris' marketing campaign for "lights," based as it was on the premise that there would be market-wide recognition that "light" equated to "health" and that health concerns would move the market for these products, has proven devastatingly effective. As stated in the Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Petitioners at 9-10: "Properly designed product labels can rapidly and efficiently convey information critical to consumer purchasing decisions while, at the same time, allowing producers to identify the characteristics that set their products apart from those of competitors." By the same token, labels that misrepresent products, like the label "lights," can just as "rapidly and efficiently" convey false information to consumers.

As described by Monograph 13, J.A.893a, "[s]everal tactics were employed by the tobacco industry that misled consumers to perceive filtered and

low-tar delivery products as safe or safer and as a viable alternative to quitting." The fact that many smokers chose these products as an alternative to quitting—a change that would produce real reductions in disease risks—makes this deception an urgent public health issue. J.A.719a-720a.

The proposition that "light" cigarettes, including Marlboro Lights cigarettes, are somehow a less risky alternative to regular cigarettes has been fostered by enormous expenditures on advertising by Philip Morris and other tobacco manufacturers. These expenditures have been a significant part of the record $15.15 billion advertising expenditures for all cigarettes, including "lights," in 2003, and later $13.11 billion in 2005. *FTC Cigarette Report* at 3. It is estimated that $66.8 million is currently spent each year on advertising in Maine alone.[15]

The resulting tragedy is that millions of smokers did switch to supposedly lower tar "light" products, falsely believing they were safer, including many who would otherwise have quit altogether. Monograph 13, J.A.730a-732a. These people took what they were led to believe was a rational step to reduce their health risk from smoking because of how these products were marketed. The misleading marketing worked all too well. The devastating reality of Philip Morris' consumer fraud is that the market share of cigarettes sold with a tar yield of 15 mg. or less has increased from a mere 2% in 1967 to nearly 85% of the 351.6 billion cigarettes sold in 2005. *See FTC Cigarette Report* at Table 4A. Meanwhile, Marlboro, the most

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[15] *See* Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Maine*, http://www.tobaccofreekids.org/reports/settlements/toll.php?StateID=ME (hereinafter "*Toll of Tobacco*").

heavily advertised brand, constitutes almost 55% of the youth market, as well as about 35% of smokers over age 25.[16]

As to Maine, 1,900 of Maine's children (under 18 years old) become new daily smokers each year, with Maine's children buying or smoking approximately 2.3 *million* packs of cigarettes each year. Approximately 16.2% of Maine's high school students smoke (11,600 children), while the percentage of adults in Maine who smoke is slightly higher at 20.2% (210,000 adults). *Toll of Tobacco.*

B. Philip Morris' Deception of the Public Health Community

The prevailing view within the public health and scientific communities in the 1960s through the early 1990s was that the Cambridge test data provided useful information to smokers who sought to compare tar and nicotine yields of cigarettes. Petitioners correctly cite the fact that *Amicus Curiae* the American Cancer Society at one time suggested that consumers be provided with tar and nicotine information, because it believed that lower numbers would equate with a comparatively less harmful cigarette. Petr.'s Br. at 5.

Thus, *Amici* do not dispute the fact that based on the scientific evidence available to them at the time, the public health community along with public health authorities believed that cigarettes yielding less tar on the "Cambridge Method" tests would likely produce less cancer as well. *See* Monograph 13, J.A.722a.

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[16] Partnership for a Tobacco-Free Maine, *About PTM: Facts*, Maine Department of Health and Human Services, Maine Center for Disease Control and Prevention, http://www.tobaccofreemaine.org/facts.html (herinafter "PTFM").

However, these views changed beginning in the 1990s, in significant part as a result of the availability for review of a large number of internal industry documents, such as research reports, which were brought to light only by litigation against the tobacco companies. *See, e.g., id.* at i-ii, 10; J.A.717a, 736a-737a.

These documents made it clear that as early as the 1970s, if not earlier, Philip Morris internally recognized, based upon its sophisticated understanding of cigarette design and smoker compensation, that "light" cigarettes as manufactured by Philip Morris and then being marketed offered no clear health benefit. *Philip Morris*, 449 F. Supp. 2d. at 431 *et seq.* They further revealed that Philip Morris had chosen to keep this information secret from the government and the public health community while continuing to sell Marlboro Lights as "light" and "lowered tar and nicotine" and, at the same time, defend the "Cambridge Method" to the public health community as a useful means of measuring tar and nicotine yields. As Dr. Burns, one of the principal authors of the 1981 United States Surgeon General's Report, stated: "Had that information [from internal documents] been available to us, we would not have then offered the recommendation to the population of the United States that it would be a good idea to shift to these products." *Philip Morris*, 449 F. Supp. 2d at 445.

By hiding its own investigations into the comparative health risks of "light" and "low tar" cigarettes, Philip Morris took advantage of the government's and public health community's lack of accurate information to help perpetuate its fraud and deception on consumers. Philip Morris was aware that the government and public health community had long

struggled to respond effectively to the devastating health consequences of cigarette smoking and to give smokers meaningful information. Despite knowing that the government and public health community were basing their conclusions on erroneous information, tobacco industry "[d]ocuments charged [their own] subordinates to 'root out' adverse information that would generate negative implications and to produce information that would encourage consumers to continue to smoke." *Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 224 (E.D. N.J. 2001) *overruled on other grounds, Empire Healthchoice, Inc. v. Philip Morris USA, Inc.*, 393 F. 3d 312 (2d Cir. 2004).

C. Marlboro Lights Are No Less Harmful, and May Be More Harmful, Than Regular Marlboros

Philip Morris' documents further reveal that in the process of creating cigarettes which would register lower tar and nicotine numbers on the "Cambridge Method," Philip Morris was creating cigarettes that may well have increased the threat to smokers' health over their regular counterparts. Indeed, Philip Morris' own research has shown that the dilution design of "light" cigarettes not only has succeeded in gaming the FTC smoking machine, but also delivers more toxins to the smoker, delivers the harmful cigarette particulate matter to more sensitive areas of the smokers' body, and increases the mutagenicity of the smoke constituents received by the smoker.[17]

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[17] *See, e.g.*, former Philip Morris scientist Dr. Farone's testimony, *Philip Morris*, 449 F. Supp. 2d at 456-57:

Internal Philip Morris documents reveal that by 1978, "Philip Morris had substantial evidence that the 'filter dilution which Philip Morris used to reduce FTC tar and nicotine yields was somehow acting to increase' the [biological] 'activity' of the whole smoke condensate ('WSC') collected from its cigarettes," *Philip Morris*, 449 F. Supp. 2d at 457, actually indicating that these "light" cigarettes were potentially more hazardous than regular cigarettes. Additional Philip Morris research conducted in 1979 yielded the same result.

This was confirmed by research conducted by Philip Morris at its secretive overseas research facility INBIFO. A May 11, 1982, Philip Morris document indicates that Philip Morris learned from its testing of low tar reference laboratory cigarettes (cigarettes used for research purposes and not actually sold in stores) that these cigarettes registered higher in standard biological tests than regular-delivery reference cigarettes and thus were potentially more carcinogenic: "Low tar reference cigarette . . . [m]ay be slightly more

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> [I]n the case of Marlboro Lights, the Philip Morris test data that I have reviewed on that level of dilution for equivalent blends indicated that the product design for their Light cigarettes was more mutagenic than the full flavor Marlboro, Marlboro Reds, and therefore predictive of more potential cancer risk. These studies were repeated multiple times over the past 20 years and continue to be repeated to this day. The Philip Morris data, as was used by Philip Morris, was a strong warning that their product design change between a Marlboro Red and a Marlboro Light-increased ventilation-resulted in a potentially more dangerous product.

active than [the regular delivery reference cigarette] as a complete carcinogen." *Id.* at 457. A January 28, 1994, report stated that the primary methods used by Philip Morris to reduce tar and nicotine on the Cambridge Method—increased cigarette filtration, porosity, and ventilation—would enhance both the degree to which cigarette smoke was toxic to living cells as well as its ability to generate mutations, such as tumors and/or cancer: "Increased filtration will result in a relative enrichment of gas phase constituents, leading to increased cytotoxicity and irritancy. . . . Increased porosity and ventilation will . . . increase the specific mutagenicity." *Id.*

Additional evidence that Philip Morris knew of increased mutagenicity comes from Clifton Lilly, Senior Vice President of Technology at Philip Morris:

> [Lilly] confirmed that data from tests run at Philip Morris's INBIFO facility showed that the Ames test for mutagenicity [designed to measure the degree to which a substance causes mutations, such as tumors and/or cancer] from Marlboro Lights produces significantly higher results than the tar from Marlboro full flavor products.

Id. at 457-58.

More recently, a study that reviewed epidemiological data collected during the American Cancer Society's Cancer Prevention Study II concluded that "[t]here was no difference in risk among men who smoked brands rated as very low tar or low tar

compared to those who smoked medium tar brands."[18] Also in 2004, the Surgeon General's Report on Smoking and Health concluded that "[a]lthough characteristics of cigarettes have changed during the last 50 years and yields of tar and nicotine have declined substantially, as assessed by the Federal Trade Commission's test protocol, the risk of lung cancer in smokers has not declined." U.S. Department of Health and Human Services, *The Health Consequences of Smoking, 2004*, at 324 (hereinafter "*Consequences of Smoking*").

D. That Philip Morris Was Able To Retain Smokers Who Might Have Quit and Attract Vast Numbers of New Smokers Through the Sale of "Lights" Has Led to Dire Health Consequences

The tragic result of the "lights" fraud is that even as Americans tried to reduce their risk of disease by switching to what they thought were lower tar products, the overall incidence of disease among smokers (the vast majority of whom now smoke "light" and "lower tar" cigarettes) actually went up. Monograph 13, J.A.730a-732a.[19] In the United States, nearly 21 percent of adults (45.3 million people) currently smoke, and cigarette smoking is responsible for about 438,000 deaths per year, or about one in five deaths annually.[20] In Maine, seven people die from

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[18] Harris, Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8*, BRITISH MED. J. 328:72 (2004).

[19] *See, e.g., Consequences of Smoking.*

[20] Centers for Disease Control and Prevention ("CDC"), *Smoking & Tobacco Use: Fact Sheet, Adult Cigarette Smoking in*

tobacco use every day, with up to one of these being a nonsmoker exposed to secondhand smoke, *see PTFM*, which translates to about 2,200 of Maine's adults dying from their own smoking each year. *See Toll of Tobacco.* 29,200 of Maine's kids now under 18 will ultimately die prematurely from smoking, while 110 to 330 of Maine's adult non-smokers will die each year from exposure to secondhand smoke. *PTFM*; *Toll of Tobacco*.

Not only has the risk of lung cancer in smokers failed to decline with the introduction of "light" cigarettes,[21] but among cancers adenocarcinomas of the lung have substantially increased since the introduction of dilution cigarettes, like Marlboro Lights. Moreover, deaths caused by cigarettes are by no means limited to cancer. Chronic Obstructive Pulmonary Disease ("COPD"), which includes emphysema and chronic bronchitis, is the fourth leading cause of death in the United States—*and it is the only one of the top five causes of death that is increasing*. Between 80 and 90% of COPD is caused by smoking.

Nor do deaths tell the entire story. For every person who dies of a smoking attributable disease, there are 20 people suffering from smoking-related illnesses.[22] In Maine, more than 21,000 residents suffer from emphysema, and over 46,400 from chronic bronchitis. *See* American Lung Association, *Estimated*

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the United States: Current Estimates (updated Nov. 2007), http://www.cdc.gov/tobacco/data_statistics/factsheets/adult_cig_smoking.htm.

[21] *Consequences of Smoking* at 61.

[22] *See* CDC, *Cigarette Smoking-Attributable Morbidity – U.S., 2000*, MMWR Vol. 52(35) (Sept. 5, 2003).

Prevalence and Incidence of Lung Disease by Lung Association Territory, Table I at 34 (May 2008).

Secondhand smoke triggers up to 26,000 new cases of asthma in the U.S. each year, and exacerbates asthmatic symptoms in some one million children. Maine has the highest rate of asthma in the nation. *PTFM*. Thus, with Marlboro Lights now the preferred choice of smokers,[23] it cannot be disputed that Philip Morris' actions, as described herein, have substantially exacerbated the devastating public health consequences of smoking.

E. The Economic Costs Related to Smoking

It is well established that cigarette smoking also has widespread economic consequences. In 2004, in Maine alone, total health care expenditures directly caused by smoking were over $600 million.[24] Smoking-caused lost productivity costs in Maine in 2004 were nearly $500 million. *Smoking Data Highlights 2006*. Hence, the true cost of smoking for the State's health care economy was in excess of $1 billion—an astonishing $658 per household. *See Toll of Tobacco*.

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[23] "Sales data from 2006 indicate that Marlboro is the most popular brand in the United States, with sales greater than the five leading competitors combined. The market share for Marlboro is 40.5%. National survey data for 2005 revealed that Marlboro is preferred by 48% of cigarette smokers aged 12-17 years, 51% of smokers aged 18-25 years, and 40% of smokers aged 26 years or older." CDC, *Fact Sheet: Tobacco Brand Preferences* (updated Apr. 2007), http://www.cdc.gov/tobacco/data_statistics/Factsheets/tobacco_brand_pref.htm (internal citations and numbering omitted).

[24] *Toll of Tobacco*. *See* CDC, *Smoking Data Highlights—2006*, http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/2006.htm ("*Smoking Data Highlights 2006*").

In 2004, each pack of cigarettes sold in Maine cost an estimated $11.60 in direct medical expenses and lost productivity attributable to smoking. *See* Smoking Data Highlights 2006. Smoking- attributable Medicaid costs in Maine in 2004 were $2.29 per pack of cigarettes—a total of $216 million.[25] *Id.*

III. There Is Now a Worldwide Consensus That the "Lights" Cigarette Descriptor Has Deceived Consumers and Has Led to an Increase in Tobacco-Related Economic and Public Health Costs

The publication in October 2001 of Monograph 13 confirmed the emergence of a public health community consensus that lower machine-measured yields of tar and nicotine in fact did not lower the risk of disease from smoking. Immediately after the release of this publication, *Amicus Curiae* the American Medical Association issued the following statement on behalf of its membership:

> In the nearly 40 years since the first U.S. Surgeon General's Report linking cigarette smoking

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[25] With smoking-attributable medical costs for 2004 nationwide surpassing $96.75 billion and lost productivity costs caused by smoking surpassing $97.65 billion, total smoking-caused losses approached $195 billion. *Smoking Data Highlights 2006*, Table 4.

The national average medical costs per pack of cigarettes sold in 2004 equaled $5.31, the productivity costs per pack were $5.16, and the Medicaid costs per pack were $1.63. The national average costs in medical care and lost productivity were over $12 per pack of cigarettes. *Id.* The national average price (including tax) for a pack of cigarettes in 2004 was $4.79. *Smoking Data Highlights 2006*, Table 3.

> to lung cancer and other diseases, tobacco companies have rolled out all sorts of marketing gimmicks and deceptive advertising to convince American Smokers that 'light' cigarettes are somehow safer.
>
> It is both absurd and tragic that the tobacco industry continues to manufacture and pitch its deadly wares without any concern for the health of its customers. The tobacco industry has directly caused the deaths of millions of Americans. "'Light' . . . cigarettes falsely raised hopes of many smokers, keeping them from quitting, and enticed non-smokers to start—most of whom did so before the age of 18."[26]

In August 2006, following more than two years of discovery and a trial at which countless scientists, government officials, and tobacco industry members testified, the federal district court for the District of Columbia held that Philip Morris had falsely marketed and continues to falsely market "light" cigarettes through its use of the descriptor "lights" in violation of RICO:

> By using descriptors such as "lights" and "low tar," Defendants

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[26] Press Release, Randolph D. Smoak, Jr., M.D., American Medical Association, *AMA Commends Report Exposing Dangers of Light Cigarettes* (Nov. 27, 2001).

> knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message.

Philip Morris, 449 F. Supp. 2d at 924-25.[27]

Nor are the District Court and the American public health community alone in this conclusion. Governments around the world have similarly concluded that marketing cigarettes as "lights" has been deceptive and a threat to public and financial health. In 2006, following an investigation by the Canadian Competition Bureau, tobacco manufacturers agreed to discontinue the use of "light" cigarette designations in Canada.[28] The European Union, as well as Israel, Brazil, and Australia, have also recently banned such descriptors. The European Union concluded that "certain texts, such as 'low-tar,' 'light,' .

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[27] The U.S. Court of Appeals for the District of Columbia has stayed the injunction pending an appeal.

[28] Canada v. JTI-Macdonald Corp., 2007 SCC 30 at ¶10 (Jun. 28, 2007), *available at* http://scc.lexum.umontreal.ca/en/2007/2007scc30/2007scc30.html; *See* Canadian Ministerial Advisory Council on Tobacco Control, *Findings of the International Expert Panel on Cigarette Descriptors* at 7 (Aug. 27-28, 2001).

. . may mislead the consumer into the belief that such products are less harmful . . ."[29]

In May 2003, the 192 member states of the World Health Organization completed negotiation of the Framework Convention on Tobacco Control, which includes a provision requiring parties to the treaty to enact legislation banning the use of any descriptor that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products, including terms such as "low tar" and "light." To date, 168 countries, including the United States, have signed the treaty, and 154 countries are parties to it.[30]

In conclusion, there is now a consensus among governments and public health leaders world-wide. No government authorized Philip Morris' "lights" fraud, but now people both in Maine and throughout the rest of the world are living with the consequences of that fraud and deception.

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[29]World Health Organization Regional Office for Europe, *Regulation of Tobacco Products: An Update on European Developments 1999-2001* at 16-17 (Oct. 2001), http://www.euro.who.int/document/e74524.pdf; *See* European Union, *Council Decision of 2 June 2004 Concerning the Conclusion of the WHO Framework Convention on Tobacco Control (2004/513/EC), in* Official Journal of the European Union 15.6.2004 at 213/8-24, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_213/l_21320040615en00080024.pdf.

[30]World Health Organization, *Framework Convention on Tobacco Control* (2003), http://www.who.int/tobacco/framework/download/en/index.html.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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June 18, 2008

APPENDIX

Appendix A

STATEMENTS OF INTEREST

The **American Medical Association** ("AMA"), an Illinois non-profit corporation founded in 1847, is an association of approximately 240,000 physicians, residents, and medical students. Its members practice in every state, including Maine, and in all fields of medical specialization, and it is the largest medical society in the United States. Its objects are to promote the science and art of medicine and the betterment of public health. The AMA has long had an interest in the regulation of tobacco products and the tobacco industry. As an institution, it has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. For many years, the AMA has been one of the leading anti-smoking organizations in the United States.[1]

The **American Cancer Society, Inc.** ("ACS") is the nationwide community-based public health organization dedicated to eliminating cancer as a major health problem through research, advocacy, education, and service. Research conducted and supported by ACS since the 1950s has played a pivotal role in identifying the use of tobacco products as a

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[1] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition between the AMA and the medical societies of each state, plus the District of Columbia. It was formed to represent the viewpoint of organized medicine in the courts.

major cause of cancer. With three million volunteers and representation in every state, ACS is the world's largest voluntary health organization, including many victims of tobacco-caused cancer and their family members.

The **Campaign for Tobacco-Free Kids** is a freestanding, privately-funded, 501(c)(3) non-profit organization that works to reduce tobacco use and exposure to secondhand smoke, particularly among youth. The Campaign focuses on increasing public awareness and on assisting efforts to develop and implement effective public and private policies and programs to prevent and reduce tobacco use and secondhand smoke exposure, thereby reducing the enormous related harms and costs. The Campaign for Tobacco-Free Kids has more than 125 member organizations, including health, civic, corporate, youth, and religious groups. But the Campaign does not accept any public funding, or any funding or support of any kind from the tobacco industry or any affiliated businesses or organizations.

The **American Heart Association** ("AHA") is the nation's largest voluntary health agency, with over 22.5 million volunteers and supporters. Since 1924, the American Heart Association has dedicated itself to reducing disability and death from cardiovascular disease and stroke—the #1 and #3 leading causes of death in the United States—through research, education, community-based programs, and advocacy. Since 1999 when AHA and ASA committed to achieving a 25% reduction in cardiovascular disease, stroke, and associated risk by 2010, the Association's efforts have contributed to a 25.8% reduction in deaths from coronary heart disease—an early achievement of their goal—and a 24.4% reduction from stroke. While

it has made significant progress, AHA continues to work toward needed reductions in the risk factors that lead to heart disease and stroke, as well as eliminating disparities in care for women and minority populations.

The **American Lung Association** ("ALA") is one of the nation's oldest voluntary health organizations, with volunteers and affiliates in all 50 states and the District of Columbia. The ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease and lung cancer, ALA has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

The American Public Health Association ("APHA") is a national organization devoted to protecting Americans and their communities from preventable serious health threats. Founded in 1872, APHA is the world's oldest and most diverse public health organization. APHA represents a broad array of health providers, educators, environmentalists, policy makers, and health officials at all levels working both within and outside governmental organizations and educational institutions. APHA advocates for national tobacco control measures to protect the public's health from the adverse effects of tobacco products.

The **American Legacy Foundation** is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation's programs address the health effects of tobacco use, especially among vulnerable populations

disproportionately affected by the toll of tobacco, through grants, technical assistance and training, research and evaluation, partnerships, youth activism, and youth prevention and adult cessation counter-marketing and grassroots campaigns. The foundation was created as a result of the November 1998 Master Settlement Agreement ("MSA") between 46 states and the tobacco industry.

The **American College of Chest Physicians** ("ACCP"), founded in 1935, is an international medical society dedicated to providing postgraduate medical education for physicians, surgeons, and allied health professionals involved in the diagnosis and treatment of chest diseases. ACCP, and the more than sixteen thousand health care professionals it represents, help promote the prevention and treatment of diseases of the chest through leadership, education, research, and communication. ACCP publishes CHEST, a leading scientific journal featuring clinical research in pulmonary, critical care sleep and chest medicine disciplines. ACCP also advocates before government agencies and the courts offering expert opinion on issues impacting cardiopulmonary health. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (ACCP amicus brief available at 1991 WL 11003931) or *New York v. EPA*, 413 F.3d 3, 30 (D.C. Cir. 2005) (discussing the health effects of air pollution emissions, as presented by amici, including ACCP).

Oncology Nursing Society ("ONS"), the largest professional oncology association in the world, is composed of more than 37,000 registered nurses and other healthcare providers dedicated to excellence in patient care, education, research, and administration in oncology nursing. Because tobacco use is responsible for one in three cancer deaths in the

United States, ONS has long supported the regulation of tobacco products to help reduce and prevent tobacco-related disease, disability, and death. ONS maintains a steadfast commitment to supporting policies, programs, and other efforts that seek to reduce adult and youth tobacco use, promote tobacco cessation, protect nonsmokers against secondhand smoke, and help increase access to tobacco use prevention and cessation services.

The **American Academy of Pediatrics**, founded in 1930, is a national, not-for-profit organization dedicated to furthering the interests of children's health and the pediatric specialty. Since its inception, the membership of AAP has grown from the original group of 60 physicians specializing in children's health to 60,000 primary care physicians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 77 years, AAP has become a powerful voice for children's health through education, research, advocacy, and expert advice and has demonstrated a continuing commitment to working with hospitals and clinics, as well as with state and federal governments to protect the well-being of America's children. AAP has engaged in broad and continuous efforts to prevent harm to the health of children and adolescents caused by the use of tobacco products and exposure to second-hand tobacco smoke.

AMICUS CURIAE BRIEF

File Date:
June 18 2008

No. 07-562

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA, INC.,

Petitioners,

v.

STEPHANIE GOOD, LORI A. SPELLMAN, AND ALLAIN L. THIBODEAU,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF ALLAN M. BRANDT, ROBERT N. PROCTOR, DAVID M. BURNS, JOHNATHAN M. SAMET, AND DAVID ROSNER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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TABLE OF AUTHORITIES

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Federal Trade Commission v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) ..... *passim*

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United States v. Atlantic Refining Co., 360 U.S. 19 (1959) 36

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United States v. Philip Morris USA, Inc., 449 F. Supp. 2d. 1 (D.D.C. 2006) ..... *passim*

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5 Me. Rev. Stat. Ann. § 207 37

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968..... 28

OTHER AUTHORITIES

Neil H. Borden, *The Effect of Advertising on the Demand for Tobacco Products—*

Cigarettes, The Economic Effects of Advertising (1944) 7

Allan M. Brandt, *The Cigarette Century* (2007) ..... *passim*

Cigaret Smoking Causes Lung Cancer, NEA J. 35 (1946) 9

Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) (Sept. 22, 1955) 16

FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1979* (undated) 35

Institute of Medicine, *The Future of Drug Safety: Promoting and Protecting the Health of the Public* (Alina Baciu, et al. eds. 2007) 8

Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373 (1990) 37

Richard Kluger, *Ashes to Ashes* (1997) 9

National Cancer Institute, *Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* (2001), http://cancercontrol.cancer.gov/tcrb/monographs/13/ ..... *passim*

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Robert N. Proctor, *Angel H. Roffo: The Forgotten Father of Experimental Tobacco Carcinogenesis*, 84 Bulletin of the WHO (June 2006) 9

Robert N. Proctor, *Cancer Wars: How Politics Shapes What We Know and Don't Know About Cancer* (1995) 10, 12, 14

Robert N. Proctor, Expert Report, *Schwab v. Philip Morris USA*, CV 04-1945 (E.D.N.Y. Dec. 18, 2005) 12, 18

Robert N. Proctor, *Tobacco and the Global Lung Cancer Epidemic*, 1 Nature Reviews Cancer 82-86 (2001) 8

Victor E. Schwartz, et al., *"That's Unfair!" Says Who—the Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93 (2007) 37

Statement of FTC Commissioner Paul Rand Dixon (May 15, 1967), http://www.nmcourt.fed.us/DCDOCS/files/05cv659/Volume_I/114.pdf 17

Tobacco Industry Research Committee, *A Frank Statement to Cigarette Smokers* (Jan. 4, 1954), http://legacy.library.ucsf.edu/tid/qxp91e00 11

U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981),

http://profiles.nlm.nih.gov/NN/B/B/S/N/_/nnbbsn.pdf 22

Richard A. Wegman, *Cigarettes and Health: A Legal Analysis*, 51 Cornell L.Q. 678 (1966) 14

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

Dr. David M. Burns is Professor Emeritus in the Department of Family and Preventive Medicine at the University of California, San Diego, School of Medicine. Dr. Burns's primary expertise is the origin, prevention, and treatment of pulmonary diseases. He was an author, editor or reviewer of every Surgeon General's Report on smoking since 1975, and has written 144 book chapters and peer-reviewed articles, including more than 100 on tobacco.

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Fellow, and the recipient of a Robert Wood Johnson Investigator Award. He is author or co-author of numerous books and articles including, with Gerald Markowitz, *Deceit and Denial: The Deadly Politics of Industrial Pollution* (2002).

Amici have a strong interest in the accuracy of the historical information that this Court considers in deciding the legal issues in this case.

SUMMARY OF ARGUMENT

Petitioner Philip Morris asks the Court to reverse the Court of Appeals for the First Circuit and to find that state-law challenges that involve Philip Morris's statements regarding tar and nicotine yields in cigarette marketing are either expressly or impliedly preempted by federal law. In support of its preemption arguments, Philip Morris advances an inaccurate history of the cigarette industry's advertising and marketing practices that fails to account for its frequent dissemination of false health claims and its manipulation of the applicable laws to deter regulation and accountability for its deceptive practices.

What Philip Morris calls regulatory compliance that should receive preemptive treatment is actually the *voluntary* marketing of Marlboro Lights and Cambridge Light cigarettes as either "light" or "lowered in tar and nicotine" without FTC control or approval. In fact, Philip Morris alone chose the "light" descriptor for its products based upon "Cambridge Filter Method" ("Cambridge Method") test results despite knowing that these results were misleading both to the FTC and consumers. Philip

Morris's use of the descriptors "light" and "low tar" in a fraudulent and misleading way was part of a lengthy, concerted campaign to deny smoking's harms while simultaneously marketing filtered and so-called "light" cigarettes as less harmful than full-flavored cigarettes, and as an alternative to quitting smoking. In light of these facts and this Court's precedent, the First Circuit correctly held that Respondent Good's claims under the Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 205-A, *et seq.*, which prohibits "deceptive acts or practices in the conduct of any trade or commerce," are not expressly preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.*, or impliedly preempted.

The history of the development and marketing of cigarettes with the "light" or "lowered in tar or nicotine" descriptors and of the FTC's attention to the issue establishes that the FTC does not regulate – or authorize – the use of any of the descriptors at issue in this case. As the First Circuit correctly held, the FTC lacks a "coherent federal policy" on the use of such descriptors. (Pet. App. 54a.)

The FTC's lack of regulation in this area and the FTC's lack of authority to enforce any particular standard for the use of descriptors, as evidenced by Philip Morris's 2002 petition urging the FTC to undertake such regulation, indicate that there has been no federal direction, and thus that Respondents' claims cannot be impliedly preempted. Even if the FTC had undertaken such regulation, the use of state consumer protection laws to further the FTC's mandate poses no conflict with federal law.

Accordingly, this Court should affirm the First Circuit's decision.

ARGUMENT

The Court of Appeals for the First Circuit correctly held that Respondents' claims that Philip Morris "falsely represented certain of its brands as 'light' or having 'lower tar and nicotine," Pet. App. 16a, are fraud claims that are not expressly preempted by the FCLAA, especially as construed by this court in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992). Further, the First Circuit correctly held that Respondents' claims are not impliedly preempted because the FTC has never formally defined the terms "light" or "low tar," or authorized their use.

I. The History of "Light" Cigarettes and the FTC's Regulatory Response to Their Marketing and Advertising Reveals That the FTC Lacks a Coherent Federal Policy That Could Impliedly Preempt Respondents' Claims.

The task of applying law to a set of facts cannot proceed in a vacuum. This Court repeatedly has stated that the "historical and factual context in which . . . cases arise is critical." *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2801 (2007). At issue here is the behavior of an industry that consistently has made various health-related claims for its products that subsequently were proven false. To avoid any consequences for those misrepresentations, it has

manipulated the facts and the law to profitable advantage.

While the cigarette industry's manipulative and deceptive conduct may not set it apart from any self-advocating industry as a general matter, the degree and depth of its mendacity are unrivaled in the annals of American commercial history. This history informs this Court's inquiry and should not be overlooked in deciding the Questions Presented.

This case centers on the simple fact that the FTC has neither compelled nor authorized Philip Morris to market its cigarettes as "light" or "lowered in tar or nicotine." Philip Morris voluntarily markets its cigarettes as "light," because doing so has proven highly profitable. The history both of the development and marketing of cigarettes, including filtered cigarettes and those labeled as "light," "low tar," or "lowered in tar and nicotine," and of the FTC's quiescent response to such marketing practices, reveals that Philip Morris, indeed the entire cigarette industry, "acted on its own" in using these descriptors.

Moreover, this history reveals that the cigarette industry, including Philip Morris, has used FTC inaction as a shield: the industry has insisted that, absent a rule or regulation governing these practices, it be allowed to rely on Cambridge Method data to justify advertising its cigarettes with these descriptors, despite having superior knowledge (not available to the FTC or the public health community) about cigarette design and the phenomenon of compensation indicating the health claims "light" and "low tar" are misleading. In fact, only recently,

after defrauded consumers, such as Respondents, began to allege claims under state deceptive trade practices statutes, enacted specifically to compliment the FTC's regulatory authority, has Philip Morris petitioned (though unsuccessfully) the FTC for a rulemaking to immunize their deceptive advertising through federal preemption. In view of this history, Respondents' claims are not impliedly preempted.

A. The rise of tobacco advertising and early FTC attempts to regulate it

Since the early twentieth century, the cigarette industry, including Philip Morris, has been one of – if not – the most aggressive advertisers of its products, setting "unprecedented ratios of promotion costs in relation to sales." Allan M. Brandt, *The Cigarette Century* 32 (2007) (citing Neil H. Borden, *The Effect of Advertising on the Demand for Tobacco Products—Cigarettes*, The Economic Effects of Advertising, 207-49 (1944)). In the years just prior to World War I, cigarette advertising accounted for $13 million dollars in advertising expenditures by tobacco companies. *Id.* at 54. By 1928, the annual advertising budget of American Tobacco on the Lucky Strikes brand alone was $7,000,000. *Id.* at 75. As President Calvin Coolidge explained "[m]ass demand has been created almost entirely through advertising," *id.*, and through advertising the cigarette industry was able to transform what had been only decades before a commercially insignificant and reviled offering into a popular, accepted, and highly-consumed product. By the late 1940s, Americans smoked more than 350 *billion* cigarettes each year, *id.* at 97, up from 2.5 billion in the early twentieth century. Robert N. Proctor,

Tobacco and the Global Lung Cancer Epidemic, 1 Nature Reviews Cancer 82-86 (2001).

Philip Morris introduced the Marlboro cigarette in 1927 as a premium brand for women. Brandt at 95. In 1933, it introduced its eponymous Philip Morris cigarette, which gained quick popularity due to Philip Morris's advertising claims that the additive diethylene glycol caused the cigarette to be less "irritating" than competitors'.[2] *Id.* In fact, in 1937 Philip Morris advertised:

> Men and Women with irritation of the nose and throat due to smoking were instructed to change to Philip Morris Cigarettes. Then day after day, each doctor kept a record of each case. The final results, published in authoritative medical journals, proved conclusively that when smokers changed to Philip Morris, every case of irritation cleared completely or definitely improved.

Id. at 104 (citing ad in *Saturday Evening Post*, Oct. 16, 1937)[3] Philip Morris even advertised heavily in medical journals and provided free cigarettes to physicians hoping to make "Philip Morris the

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[2] Diethylene glycol is highly toxic and can be fatal if ingested. It is commonly used in antifreeze and was a main ingredient in elixir of sulfanilamide, from which more than 100 people died, leading Congress to enact the Food Drug and Cosmetics Act of 1938. Institute of Medicine, *The Future of Drug Safety: Promoting and Protecting the Health of the Public* 22, 152 (Alina Baciu, et al. eds. 2007).

[3] For more recent advertisements, *see* http://cancercontrol.cancer.gov/tcrb/monographs/13/m13_7.pdf.

cigarette of the American medical profession." *Id.* at 95. In 1947, Philip Morris had a display at the American Medical Association convention giving away free cigarettes, insisting that Philip Morris was the "healthiest cigarette" and "explain[ing] the advantages of diethylene glycol as a hygroscopic agent." *Id.* at 105.[4]

Even as Philip Morris advertised these claims, it was becoming increasingly evident to tobacco manufacturers, including Philip Morris, and to the scientific community that cigarette smoking *caused* disease. In 1946, researchers found that the incidence of lung cancer had tripled over the previous three decades. *Id.* at 106 (citing *Cigaret Smoking Causes Lung Cancer*, NEA J. 35, no. 2 (1946)). Scientists also had identified the constituents of burning tobacco, or tars, as carcinogenic polycyclic aromatic hydrocarbons. *Id.* at 118; Robert N. Proctor, *Angel H. Roffo: The Forgotten Father of Experimental Tobacco Carcinogenesis*, 84 Bulletin of the WHO 494-95 (June 2006). And over the following decade the *New England Journal of Medicine*, among others, published research that "yielded evidence of an association between cigarette

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[4] In March 1943, the FTC filed a Complaint against P. Lorillard Co. alleging "unfair methods of competition in commerce and unfair and deceptive acts and practises [sic] in commerce in violation" of the FTC Act for conduct similar to Philip Morris's: Lorillard claimed in ads that the cigarettes were "'easy on the throat,' provided a 'bonus on throat ease,' . . . provided 'definite defense against throat irritation'". In *Matter of P. Lorillard Co.*, 46 F.T.C. 735 (No. 4922) (1950) (citing Compl. Mar. 2, 1943); *see also* Richard Kluger, *Ashes to Ashes* 130 (1997) (stating that the FTC filed complaints in 1942 against four top cigarette makers for "continually offering health reassurances that skirted intolerably close to express warranties of harmlessness").

smoking and lung cancer so strong as to be considered *proof* . . . ." Brandt at 156 (emphasis added).

Prominent magazines and newspapers reported this research and its authors' conclusions that experiments had "proved" "beyond any doubt" that smoking *caused* cancer, alongside the statistics that rates of lung cancer in the United States had quadrupled for men and doubled for women since 1933. *Id.* at 161. The widespread public dissemination of this research led to what the tobacco industry called a "health scare," as consumers became increasingly aware of the health risks associated with smoking. National Cancer Institute, *Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, at 199 (2001) ("Monograph 13"), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/13/.

Notwithstanding these facts, the tobacco industry, including Philip Morris, publicly refused to acknowledge that smoking caused disease. Instead, the industry collectively decided to respond to the scientific research and related health claims by waging a public relations campaign aimed at producing and sustaining scientific skepticism, resisting regulation of its products, and defending itself from legal liability. It also vigorously sought to maintain controversy around the scientific findings that causally linked smoking to cancer and other diseases. *See* Robert N. Proctor, *Cancer Wars: How Politics Shapes What We Know and Don't Know About Cancer* 101-32 (1995) ("Cancer Wars"); Brandt at 159-60. The tobacco industry also decided to

appeal to increasingly health-conscious consumers, by developing filtered cigarettes, and later marketing cigarettes as "light" and "lowered in tar." *See* National Cancer Institute, Monograph 13, at 199. And the tobacco industry used Congress and the FTC as a shield, first by resisting regulation, and then, when Congressional regulation appeared inevitable, by actively shaping the legislative action to their advantage.

These industry efforts were deliberate and coordinated. For example, after December 1953, the tobacco companies presented a "unified front on smoking and health" requiring "strategic and explicit collusion." Brandt at 169. The companies established the Tobacco Industry Research Committee ("TIRC") – Parker McComas of Philip Morris served as one of its early acting chairs – and in early January 1954 issued "A Frank Statement to Cigarette Smokers." *Id.* at 170, 173. The statement was "a triumph of modern PR" – it was duplicitous but effective. *Id.* It read:

> We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health.

Id. (citing Tobacco Industry Research Committee, *A Frank Statement to Cigarette Smokers* (Jan. 4, 1954), *available at* http://legacy.library.ucsf.edu/tid/qxp91c00). It was

signed by top executives from the major U.S. tobacco companies, except Liggett & Meyers, and was published as an advertisement in 448 newspapers. *Id.* at 171; Cancer Wars at 105.

Notwithstanding the rhetoric of the Frank Statement, the tobacco companies' unified advertising strategy dodged advertising regulation, presenting claims about the beneficial health effects of specific cigarette brands, minimizing health concerns, and reassuring consumers with images and advertisements of healthy, attractive smokers. Brandt at 243. For example, one company urged smokers to take their "own personal 30-day test" to prove the brand's mildness, and juxtaposed in the ad a "Doctors Report" and a "Smokers Report." *Id.* at 162. Arthur Godfrey's television appearances also epitomized this campaign: During his weekly show Godfrey announced, "I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did any harm, and now, we've got proof."[5] *Id.* at 162.

Even as the industry funded a massive public relations campaign undermining the relationship between smoking and disease, and issued press releases explaining that "[c]hemical tests have not found any substance in tobacco smoke known to cause human cancer . . . ," *id.* at 202, industry scientists privately confirmed and added to "the evidence showing the connection between lung cancer and cigarette smoking." *Id.* at 199. *See also* Proctor Expert Report, *Schwab v. Philip Morris USA*, CV 04-1945 (E.D.N.Y. Dec. 18, 2005)

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[5] "Godfrey died of emphysema in 1983." Brandt at 163

Companies, however, were unwilling to develop cigarettes that actually were safer, because to do so would have admitted that smoking cigarettes was harmful.

Yet, cigarette manufacturers began to alter their products in response to public concern, by initially adding filters and later adding the descriptors "light" and "lowered in tar." *Id.* at 244. So was born the *illusory* quest to develop and market a "safer" cigarette. It was illusory because industry executives realized that filters were "a critical new marketing tool," and industry scientists realized that filters *did not* create a safer cigarette. *Id.*

After an R.J. Reynolds' chemist determined that varying the pH in a filter changed the filter's color when smoked, he recommended that filters' pH be altered so that filters darkened upon smoking: "While the use of such color change material would probably have . . . no effect on the actual efficiency of the filter tip material, the *advertising* and *sales advantages* are obvious." *Id.* at 245 (citation omitted) (emphasis added). Consumers assumed the color change meant that the filter was working and consumption of filtered cigarettes accordingly increased. By 1954, filtered cigarettes composed approximately ten percent of the U.S. cigarette market. *Id.* at 244.

In 1955, the FTC issued voluntary guidelines advising tobacco companies not to make unsubstantiated representations about the tar and nicotine levels of their cigarettes. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985); *see also* Brandt at 244. The FTC had become

alarmed that tobacco companies' advertising claims were inaccurate and misleading. *Brown & Williamson*, 778 F.2d at 37. Despite the 1955 FTC advisory, and 1960 FTC rules to eliminate unsubstantiated health claims, tobacco companies continued to aggressively market their cigarettes as having less tar than competitors' and thus as impliedly healthier. The FTC's limited ability to regulate tobacco advertising became increasingly obvious.

The combination of the TIRC and the industry's concerted media campaign successfully created a cigarette "controversy" by 1960. Cancer Wars at 105-10; Brandt at 184. The industry actively and aggressively identified and supported skeptics and by doing so "managed to sustain the widespread perception of an active . . . scientific controversy into the 1960s despite overwhelming evidence and scientific consensus that smoking cause serious disease." Brandt at 184. And the industry managed to increase sales: the total number of cigarettes sold rose from 369 billion annually in 1954, to 488 billion in 1961. *Id.* at 203.

In 1964 the Surgeon General released its landmark report, establishing cigarette smoking as a cause of lung cancer, at least in males. The FTC responded that "given the surgeon general's findings, tobacco companies would be engaging in 'an unfair or deceptive act' . . . if they did not disclose on both packages and in ads: 'Caution: cigarette smoking is dangerous to health and may cause death from cancer and other diseases.'" Brandt at 250 (citing Richard A. Wegman, *Cigarettes and Health: A Legal*

Analysis, 51 Cornell L.Q. 678 (1966)). The FTC mandated such warnings as of January 1, 1965.

The report galvanized the tobacco industry, including Philip Morris. The industry insisted "that there is no proof that tobacco causes disease; disparage[d] and attack[ed] all studies indicating such a relationship," *id.* at 230, all the while recognizing that its continued profitability rested on marketing cigarettes that assuaged health concerns but continued to deliver sufficient amounts of nicotine. Monograph 13 at 206. And, despite declines in cigarette sales immediately following the report's release, the industry reported record sales in 1965 and its highest profits in its history. Brandt at 237.

Industry executives also responded politically by appointing a single spokesman, Thomas Austern, to respond to the FTC – and to attempt to derail FTC regulation by seeking congressional oversight. Brandt at 253. Congress essentially enacted the bill presented to it by the tobacco industry in response to the Surgeon General's Report and proposed FTC action, the FCLAA at issue here. *Id.* at 256. In the act, the warning label proposed by the FTC that was to take effect in January 1965 was diluted: "Caution: Cigarette Smoking *May Be* Hazardous to Your Health."[6] *Id.* (emphasis added). The FTC fought the change in language but recognized that "the present

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[6] The FCLAA and its ambiguous warning label succeeded in accomplishing the tobacco industry's goal of neutralizing or minimizing state tort claims. Because every smoker would be warned that "smoking may be hazardous to your health," the FCLAA gave the industry ammunition for its argument that smokers *knowingly* assumed the risks associated with and inherent in smoking. Brandt at 254.

cautionary statement on cigarette packages . . . cannot compete with the forces that promote cigarette smoking." *Id.* (citation omitted). The FCLAA also prohibited the FTC from requiring health warnings in cigarette advertisements for four years.[7] *Id.* at 257.

The FCLAA did not eliminate the FTC's regulatory role entirely – the FTC was to monitor the effectiveness of labeling and the ongoing impact of advertising and promotion. *Id.* at 266. In 1966, the FTC issued a policy statement indicating that a factual statement of the tar and nicotine content based upon the Cambridge Method would not be treated as deceptive as long as there were no express or implied representations in advertisements that the represented level of tar or nicotine reduced or eliminated health hazards. Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955).[8]

The FTC believed that the Cambridge Method "provide[d] smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62

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[7] The 1969 act extended the bar on FTC labeling requirements for ads until at least July 1, 1972. Brandt at 272.

[8] Such policy statements are not formally promulgated as a substantive rule with a public comment period. Therefore, they lack the force and effect of law, and merely advise how an agency likely will exercise a discretionary power. They are neither rules nor regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31, 315-16 (1979); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003) (stating that policy statements inform the public of an agency's views but do not create legal rights or obligations).

Fed. Reg. 48,158 (1997). The Cambridge Method is a machine measurement of cigarette tar and nicotine yields that does not attempt to replicate the amount of tar and nicotine actually inhaled by human smokers, which itself varies based upon an individual's personal smoking behavior. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d. 1, 435-36 (D.D.C. 2006). The Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Brown & Williamson*, 778 F.2d at 37.

Although the Cambridge Method was originally designed by a government scientist, the cigarette industry embraced the Method, refined testing procedures, and lobbied the FTC to use their "smoking machine." Statement of FTC Commissioner Paul Rand Dixon (May 15, 1967) *available at* http://www.nmcourt.fed.us/DCDOCS/files/05cv659/Volume_I/114.pdf (stating, "[W]e have received [the cigarette companies'] complete cooperation in establishing this laboratory. Our smoking machine . . . has been developed and perfected by the tobacco scientists since the Commission announced its intentions."). Philip Morris and the cigarette industry told the FTC that the Cambridge Method could have *some* useful value in comparing the tar and nicotine yields of cigarettes, even if this data did not reflect actual smoker tar and nicotine intake; yet, it did not disclose to the FTC that its own internal tests, based on superior testing methods and reflecting a sophisticated understanding of cigarette design and the

phenomenon of compensation, indicated that the data had no value in predicting human exposure.

By 1966, cigarette sales were at an historic high and in June 1967, the FTC found "virtually no evidence that the warning statement on cigarette packages has had any significant impact." Brandt at 257 (citation omitted).

In 1970, the FTC initiated formal rulemaking proceedings to require tobacco manufacturers to disclose the tar and nicotine yields as determined by the Cambridge Method test. 35 Fed. Reg. 12,671 (1970). However, the FTC never completed the rulemaking process. Instead, five major tobacco companies, including Philip Morris, as well as three minor producers, entered into a private, voluntary agreement to disclose Cambridge Method test data in cigarette advertisements. The companies entered into this voluntary agreement to avoid FTC regulation of their cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. at 435. This private agreement prompted the FTC to end its formal rulemaking proceedings. 62 Fed. Reg. at 48,158. Notably, the FTC was not a party to the agreement and, as a result, it never established the agreement's terms as a "Trade Regulation Rule" pursuant to 15 U.S.C. § 57a. Thus, the FTC lacked the authority to enforce the voluntary agreement. *See Brown & Williamson*, 778 F.2d at 37.

B. Sales of "light" cigarettes flourished in an increasingly unregulated era

In 1971, Philip Morris introduced Marlboro Lights cigarettes nationwide as "light," while

including the phrase "lowered in tar and nicotine" on all of its packaging. *See* Proctor Schwab Report.

Nevertheless, as early as the 1970s, Philip Morris internally recognized, based upon its sophisticated understanding of cigarette design and smoker compensation, that "low tar" or "light" cigarettes offered no discernable health benefit and that these "light" cigarettes were potentially more hazardous than regular cigarettes. *Philip Morris USA*, 449 F. Supp. 2d. at 222-24 ("By 1978, Philip Morris had substantial evidence that 'filter dilution [which Philip Morris used to reduce tar and nicotine yields when testing by the Cambridge Method] was somehow acting to increase' the biological 'activity' of the whole smoke condensate ("WSC") collected from its cigarettes."). While Philip Morris kept this information secret, it continued selling Marlboro Lights as "light" and "lowered in tar and nicotine" and publicly defended the Cambridge Method as a useful means of measuring tar and nicotine yields in "light" cigarettes.

Dr. William Farone, who was the Director of Applied Research at Philip Morris from 1977 to 1984, has testified that:

> [I]n the case of Marlboro Lights, the Philip Morris test data that I have reviewed on that level of dilution for equivalent blends indicated that the product design for their Light cigarettes was more mutagenic than the full flavor Marlboro, Marlboro Reds, and therefore predictive of more potential *cancer* risk. These studies were repeated multiple

> times over the past 20 years and continue to be repeated to this day. The Philip Morris data, as was used by Philip Morris, was a strong warning that their product design change between a Marlboro Red and a Marlboro Light – increased ventilation – resulted in a potentially more dangerous product.

Id. at 456-57. Dr. Farone further testified that Philip Morris has not "changed the design of [Marlboro] 'Lights' cigarettes in response to its studies and knowledge concerning mutagenicity." *Id.* at 457.

Philip Morris was aware, as early as 1975, that, due to compensation, smokers got as much tar and nicotine from Marlboro Lights as from regular Marlboros:

> Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers and Marlboro Lights smokers. . . . [T]he Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.

Id. at 465-66.

Nevertheless, Philip Morris continued to market Marlboro Lights as "light" and "lowered in tar and nicotine." James Morgan, former CEO of Philip Morris, testified that "Philip Morris made a calculated decision to use the phrase 'lower tar and nicotine' even though its own marketing research indicated that consumers interpreted that phrase as meaning that the cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option." *Id.* at 513-14.

During this period, the FTC took no regulatory action regarding "light" cigarette advertising; nor did it take any regulatory action based on the Cambridge Method.

In the early 1980s, Philip Morris and R.J. Reynolds discovered that Brown & Williamson was taking market share by marketing its Barclay cigarettes as the industry leader in "light" smoking, yielding a mere 1 mg of tar using the Cambridge Method. Philip Morris and R.J. Reynolds protested to the FTC that the cigarettes' unique design fooled the smoking machine. The FTC addressed the issue and sought an injunction in federal district court to stop Brown & Williamson. *Brown & Williamson*, 778 F.2d at 37. The injunction sought also would have forced Brown & Williamson to modify the standard Cambridge Method testing procedure to one that the FTC devised solely for Barclay cigarettes. Although the D.C. Circuit concluded that Brown & Williamson's claims about the amount of tar and nicotine were deceptive and had to cease, it found, in an opinion by Judge Bork, that the FTC could not dictate how cigarettes are tested. *Id.* at 42. The court explained that to grant the requested

injunction would "enshrine the current FTC system [Cambridge method] as the sole legitimate testing method, even though it was not passed pursuant to section 18 of the FTC Act, 15 U.S.C. § 57a (1982), and subjected to the possibility of judicial review." *Id.* at 45. Absent the use of such procedures, the court held that the FTC lacks the authority to require any particular tar and nicotine rating system. *Id.* The D.C. Circuit invited the FTC to "address the problem by promulgating a Trade Regulation Rule under section 18 of the Act." *Id.* To date, the FTC has not done so.

Rather than promulgate a trade regulation rule "enshrining" the Cambridge Method, the FTC ceased conducting its own testing of "light" cigarettes in 1987, closing its laboratory. 62 Fed. Reg. at 48,158. The Tobacco Institute Testing Lab, an organization funded by major tobacco companies, then assumed the role of conducting the Cambridge Method tests, annually submitting the data to the FTC to discharge the agency's obligation to report the numbers to Congress. *Id.* at 48,158 n.5.

Public health authorities believed that a cigarette yielding less tar in the Cambridge Method tests would be likely to produce less cancer as well. Monograph 13 at 2. For example, in 1981, the Surgeon General recommended that smokers who could not quit could face less risk of illness by smoking "light" cigarettes. U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981), *available at* http://profiles.nlm.nih.gov/NN/B/B/S/N/_/nnbbsn.pdf.

Philip Morris, on the other hand, had special knowledge of the Cambridge Method's limitations, in part because it had developed an alternative testing machine, the human smoke simulator, that could test for actual smoker nicotine and tar yields. A Philip Morris document dated September 17, 1975, from Goodman to Leo F. Meyer, the Philip Morris Director of Research, reflects the depth of Philip Morris's knowledge. As Dr. David M. Burns, an author of the 1981 Surgeon General's Report, has explained the document:

> "very clearly demonstrates that, in contrast to what we believed six years later when we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We [in the public health community] believed they were . . . [T]his study was done on a machine that mimicked actual smoking behaviors, that actually matched the behavior of the individual when the machine smoked the cigarette. In 1981, one of the recommendations that we made . . . was that this type of machine should be developed so that we could develop a better understanding of the relationship between delivery of tar and nicotine of these cigarettes when they were actually smoked."

Philip Morris USA, 449 F. Supp. 2d, at 466. Dr. Burns further testified, "Had that information been available to us, we would not have then offered the

recommendation to the population of the United States that it would be a good idea to shift to these products." *Id.* at 445.

Philip Morris also internally recognized that the Cambridge Method data from its line of "light" cigarettes, which were designed with dilution filters, were false and misleading. A Philip Morris document dated August 11, 1967, from Helmut Wakeham, Vice President of Corporate Research and Development, to Paul D. Smith, Vice President and General Counsel, recognized that human smokers increased their smoke intake when switching from non-filter to filter cigarettes:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case. . . . In the smoking machine the puff volume is constant so that with dilution the quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human smoker who appears to adjust to the diluted smoke by taking a *larger puff* so that he still gets about the same amount of equivalent undiluted smoke. . . . The smoker is, thus, apparently defeating the purpose of dilution to give him less "smoke" per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appear to be erroneous and misleading.

> It has probably always been so for diluted smoke cigarettes, whether dilution is obtained by porous paper or holes in the filter.

Id. at 462. Philip Morris's own scientist, Dr. Jerry Whidby, testified that:

> Product Opinion Laboratories was a facility established by Philip Morris to evaluate smokers' reaction to the cigarette brands Philip Morris was selling, as well as to Philip Morris's prototype cigarettes," and that he was not "aware of any instance, at any time between when Dr. Wakeham wrote this document in 1967 and when [Dr. Whidby] left the company in 1998, in which Philip Morris informed the American public directly of Wakeham's conclusions that the FTC tar and nicotine yields are apparently 'erroneous and misleading,'" and "dilution filter cigarettes generated lower FTC yields than non-dilution cigarettes, but delivered about the same amount of smoke to smokers.

Id. (citing Dr. Jerry Whidby Dep.).

Dr. Farone has testified to the extraordinary significance of Mr. Wakeham's statements in this document:

> It shows that Philip Morris understood the puff compensation phenomenon. . . . this document [also] shows that Philip

> Morris knew in 1967 that human smokers compensated by increasing their smoke intake when switching from non-filter to filter cigarettes, and in doing so, smokers received the same amount of tar and nicotine from their filter cigarettes as from non-filter cigarettes. It also shows Wakeham's understanding that the FTC tar and nicotine yields for low tar cigarettes are erroneous and misleading.

Id. at 463.

Thus, when Philip Morris first designed Marlboro Lights and crafted a marketing strategy that would downplay the health risks of smoking "light" cigarettes in comparison to full-flavored cigarettes, it was fully aware that its marketing strategy was "erroneous" and "misleading." The public health authorities, in contrast, lagged behind in their scientific understanding of cigarette design and compensation. Any attempts by them to raise awareness of the health effects of smoking were fiercely contested by Philip Morris and other industry members, who continued to insist that more research was needed before any definitive pronouncements could be made about whether cigarettes were addictive or caused disease. That Philip Morris in the 1970s and 1980s had a sophisticated and specialized understanding of just how addictive and harmful its "light" cigarettes were makes their use of these descriptors all the more fraudulent.

C. The FTC declined to adopt regulations governing "light" cigarettes even as the United States prosecuted Philip Morris for deceptive marketing practices related to "light" cigarettes

In 1997, the FTC solicited public comment on whether it should regulate descriptors such as "light" or "low tar." 62 Fed. Reg. at 48,163. The FTC stated in its request that "[t]here are *no* official definitions" for terms such as "low tar," "light," or "ultra light," but explained that "they appear to be used *by the industry* to reflect ranges of FTC tar ratings." *Id.* (emphasis added).

The FTC sought public comment on the use of these descriptors at a time when public health authorities and researchers were developing an increasingly sophisticated understanding of smoker compensation and cigarette design – an understanding that the cigarette industry, including Philip Morris, had long possessed. These advancements in public knowledge became possible largely because numerous internal industry documents, including memoranda on the science of cigarette design and on advertising practices, were made publicly available through litigation brought against the tobacco companies. *See* Monograph 13 at i-ii.

The National Cancer Institute's Monograph 13, which summarizes these documents, concludes that "[w]idespread adoption of lower yield cigarettes in the United States has not prevented the sustained increase in lung cancer among older smokers." Monograph 13 at 10. The report found that:

> [m]easurements of tar and nicotine yields using the FTC method do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette. The measurements also do not offer meaningful information on the relative amounts of tar and nicotine exposure likely to be received from smoking different brands of cigarettes.

Id.

Although the FTC did not take any regulatory action following its request for public comment, the United States in 1999 brought suit in federal district court under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against Philip Morris and tobacco-related entities, several of whom were signatories to the 1971 voluntary agreement. With respect to Philip Morris, the United States alleged, in part, that it had engaged in a decades-long unlawful conspiracy to deceive the American public about the health benefits derived from smoking low tar, "light" cigarettes. *Philip Morris USA*, 449 F. Supp. 2d. at 26.

Philip Morris in this case argues that as early as 1967 both the FTC and the cigarette industry were aware of the Cambridge Method test's limitations, namely, that the test neither reflected actual tar and nicotine intake in human beings, nor accounted for the phenomenon of compensation. (Br. 6-7). But as amicus curiae Dr. David M. Burns testified in *United States v. Philip Morris USA*, this is false. Philip

Morris and other cigarette manufacturers had superior knowledge about "the deceptive nature of low tar cigarettes and the influence of compensatory behavior on exposure of smokers who uses these cigarettes" that they "failed to disclose to public health authorities." 99-cv-02496 (D.D.C) (Dr. Burns Direct Exam. 48:2-5), *available at* http://www.usdoj.gov/civil/cases/tobacco2/01_Burns_Testimony.pdf.

Based on his review of internal documents of the tobacco company defendants, Dr. Burns concluded:

> [T]he cigarette companies were aware of nicotine compensation and design changes that could be employed to facilitate compensation by smokers. . . . [T]he companies were aware that the FTC-machine measured yield was misleading to consumers and that the FTC yield it provided little to no information on how much tar and nicotine, whether in absolute or relative terms, were likely to be ingested into the smoker's body.

Id. at 48:12-17.

Philip Morris itself had superior knowledge that it failed to disclose to the public or public health authorities. Dr. Burns testified that Philip Morris was "aware[ ] of the deception of smokers by the use of machine measured tar values and use of the term 'light'. . ." *Id.* at 52:9-10. Philip Morris's own internal documents "very clearly demonstrate[ ] that, in contrast to what we believed six years later when

we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We believed that they were." *Id.* at 52:21-53:1-3. But the Surgeon General and the public health community at that time "did not have access to this information or comparable information." *Id.* at 53:5.

Amicus curiae Dr. Allan Brandt testified that in the course of suppressing this superior knowledge, Philip Morris and members of the cigarette industry sought to create a "controversy" over the health effects of smoking:

> It is my opinion that filtered cigarettes, and their advertising and promotion, constituted a critical aspect of industry strategy in the wake of categorical scientific evidence demonstrating the harms of smoking. As I have suggested, the central part of this strategy was to utilize science to argue that there was "no proof," that there was a controversy about the scientific findings. At the same time, a consistent counterpart to this strategy was to imply that the product had been successfully modified to remove any hazards. . . Both the effort to sustain a controversy and the reassurance of filtered cigarettes were important in an ongoing effort to shape public knowledge about smoking and its harms in the interest of the industry, and to maintain and expand the sales of cigarettes.

United States v. Philip Morris, 99-cv-02496 (D.D.C.) (Dr. Brandt Direct Exam. 138:22-23 to 139:1-5, 7-9), *available at* http://www.usdoj.gov/civil/cases/tobacco2/20040920%20Allan%20M.%20Brandt,%20Ph.D.,%20Written%20Direct.pdf. According to Dr. Brandt, public relations strategists for the industry had, in December 1953, developed a marketing and advertising strategy rooted in deception.

> As the memoranda from 1953 make clear, [the industry] well understood that the health risks associated with smoking by that time had created a new environment that had dramatically changed the market for selling cigarettes. Unless consumers came to doubt the evidence, or came to believe that the product had been modified, the traditional rationale for the product would be severely damaged. The industry utilized considerable resources in the aggressive implementation of this strategy. They repeatedly denied and distorted the massive scientific evidence through a sophisticated public relations program. At the same time, they implied that modifications in their product protected consumers from these very harms.

Id. at 139:17-23 to 140:1-2.

In August 2006, following more than two years of discovery and a trial at which countless scientists, government officials, and tobacco industry members testified, the federal district court held that Philip

Morris had falsely marketed and continues to falsely market "light" cigarettes through its use of the descriptor "light" in violation of RICO. The court enjoined Philip Morris from using descriptors such as "light" in cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. at 398. It found:

> [T]he only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about "light" and "low tar" cigarettes is to prohibit them from using any descriptor which conveys a health message. . . . By using descriptors such as "lights" and "low tar," Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message.[9]

Id., 449 F. Supp. 2d at 924-25.

Notably, in 2002, during the Government's RICO suit, Philip Morris petitioned the FTC to promulgate a trade rule that would require tobacco companies:

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[9] The U.S. Court of Appeals for the District of Columbia has stayed that injunction pending appeal.

(1) to disclose the average tar and nicotine yields of cigarette brands; (2) to define and regulate the use of descriptors such as "light" and "ultra light;" and (3) to mandate the use of disclaimers with respect to the average tar yield and the health effects of low-yield cigarettes. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). The FTC never acted on that petition.

To this day, Philip Morris and other cigarette companies continue to market their cigarettes as "light" and "low tar" without any FTC authorization or requirement that they do so. For undertaking these voluntary marketing efforts, these cigarette companies can be fairly characterized as a "rogue" industry: "[W]hen an industry knows it is producing a dangerous and deadly product but denies these harms for decades, all the while vigorously promoting the product, it is well outside the boundaries of American corporate practice." Brandt at 502.

II. The History and the FTC's Conduct Demonstrate That Respondents' Claims Are Not Impliedly Preempted

No FTC rule or regulation governs Philip Morris's use of "light" or other such descriptors in advertising. The FTC does not authorize or regulate Philip Morris's "light" cigarette marketing practices: Respondents' claims thus are not impliedly preempted. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002) (holding that the coast guard's decision not to regulate propeller guards has no implied preemptive effect).

The 1971 voluntary agreement among select tobacco industry members does not equal an FTC regulation carrying the force and effect of law. The FTC, which was not a party to that agreement, has no authority to enforce the agreement. *Brown & Williamson*, 778 F.2d at 37. As the court in *Brown & Williamson* explained, because the "FTC had not adopted [the Cambridge Method] of testing pursuant to a Trade Regulation Rule . . . one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." *Id.* at 44.

It is also inconsequential that the FTC once conducted testing pursuant to the Cambridge Method. Absent a rulemaking, the FTC lacks the authority to require any particular tar and nicotine rating system. *See id.*

The FTC reports to Congress, which on occasion have used the term "low tar" to refer to cigarettes measuring 15 milligrams or less in tar under the Cambridge Method test, are not legally binding.[10] *See United States v. Anderson*, 82 F.3d 436 (D.C. Cir. 1996) (holding that a statement by the United States Sentencing Commission included in a special report to Congress was at most a policy statement). Only after following its applicable procedures may a federal agency affect the rights of individuals through regulation. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

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[10] This purported "low tar" definition was *never* used in the context of any enforcement proceeding, formal rule, guide or policy statement that indicated the FTC's view on the legality of the use of the representation in advertising.

Furthermore, FTC reports that have employed the term "low tar" or related descriptors have not purported to define these terms. The FTC has repeatedly assured Congress that it has never formally defined "'ultra-low tar,' or any term related to 'tar' level." FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1979*, 11 n.8 (undated). As recently as 1997, in its request for comments on whether it should define "light" cigarette descriptors, the FTC reiterated that "[t]here are no official definitions for these terms," and that these terms merely reflect industry usage. 62 Fed. Reg. at 48,163.

Finally, nothing more clearly evidences that the FTC has never defined the term "light" than the fact that Philip Morris in 2002 petitioned the FTC to do just that. *See* Petition for Rulemaking Preliminary Statement at 32-35. As discussed above, the FTC never acted on that petition.

The 1971 consent order between the FTC and American Brands also does not evidence FTC control over the cigarette marketing practices of any other tobacco company, including Philip Morris. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971).

This Court has held consistently that consent orders or decrees are contracts that only bind the parties thereto, and that "any command of a consent decree or order must be found within its four corners, and not by reference to any purposes of the parties or of the underlying statutes." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 233 (1975) (internal quotation marks omitted); *see also California v. Am. Stores Co.*, 495 U.S. 271 (1990) (deciding merits of

California's suit alleging that merger violated Clayton Act, which suit had been filed a day after the FTC had approved the proposed merger following American Stores Co.'s agreement to the terms of a consent order with the FTC); *Am. Stores Co. v. Comm'r of I.R.S.*, 114 T.C. 458 (2000).

Further, since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed as contracts, without reference to the legislation the Government sought to enforce but never proved applicable through litigation. *ITT Cont'l Baking Co.*, 420 U.S. at 236-37; *see United States v. Atl. Ref. Co.*, 360 U.S. 19, 23 (1959) (rejecting the Government's argument that its interpretation of a consent order would better serve "the basic purpose of the [act]" and explaining that, "[t]his may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues.").

Most importantly, because consent orders are contracts between the parties, they cannot bind non-parties. *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *superseded by statute on other grounds in* The Civil Rights Act of 1991 (explaining that this "rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'"); *see also Am. Stores*, 495 U.S. at 271. It is undisputed that Philip Morris was not a party to this 1971 consent order. Therefore, this 1971 consent order can have no legal effect regarding whether Philip Morris is compelled or authorized to use the descriptors "light" and "lowered in tar and nicotine" in advertisements or on packaging.

None of these FTC actions impliedly preempt suits under Maine's deceptive trade practices statute, which is designed to further the FTC's own policies. In fact, the FTC, beginning in the 1960s, assisted states like Maine in drafting deceptive trade practices statutes, known as "little FTC Acts," to compliment the agency's regulatory authority, recognizing that the agency has limited resources to prosecute deceptive advertising claims. Victor E. Schwartz et al., *"That's Unfair!" Says Who—the Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 99 (2007) ("When the FTC urged states to adopt their own 'little-FTC Acts,' they did so as a way of combining resources to target unfair and deceptive practices at both the local and national levels. The federal and state laws are meant to complement each other.") (citations omitted); *see also* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373, 374 (1990). These little FTC Acts extend to state attorneys general and private litigants the authority to prosecute deceptive marketing practices that would violate the FTC Act. This enforcement authority is co-extensive and complimentary, and thus there is no "disruption" of the FTC's own regulatory authority.[11] Schwartz, 47 Washburn L.J. at 99 (recognizing that the "adoption of [little FTC Acts] are not intended to create a new policy-making function that could be at odds with federal consumer protection efforts.");

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[11] As in most states, Maine's consumer protection statute requires that it be construed in conformity with the FTC and federal courts' construction of "the Federal Trade Commission Act." 5 Me. Rev. Stat. Ann. § 207(1).

compare Riegel v. Medtronic, Inc., 128 S.Ct. 999, 1008 (2008) (indicating there is no conflict and thus no preemption when state-based lawsuits help enforce federal agency responsibilities).

Respondents are furthering the underlying purposes of the FTC Act by prosecuting Philip Morris's deceptive advertising and marketing practices. Should the FTC conclude that Philip Morris's use of these descriptors is not deceptive, it could enact a trade regulation rule to that effect. But it has not, and in the absence of a rule or regulation, Respondents' claims are not impliedly preempted by FTC inaction.

CONCLUSION

Philip Morris voluntarily markets Cambridge Light cigarettes and Marlboro Lights as "light" or "lowered in tar and nicotine" without FTC control or direction. Thus, Respondents' claims are not impliedly preempted. For these reasons, and because Respondents' claims are not expressly preempted under the FCLAA, as discussed in Respondents' brief, this Court should affirm the First Circuit's decision.

Respectfully submitted,

June 18, 2008

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AMICUS CURIAE BRIEF

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(11)

No. 07-562

FILED
APR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

**BRIEF OF *AMICUS CURIAE*
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OF THE UNITED STATES OF AMERICA
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

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Anindya Sen, *An Empirical Test of the Offset Hypothesis*, 44 J.L. & Econ. 481 (2001) 30

Barbara J. Rolls & Debra L. Miller, *Is the Low-Fat Message Giving People a License to Eat More?*, 16 J. Am. College of Nutrition 535 (1997) 29

Brian Wansink & Pierre Chandon, *Can "Low Fat" Nutrition Labels Lead to Obesity?*, 43 J. Marketing Res. 605 (2006) 29

David McCullough, *John Adams* 20 (2001) 18

Dianne Engell, *et al.*, *Effects of Information About Fat Content On Food Preferences in Pre-Adolescent Children*, 30 Appetite 269 (1998) 29

Steve Peterson, George Hoffer, & Edward Millner, *Are Drivers of Air-Bag Equipped Cars More Aggressive? A Test of the Offsetting Behavior Hypothesis*, 38 J.L. & Econ. 251 (1995) 30

IN THE

Supreme Court of the United States

NO. 07-562

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry

[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber has filed *amicus* briefs in other preemption cases and is well situated to address the preemption issues raised in this case. Its members are engaged in commerce in each of the 50 States and are subject in varying degrees to a wide range of federal statutes and regulations. As a result, its members often confront the interplay between the duties imposed by federal law and the state-law standards applied in consumer fraud cases. The Chamber is, as a result, uniquely suited to offer a broader perspective on preemption and keenly interested in ensuring that the regulatory environment in which its members operate is rational and consistent.

SUMMARY OF ARGUMENT

Product labeling and descriptions are critical both to consumers and our integrated national economy. Recognizing that, Congress has enacted a variety of statutes addressing such disclosures, including the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), 15 U.S.C. § 1331 *et seq.* Such statutes ensure uniform, nationwide standards. They promote efficiency, reduce barriers to interstate commerce, and prevent consumer confusion. But federal law cannot achieve those goals if federal labeling requirements and testing methods can be second-guessed by different juries under state tort law in different States.

A. The Labeling Act expressly preempts plaintiffs' claims. This lawsuit unequivocally seeks to impose a state-law requirement or prohibition "based on smoking and health" with respect to the advertising or promotion

of cigarettes. Plaintiffs would require Philip Morris USA Inc. ("PMUSA") either to include more information in addition to federally required tar and nicotine data, or to omit the lower-tar and lower-nicotine descriptors supported by federally mandated testing. Such requirements or prohibitions are plainly "based on" smoking and health.

B. The decision below erred in reducing the Labeling Act and this Court's cases, including *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), to mere pleading rules, depriving the statutory preemption language of any real effect. The fact that PMUSA could avoid suits and adverse jury verdicts only by providing additional disclosures—or abandoning descriptors that are both accurate under federal models and promoted by federal policies—confirms that, no matter how plaintiffs characterize their claims, they are preempted under any reasonable reading of the Labeling Act and *Cipollone*.

C. The decision below invites the very disuniformity and confusion that Congress sought to avoid. Congress has repeatedly recognized that, in today's integrated national economy, uniform standards promote efficiency, avoid waste, and reduce barriers to interstate commerce. Congress has also recognized that consumers would be harmed by the confusion that results if the same products are labeled differently in different States. The decision below cannot be reconciled with Congress' effort to avoid the injury to the national economy that would result from such nonuniform labeling.

II. Plaintiffs' claims are also impliedly preempted because they create obstacles to important federal goals.

A. The FTC has a longstanding policy of requiring cigarette companies to provide standardized tar and nicotine data to consumers. The fact that the FTC has not issued a formal rule is of no moment, as this Court has

repeatedly made clear that agency activity outside the formal rulemaking process can have preemptive effect where, as here, that activity reflects the agency's considered policy judgments.

B. Plaintiffs' lawsuit does not merely create an obstacle to federal goals. It also seeks to indict statements that accurately reflect a federal testing method imposed by a federal agency. Plaintiffs' theory is, in essence, that the FTC's method for measuring tar and nicotine does not accurately reflect real-world conditions because smokers may "compensate" for the reduced nicotine yields from "light" cigarettes by, for example, puffing more frequently or smoking more. They thus assail descriptors as fraud even though they accurately reflect the results of the FTC's testing method. The nationwide uniformity and consistency Congress sought to achieve cannot exist, however, where federal law mandates certain tests—and requires publication of the results to educate consumers—if state law can indict publication of the results as fraud.

C. Plaintiffs' theory of this case is an invitation for labeling and regulatory chaos. Congress has provided for uniform and mandatory labeling through myriad programs, including "Energy Star" certification, "Five Star" crash-test ratings, and food labeling regulation (*e.g.*, the "Reduced Fat" label). Plaintiffs' theory would allow suit against any manufacturer who uses one of those labels, even with 100 percent accuracy, based on the claim that the federal testing method does not reflect real-world circumstances. Litigants could claim that the federally regulated "Low-Fat" label on cookies is misleading because it does not account for the tendency of consumers to "compensate" for the reduced fat content by eating more cookies (some studies suggest they do). Plaintiffs who disagree with government tests could bring similar tort suits against manufacturers based

solely on manufacturers publishing the results of government safety or efficiency tests. To allow such lawsuits conflicts not merely with common sense, but also with the purpose of the federal statutes, which is to allow for labeling uniformity that promotes efficiency, increases comprehension, and enhances consumer awareness, without barraging consumers with a confusing array of contradictory and distracting state-specific data.

ARGUMENT

Product labeling plays a critical role for consumers and producers alike in today's increasingly integrated, national economy. Properly designed product labels can rapidly and efficiently convey information critical to consumer purchasing decisions while, at the same time, allowing producers to identify the characteristics that set their products apart from those of competitors. Recognizing that, Congress and federal agencies have promulgated a variety of labeling regimes for goods as diverse as automobiles, appliances, food, and pharmaceuticals. Those programs ensure that commerce and the national economy are not impeded by diverse, nonuniform, and confusing requirements in different States. They carefully balance interests such as accuracy, completeness, and clarity. They prevent the imposition of multifarious requirements that might so barrage consumers with information that key facts become buried in a haystack of verbiage. As a result of those federal efforts, descriptions such as "low fat," "light," and "Energy Star" certified are now household terms with well-established and uniform meanings nationwide.

The decision below threatens the uniformity and efficacy of those regimes. Here, Congress expressly imposed a standard health warning for cigarette packaging and unequivocally displaced state efforts to impose additional requirements "relating to smoking and health"

in cigarette advertising and packaging. 15 U.S.C. § 1334(a), (b). At the same time, the federal agency with jurisdiction over cigarette packaging and advertising, the Federal Trade Commission ("FTC"), mandated a specific test for measuring the tar and nicotine delivery of cigarettes. There is no dispute that the descriptors used by petitioner Philip Morris USA Inc. ("PMUSA") in its labels and advertising in connection with Marlboro and Cambridge Lights cigarettes—words such as "light" and "lowered tar and nicotine"—were accurate according to that FTC-mandated test. Both Marlboro and Cambridge Lights in fact had lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes when tested under the FTC's method. J.A. 30a (Am. Compl. ¶ 23).

In the decision below, the First Circuit nonetheless held that plaintiffs can challenge those descriptors as misleading—and seek to impose potentially massive state tort liability—on the theory that the FTC's methodology did not reflect real-world conditions. In particular, plaintiffs assert that the FTC's method for measuring tar and nicotine delivery did not account for smokers' alleged tendency to "compensate" for lower tar and nicotine yields by inhaling more deeply, "taking more frequent" or "larger puffs," holding smoke in their lungs for longer periods, or simply "smoking more cigarettes." Pet. App. 4a; J.A. 30a-31a (Am. Compl. ¶ 27). Plaintiffs thus contend that otherwise accurate descriptors reflecting results under the mandatory federal testing method misled smokers by "reduc[ing]" their "concerns about the negative health implications of smoking and thereby allow[ing] them to continue to smoke cigarettes." J.A. 29a (Am. Compl. ¶ 18) (emphasis added). But allowing such a state-law tort claim to proceed cannot be reconciled with the express preemptive scope of the federal statute, which precludes States from imposing additional

requirements or prohibitions respecting "smoking and health" on cigarette labels and advertising.

More important, plaintiffs' theory represents a direct assault on the federal testing methodology and federally mandated disclosures. Plaintiffs' case rests on the claim that the descriptors such as "lowered tar and nicotine"—although accurately reflecting the results of FTC-mandated testing—were misleading because the FTC's tests ignore the fact that consumers might change their behavior to "compensate" for lower nicotine yields (*e.g.*, by smoking more cigarettes). But the same theory could be used to challenge virtually any national standard. Under uniform FDA standards, for example, cookies can be labeled "Reduced Fat" if they meet particular requirements. Plaintiffs' theory, however, would allow consumers to sue every cookie-maker using the "Reduced Fat" label—even in strict conformity with FDA standards—based on the theory that the FDA standard fails to account for "real-world" consumer behavior, such as the fact that consumers "compensate" for cookies' lower fat content by eating more of them. (As noted below, some studies indicate that consumers do just that.) Thus, anyone who advertises a product using the results of federally regulated tests—which cover everything from safety ratings, to automobile mileage estimates, to wine labeling—would confront rafts of lawsuits from those purporting to disagree with the federal methodology.

A greater threat to nationally uniform standards—and the ability of the federal government to ensure comprehensive and comprehensible labeling—is hard to imagine. Just as Congress and federal agencies impose consistent, uniform, and clear standards for descriptors (whether "low fat," "lowered tar," or for EPA mileage estimates), the tort law of 50 different States would be permitted to press in the opposite direction. In the end, manufacturers would have no choice but to balkanize their labels

with additional state-specific warnings, caveats, or counterstatements qualifying or contradicting federally approved labeling—or confront potentially massive liability merely because they used product labels that are accurate under testing methods imposed by federal law. That undermines the efficiency that comes from nationally uniform labeling. It reintroduces the confusion that can result when an increasingly mobile American public confronts different labels for the same product based on the happenstance of geography. And it replaces the federal judgment about the type and quantity of information to require—and how to avoid overloading consumers with so much information that the most helpful facts become lost—with the *ad hoc* decisions of different jurors in different courts under different state-law standards.

I. PLAINTIFFS' CLAIMS ARE EXPRESSLY PREEMPTED BY FEDERAL STATUTE

Congress enacted the Federal Cigarette Labeling and Advertising Act (the "Labeling Act") to "establish a *comprehensive Federal program* to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331 (emphasis added). Seeking to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations," *ibid.*, Congress preempted certain state laws respecting the advertising or promotion of cigarettes.

Under the Labeling Act, Congress required cigarette manufacturers to place federally prescribed warning labels on cigarette packaging. 15 U.S.C. § 1333. It mandated that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." 15 U.S.C. § 1334(a). And it expressly preempted state laws that purport to establish any "requirement or prohi-

bition based on smoking and health" with respect to the advertising or promotion of cigarettes that are labeled in conformity with the Labeling Act's requirements. 15 U.S.C. § 1334(b).

Congress also left undisturbed the FTC's regulatory authority over cigarette advertising and promotion. 15 U.S.C. § 1336; *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001). Exercising that authority, the FTC has required cigarette manufacturers to disclose the tar and nicotine yields of their cigarettes, as calculated under the "FTC Method." *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); see also *Watson* v. *Philip Morris Cos., Inc.*, 420 F.3d 852, 860 (8th Cir. 2005), rev'd on other grounds, 127 S. Ct. 2301 (2007); *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). Moreover, to ensure uniformity and avoid consumer confusion, the FTC has made its methodology exclusive. *In re Am. Brands, Inc.*, 79 F.T.C. at 257. Finally, to enhance consumer awareness and competition among manufacturers, the FTC has long allowed the use of descriptors such as "Light" and "Lowered" as shorthands for the yields of tar and nicotine as measured under the FTC's method. *Ibid.*; *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).

The Labeling Act thus creates a complete federal scheme for regulating the content of cigarette advertisements: mandatory federal labels, a prohibition of any additional warning labels required by state law, and FTC oversight to ensure that consumers receive useful information about relative tar and nicotine yields. The plain text of that Act and its purpose of ensuring uniform nationwide standards require preemption of plaintiffs' claims.

A. Plaintiffs' Tort Claims Fall Squarely Within The Text Of The Labeling Act's Preemption Provision

As with other issues of statutory construction, express preemption analysis begins with statutory text. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). In construing the scope of federal preemption provisions, this Court accords them as much breadth as their text and structure mandate. Thus, where the language chosen by Congress otherwise provides for preemption, this Court will not impose fine-tuned distinctions that are unsupported by statutory text, much less "turn somersaults to create" them. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008). That principle should apply with special force where, as here, such efforts would lead to untenable results, such as rendering the relevant provision ineffectual or essentially meaningless. See *Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982).

The Labeling Act's express preemption provision states in relevant part:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). *Amicus* will not repeat petitioners' exhaustive analysis of the Labeling Act's text, purpose, and structure. See Pet. Br. 22-45. For now, it is sufficient that the statutory language requires preemption of plaintiffs' claims because (1) they seek to impose a "requirement" or "prohibition" on cigarette labeling or promotion that is (2) "based on smoking and health" within the meaning of Section 1334(b).

1. There can be no serious question that plaintiffs' claims, if successful, would impose a "requirement" or

"prohibition" within the meaning of the Labeling Act's preemption provision. Plaintiffs allege that PMUSA "made material statements of fact that it knew to be false—'that Marlboro Lights and Cambridge Lights cigarettes are 'light' or have 'lower tar and nicotine'—to encourage smokers to purchase its products, and that smokers did so in reliance on those statements." Pet. App. 26a. In *Riegel*, this Court recently reaffirmed that the term "requirements" in express preemption provisions includes state common-law and statutory claims. 128 S. Ct. at 1008 ("Absent other indication, reference to a State's 'requirements' includes its common-law duties."). In this case, plaintiffs seek to impose liability for one of two alleged failures: Either plaintiffs want to *require* PMUSA to add warnings about the descriptors such as "light" and "lowered tar and nicotine" to identify the alleged shortcomings in the FTC's method for measuring tar and nicotine yield; or plaintiffs want to *prohibit* PMUSA from using those descriptors or otherwise disclosing tar and nicotine yields under the FTC's method. Plaintiffs' state-law claims thus plainly seek to impose "requirements" or "prohibitions" within the meaning of the preemption provision.

Plaintiffs' state-law claims likewise seek to impose a "prohibition" or "requirement" with respect to advertising or promotion that is "based on smoking and health." The descriptors, plaintiffs allege, are misleading because "the relative levels of [tar and nicotine] bear on a reasonable consumer's decision on which cigarette to purchase because consumers understand that reducing the quantities of tar and nicotine in cigarettes *reduces their adverse health effects*." Pet. App. 4a (emphasis added); see J.A. 28a-29a (Am. Compl. ¶¶ 15, 17) (urging that phrases like "lowered tar and nicotine" were used to imply that the cigarettes are "less harmful or safer than [their] regular" counterparts). And they claim that PM-

USA marketed Marlboro and Cambridge Lights "with the intent to provide smokers who were concerned about their *health* with a product that *could reduce their concerns about the negative health implications of smoking* * * *." J.A. 29a (Am. Compl. ¶ 18) (emphasis added). The requirements plaintiffs would impose to avoid liability—either the inclusion of more qualifications about the descriptors (beyond disclosure of the federally mandated test results), or the omission of the lower-tar and lower-nicotine descriptors—are thus unquestionably "based on" smoking and health.

Indeed, the FTC's regulatory purpose in requiring disclosure of nicotine and tar yields (and in permitting short-hand descriptors for those yields) is based on concerns about smoking and health. The FTC has long required tobacco companies to disclose tar and nicotine amounts to "prompt cigarette manufacturers to develop *less hazardous cigarettes*" and to "augment information available to the public on the tar and nicotine content of cigarettes." J.A. 527a. The FTC thus promoted the disclosures challenged here precisely because the FTC believed they would inform consumers about the relative *health* effects of smoking different brands and encourage cigarette manufacturers to create lower-tar and lower-nicotine alternatives to their full-flavored cigarettes.

2. This Court's cases confirm that plaintiffs' claims are preempted. In *Cipollone*, the plurality opinion explained that the Labeling Act preempts common-law claims that would require additional disclosures regarding the health effects of smoking in cigarette advertising or promotion. In reaching that conclusion, the plurality "consider[ed] each category of damages actions in turn." 505 U.S. at 524. With respect to "failure to warn" claims, the plurality held that, "insofar as [those] claims * * * require a showing that respondents' * * * advertising or promotions should have included additional, or more

clearly stated, warnings, those claims are pre-empted." *Ibid.* The plurality then turned to the fraudulent misrepresentation claims, concluding that a claim alleging that "respondents, through their advertising, neutralized the effect of federally mandated warning labels" was likewise preempted:

> Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials.

Id. at 27.

The *Cipollone* plurality opinion found, however, that claims alleging "intentional fraud and misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact'" were *not* preempted "insofar as [they] rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." 505 U.S. at 528. The plurality concluded that claims based on "allegedly false statements of material fact made in advertisements * * * are not preempted by § 5(b)," because they were "predicated * * * on a more general obligation—the duty not to deceive," rather than on a "duty 'based on smoking and health.'" *Id.* at 528-29.

Importantly here, the *Cipollone* plurality recognized that claims "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking" are preempted because "[s]uch a *prohibition* * * * is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." 505 U.S. at 527. That observation controls

this case. If plaintiffs' claims succeed, PMUSA faces either a prohibition on use of the terms "light" or "lowered tar and nicotine" to indicate the relative levels of nicotine and tar in their products, or a requirement to include additional information when using those terms, precisely because words like "light" and "lowered tar and nicotine" allegedly "minimize" the relative health effects of smoking a particular brand of cigarettes. Either mandate is clearly "based on smoking and health."

Cipollone, of course, addressed a claim that certain advertisements minimized the dangers of cigarette smoking *generally* and thus diluted federally mandated safety warnings. But that cannot meaningfully distinguish this case. The text of the Labeling Act provides no basis for distinguishing between statements relating to smoking and health that allegedly mislead by minimizing the *general* impact of smoking, and those that allegedly mislead about the *relative* health effects of smoking different brands of cigarettes. Plaintiffs seek to impose liability here on the theory that PMUSA's use of descriptive terms misleadingly "reduce[d]" smokers' "concerns about *the negative health implications of smoking* and thereby allow[ed] them to continue to smoke cigarettes." J.A. 29a (Am. Compl. ¶ 18) (emphasis added). Plaintiffs thus seek to impose a prohibition or requirement on cigarette labeling or promotion based on smoking and health.

This Court's decision in *Riegel* rejected analogous efforts to escape preemption by manipulating the generality of the legal challenge. In *Riegel*, the Medical Device Amendments of 1976 ("MDA") provided that "no State 'may establish or continue in effect *with respect to a device* * * * *any requirement*' relating to safety or effectiveness that is different from, or in addition to, federal requirements." 128 S. Ct. at 1010 (quoting 21 U.S.C. § 360k)). This Court refused to read a "specificity" limitation into the statute, holding that "[n]othing in

the statutory text suggests that the pre-empted state requirement must apply *only* to the relevant device, or only to medical devices and not to all products and all actions in general." *Ibid.* Conversely, one cannot read an extra-statutory generality requirement into the Labeling Act. By its terms, the Act prohibits state-law requirements "based on smoking and health." Nothing "in the statutory text suggests that the pre-empted state requirement must apply" only to the health effects of smoking cigarettes generally, as opposed to cigarettes of a particular brand or configuration.

B. The Decision Below Misinterprets *Cipollone*

The decision below not only does violence to the plain text of the Labeling Act, but also misreads the plurality opinion in *Cipollone*. The court of appeals ruled that state-law claims are not preempted—no matter how intertwined with "smoking and health" they may be—so long as they are "premised on a state-law duty that is broader in scope," *i.e.*, a duty that imposes obligations beyond the context of cigarettes and health. Pet. App. 21a. That flawed reading of the *Cipollone* plurality would allow plaintiffs to plead around preemption in nearly every instance, thus rendering the Labeling Act's pre-emption provision virtually meaningless and abrogating Congress' effort to establish uniform national standards. The phrase "based on smoking and health" has almost no meaning if *any tort* with general applicability or a general standard—such as "falsity" or "negligence"—invariably escapes preemption. Indeed, under that standard, a state legislature could adopt a warning requirement applicable not just to cigarettes but also to smokeless (chewing) tobacco and then seek to avoid preemption on the theory that its new law rests on a broader state-law duty concerning tobacco that extends beyond "*smoking* and health."

Under the court of appeals' reading of the *Cipollone* plurality, the *only* claims Section 1334(b) would expressly preempt are those predicated on a need for "additional warnings" on cigarette packaging. Pet. App. 26a-31a. But no well-counseled plaintiff would make such an obviously defective claim. Instead, future litigants will (like plaintiffs here) simply style their pleadings as a challenge to allegedly misleading terms already used on labels, rather than as a demand that the defendant add new information to qualify those terms. Such claims, however, should be no less preempted under *Cipollone*. Simply put, they seek to impose a state-law "prohibition" on cigarette advertising and promotion—a ban on the use of certain terms—based on smoking and health.

If Section 1334(b) is to have any effective preemptive force, courts must look to the substance of the plaintiffs' claims. Plaintiffs here in substance seek to impose a new prohibition or requirement in cigarette labeling or promotion—abandonment or qualification of terms like "light" or "lowered tar and nicotine"—based on smoking and health. The court of appeals, however, refused to look to the substance of plaintiffs' claims because, in its view, that would improperly prejudge "plaintiff's chance of proving his claim." Pet. App. 33a-35a. But looking to substance does not "put[] the cart before the horse," Pet. App. 34a; it just puts substance ahead of form. Unless *Cipollone* is to be read as reducing express preemption into a pleading rule, at the very least a practical glance at substance is required.

Here, that practical glance makes the preemptive effect of the statute unmistakable. To avoid a lawsuit like plaintiffs', PMUSA must either provide additional information to qualify its descriptors—even though they accurately reflect the results of mandatory FTC testing—or PMUSA must abandon the descriptors altogether. No one disputes that the *Cipollone* plurality squarely fore-

closes the first option. As for the second, cigarette companies are *required* to disclose tar and nicotine yields calculated under the FTC's method, 36 Fed. Reg. 784 (Jan. 16, 1971), and are *required* to use FTC-method results, *In re Am. Brands*, 79 F.T.C. at 257; see also *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). In allowing plaintiffs' claims to go forward without looking beyond plaintiffs' own styling of those claims, the decision below places manufacturers in a Catch-22: Comply with federal law and face a state tort lawsuit for fraudulent misrepresentation, or avoid using any descriptor that could potentially (if accurately) reflect the results of testing that they are required to disclose. As the district court observed:

> To respond to Plaintiffs' concerns, [PMUSA] would have to tell the public that the FTC method test, though accurate in the laboratory, was inaccurate in real life, and that light cigarette smokers * * * infused greater amounts of nicotine and tar than the designation 'Lights' and 'Lowered Tar and Nicotine' would imply. But, this information, if conveyed through a form of advertising would run head first into * * * the comprehensive federal scheme governing the advertising and promotion of cigarettes.

Pet. App. 104a (internal quotation marks omitted). Properly read, the *Cipollone* plurality opinion does not require, much less permit, such an absurd result.

The correctness of that conclusion is confirmed by considering how PMUSA might re-label its brands following an adverse jury verdict. For example, faced with a decision that "light" or "lowered tar" is misleading, PMUSA might choose to re-brand its Marlboro cigarettes as Marlboro 11 mgs., its Marlboro Lights as Marlboro 8 mgs., and its Ultra Lights as Marlboro 5 mgs. Like the "light" and "lowered tar" descriptors, those measurements would be literally true statements of the

results of the FTC's method. Yet, under the court of appeals' reasoning, even publishing the nicotine yield based on the FTC's method could support a state-law fraud claim because "falsity" is a generally applicable standard.

C. Circumvention Of The Labeling Act's Preemption Provision Invites The Costly And Confusing Disuniformity Congress Sought to Avoid

Today, more than ever, this Nation has a truly integrated economy. At the time of the Framing, even prominent Americans like Abigail Adams of Massachusetts could sensibly think of Pennsylvania as "'that far country,' unimaginably distant." David McCullough, John Adams 20 (2001). Back then, travel was arduous and slow. Today, by contrast, it passes virtually unnoticed that tons of potato chips or cranberries regularly make the trip from Massachusetts to Pennsylvania—or beyond. Whenever an American buys a product today—whether a book or a vegetable—it very likely originated in another State. In 2006, $5 trillion in goods were shipped in the United States, and sales of goods over the Internet currently exceed $120 billion a year.[2] The American public is also increasingly mobile. In 2001, Americans made 936 million interstate trips.[3] And our communications are increasingly national in scope. Daily papers, periodicals, electronic media, as well as radio and

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[2] See U.S. Census Bureau, Shipped Goods in U.S. Manufacturing Reaches $5 Trillion in 2006 (avail. at http://www.census.gov/Press-Release/www/releases/archives/economic_surveys/010892.html) (shipping data); U.S. Census Bureau, Quarterly Retail E-Commerce Sales (avail. at http://www.census.gov/mrts/www/data/html/07Q4.html) (e-commerce statistics).

[3] Bureau of Transportation Statistics, Highlights of the 2001 National Household Travel Survey (avail. at http://www.bts.gov/publications/highlights_of_the_2001_national_household_travel_survey/pdf/entire.pdf.)

television can reach 100 million Americans simultaneously from coast to coast.[4]

Congress has repeatedly recognized the importance of such interstate commerce, and has at appropriate times imposed uniform labeling regulation to protect and promote it. Uniform, nationwide standards promote efficiency, avoid waste, and reduce hidden barriers to interstate commerce by allowing producers to use the same packaging, promotions, and labeling throughout the Nation. They prevent efforts to favor in-state producers through the imposition of quirky or unique labeling requirements. And, most critically, they prevent the consumer confusion that inevitably would result when our mobile populace is confronted with different names, different labels, and different disclosures for the same products simply because they are found in a different State.

The Labeling Act responded to precisely such concerns. The Act, Congress declared, was enacted to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. § 1331.

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[4] This year's Super Bowl and the accompanying national advertisements simultaneously reached as many as 100 million Americans—nearly one-third of our population. See The Nielsen Company, Neilsen's Recap of 2008 Super Bowl Advertising (avail. at http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-07-2008/0004751824&EDATE=http://biz.yahoo.com/prnews/080207/nyth105b.html?.v=1). The NBC Nightly News reaches an average of 9 million viewers, while the readership of USA Today, Newsweek, and Time Magazine averages about 3.9 million, 3.1 million, and 3.4 million per issue, respectively. USA Today Press Kit, Just the Facts, http://www.usatoday.com/media_kit/pressroom/pr_justfacts_usatoday.htm; Louis Hau, *Time's Lead Over Newsweek Narrows*, FORBES, Aug. 13, 2007, http://www.forbes.com/ 2007/08/13/magazines-audit-circ-biz-cx_ lh_0813mags.html.

As a result, while relatively few States may grow and process tobacco products, those products can be distributed nationally with identical packaging, labels, and warnings under national legislation enacted by Congress and the nationally binding determinations of the FTC. Congress has imposed similar national standards for a variety of products. 15 U.S.C. § 1232(g), 49 C.F.R. pt. 575 (crash test ratings for automobiles); 49 U.S.C. § 32908(b) (automobile fuel economy); 21 U.S.C. § 393(b) (prescription drug labeling and advertising); 21 U.S.C. § 343-1(a) (food nutritional labeling); 21 C.F.R. § 101.72 *et seq.* (health claims in food labeling); 27 U.S.C. § 205(e) (wine labels); 42 U.S.C. §§ 6293 & 6294 (testing and labeling for consumer product energy consumption).

The decision below cannot be reconciled with that effort to avoid the injury to "commerce and the national economy" that results from "nonuniform" and "confusing" labeling that varies from State to State. Indeed, plaintiffs do not merely challenge descriptors such as "lowered tar and nicotine" used on PMUSA's packages and promotions. They challenge the very name of the products—Marlboro and Cambridge Lights. If plaintiffs were to prevail, PMUSA might be able to sell the same cigarette in 49 States under the same names "Marlboro Lights" and "Cambridge Lights." But in Maine they would have to be known as "Marlboro and Cambridge Something-Elses." Or PMUSA could sell Marlboro Lights in Maine under the "Marlboro Lights Unless-You-Puff-More, Smoke-More, Or Otherwise-Compensate" brand name. The important interests of avoiding consumer confusion and ensuring national uniformity are ill-served by giving the exact same products different names based on the happenstance of location. That is no less true for cigarettes than for any other product that regularly travels in interstate commerce.

II. Plaintiffs' State-Law Claims Are Preempted Because They Create Obstacles To Important Federal Goals

Plaintiffs' putative state-law causes of action are also impliedly preempted, because they directly challenge the propriety of a federally mandated methodology and disclosure. State-law claims are impliedly preempted when they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); see also *United States* v. *Locke*, 529 U.S. 89, 109-112 (2000); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-97 (1987). "Obstacle" preemption applies even though a statute, like the Labeling Act, contains an express preemption clause. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288-289 (1995).

In *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 874-75 (2000), this Court affirmed that preemption does not "require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists"—*i.e.*, that preemption can (and often must) be inferred from comprehensive federal regulation itself. Finding preemption based on precisely such a comprehensive regulatory program in *Geier*, this Court held that inconsistent state duties were preempted. In that case, the Court explained, the federal standards for airbags and passive restraints had "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875. It therefore held that common-law claims seeking to "restrict that range of choices" were preempted "as an obstacle to the accomplishment and execution of * * * federal objectives." *Id.* at 881. The same thing is true here. Plaintiffs' claims "stand as an obstacle" to the "full purpose and objectives" of the comprehensive federal policy of providing

consumers with standardized information and encouraging tobacco companies to develop cigarettes lower in tar and nicotine.

A. The FTC Has A Consistent, Longstanding Policy Of Requiring Tobacco Companies To Provide Standardized Information To Consumers

Both before and after enactment of the Labeling Act, the FTC extensively regulated (by consent decree and otherwise) disclosures related to cigarette advertising and promotion. Time and again, the FTC required tobacco companies to disclose tar and nicotine yields in their cigarette advertising; regulated the methodology for testing tar and nicotine yields; and precluded the use of alternative methodologies. J.A. 386a (1967 Pol'y Stmt.); *In re Am. Tobacco Co.*, 119 F.T.C. at 11; *In re Am. Brands, Inc.*, 79 F.T.C. at 257.

The FTC has required such disclosures to achieve its longstanding policy of providing consumers with standardized information about nicotine and tar yields to facilitate inter-brand comparison and encourage the industry to develop cigarettes lower in tar and nicotine. See, *e.g.*, *In re Am. Tobacco Co.*, 119 F.T.C. at 11 (cigarette company may continue to compare nicotine and tar levels between brands with descriptors such as "low," "lower," and "lowest"); *In re Am. Brands, Inc.*, 79 F.T.C. at 257. Consistent with that policy, the FTC has repeatedly allowed cigarette companies to use descriptors such as "light" and "lowered tar" based on the yields accurately and fully substantiated by the FTC's testing method. *In re Am. Tobacco Co.*, 119 F.T.C. at 11; *In re Am. Brands, Inc.*, 79 F.T.C. at 257.

That the FTC "has never issued a formal rule specifically defining which cigarette advertising practices violate the" FTCA, Pet. App. 46a, is of no moment. This

Court has repeatedly held that agency activity other than formal rulemaking can have preemptive effects when such activity reflects a considered policy judgment by the agency. For example, in *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64 (2002), the Court recognized that even an agency's decision not to engage in regulation can pre-empt state law. See also *Geier*, 529 U.S. at 884 (finding that "a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking" is not required before agency action can trigger implied pre-emption). Similarly, this Court's cases involving the "filed rate doctrine"—a species of preemption--typically accord preemptive effect to an agency's issuance of an order determining that a particular rate is just and reasonable, even though the agency has not memorialized that determination in a formal rule. See, *e.g.*, *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578-79 (1981) (discussing FERC's issuance of such orders). Many courts of appeals have come to the same conclusion.[5]

B. This Suit Represents A Frontal Assault On The FTC's Mandatory Methodology

1. Plaintiffs do not dispute that PMUSA's disclosures regarding tar and nicotine delivery were accurate under the testing method mandated for decades by the FTC. Nor do they dispute that the descriptors, such as "light," "lowered tar" or "lowered nicotine," are wholly accurate if measured by the mandatory FTC standard.

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[5] See, *e.g.*, *Gen. Motors Corp.* v. *Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) ("a consent order reflecting a reasonable policy choice of [the FTC] and issued pursuant to a congressional grant of authority may preempt state legislation"); *Feikema* v. *Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994) (holding that an EPA consent order preempted state common-law claims regarding the environmental conditions addressed in the order); see also *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 5-6, 9-11, 14-15 (Cal. 2004) (holding an FDA advisory letter could have preemptive effect).

To the contrary, they agree that, when tested using the FTC's method, PMUSA's "light" and "lowered tar and nicotine" cigarettes in fact yielded lower quantities of tar and nicotine. J.A. 30a (Am. Cmplt. ¶¶ 23-25).

Instead, plaintiffs urge that those descriptions amount to fraud because the *FTC*'s mandatory testing method itself is flawed. That method, they claim, does not account for real-world human behavior, such as the tendency to "compensate" for lower tar or nicotine yields by smoking more cigarettes, inhaling more deeply, or puffing more often. J.A. 30a-31a (Am. Compl. ¶ 27). Plaintiffs thus seek not only the right to have a jury decide that the FTC's testing methodology is inaccurate. They also seek the right to ask a jury to indict as *fraud* public statements that fully and accurately represent the results of the FTC's methodology.

Surely there can be no greater "obstacle" to a federal policy or methodology than to impose fraud liability on companies that conduct federally mandated tests and accurately publicize the results those tests yield. This Court has held that state tort law is preempted to the extent it seeks to impose liability for perpetrating a fraud on a federal agency. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 351-52 (2001). *A fortiori* state-law tort claims must similarly be preempted where they seek to impose liability for *accurately* reporting or characterizing the results of testing under a federal methodology.[6]

For that reason, courts have regularly rejected efforts to challenge, through state tort law, drug advertisements that accurately reflect the contents of federal drug labels. In *Prohias* v. *Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla.

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[6] In effect, the mandatory federal test establishes the results as preemptive "legislative facts" for certain purposes, *Friends of the Earth* v. *Reilly*, 966 F.2d 690, 693-94 (D.C. Cir. 1992), and those facts cannot be challenged as false under state law.

2007), for example, the district court recognized that FDA labeling requirements preempted claims regarding Lipitor's marketing. The court explained that, under the Food, Drug, and Cosmetic Act ("FDCA"), the FDA has broad authority to regulate prescription drug labeling and advertising, see 21 U.S.C. § 393(b), which the FDA has exercised through extensive regulations, 21 C.F.R. § 202.1 *et seq.* See *Prohias*, 490 F. Supp. 2d at 1234 n.6. The court held that, although the plaintiff had challenged the *advertisements* for Lipitor, the FDA's approval of the *labels* for Lipitor preempted the claims since the content of the advertisements and the approved labels were largely the same.

The Third Circuit came to the same conclusion in connection with a Delaware Consumer Fraud Act claim that challenged advertisements for the drug Nexium. *Pa. Employees Benefit Trust Fund* v. *Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007). The court explained that a particularly "strong[] case for preemption occurs when FDA-approved *labeling* is the basis for allegedly fraudulent representations made in prescription drug advertising." *Id.* at 251 (emphasis added). The "purpose of protecting prescription drug users in the FDCA would be frustrated," the Third Circuit explained, "if states were allowed to interpose consumer fraud laws that permitted plaintiffs to question the veracity of statements approved by the FDA" for product labels. *Ibid.* Yet that is precisely what the court of appeals has done here: It has allowed state tort law to be used to challenge the veracity of statements that accurately reflect the results of mandatory FTC testing. Federal and state law cannot coexist where the federal law mandates testing under a certain method—for the purpose of giving consumers access to uniform data—but state law indicts accurate descriptors for the test results as "fraud."

2. That is not to say that federal judgments about testing methodologies and disclosures are or should be beyond challenge. Those wishing to challenge federal regulations and methodologies can do so by participating in federal agency rulemakings, intervening in adjudications and, if adversely affected or aggrieved, seeking judicial review in federal court. Consumers and producers alike are best served through those processes, which allow regulators to weigh all relevant concerns in pursuit of the public interest. To allow jurors in different States to second-guess those determinations, without the necessary cost-benefit analysis, invites consumer confusion and labeling chaos. As this Court stated in *Riegel*:

> A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

128 S. Ct. at 1008. Similarly here, juries in tobacco labeling cases will not perform cost-benefit analyses for various testing methods or consider the value of clarity and uniformity. Instead, they would be asked to decide whether the FTC's method—and thus a descriptor based on it—is in some sense faulty.

To allow such a suit to proceed—to let jurors second-guess the FTC's uniform, nationwide methodology—is particularly pernicious given that the FTC was well aware of the potential limitations inherent in its tests. Indeed, before the FTC adopted that method and during its many investigations regarding its test methodology, it heard *exactly* the same testimony that a jury would hear

in this case: that smokers may compensate for lower tar and nicotine yields by smoking more cigarettes. Pet. Br. 7. The FTC explained, however, that "the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by [a] machine" so as to "standardize" results across brands. J.A. 486a-488a. Implicit in the FTC's decision is that uniform bases for comparison are better than no information, or confusing or nonuniform information. The FTC weighed the effects of compensating behavior against the fact that some smokers *could* use the information to reduce their tar and nicotine intake and determined that its testing method, albeit imperfect, at least gave consumers standardized information with which to compare tar and nicotine yields. A jury asked only to assess the accuracy of the FTC's method would not perform this analysis and, as a result, the potential benefits of providing this information would be lost. As this Court recognized in *Geier*, "too many different safety-standard cooks" can result in "conflict, uncertainty, cost, and occasional risk to safety itself." 529 U.S. at 871. That is just as true when disclosing relative tar and nicotine yields as it is when dealing with passive restraints.

C. Plaintiffs' Theory Would Undermine Federal Labeling Regulation In Myriad Contexts

Plaintiffs' theory does not merely undermine the FTC's authority. It also threatens the federal government's ability to establish clear, comprehensible, and uniform labeling requirements in a variety of contexts.

One need look no further than the pantry to see those efforts in operation. Acting pursuant to the Nutrition Labeling and Education Act ("NLEA"), the FDA has established standards for regulating food labeling and certain health-related claims. 21 U.S.C. § 343(r); 21

C.F.R. §§ 101.54-83. The NLEA expressly preempts States from creating labeling requirements, 21 U.S.C. § 343-1(a), including nutritional descriptors such as "Low Calorie," 21 C.F.R. § 101.60; "Low Fat," "Reduced Fat," 21 C.F.R. § 101.62(b); and "Light," 21 C.F.R. § 101.56. For example, under federal regulations, a food can bear the "Reduced Fat" label if it has 25 percent less fat than that generally found in the ordinary version of the product. 21 C.F.R. § 101.62(b). "Reduced Fat" Wheat Thins, for example, can have no more than 75 percent of the fat content of "regular" Wheat Thins. The FDA also regulates food health claims on labels that link the consumption of specific nutrients to health conditions (such as the claim that "diets low in sodium may reduce the risk of high blood pressure"). See, *e.g.*, 21 C.F.R. § 101.74 (sodium and high blood pressure); 21 C.F.R. § 101.73 (total fat consumption and cancer); 21 C.F.R. § 101.72 (calcium and osteoporosis).

Notwithstanding that comprehensive federal regime, plaintiffs' theory would allow consumers to bring state-law deception actions against producers for using those federally defined terms, even though fully accurate under the federal methodology. For example, consumers might sue the maker of "Reduced Fat" cookies on the theory that the label falsely implies that those cookies are healthier because of their lowered fat content. Compare J.A. 28a (Am. Compl. ¶ 15) ("Defendants intentionally marketed Marlboro Lights cigarettes in this manner with the intention of communicating to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes."). The cookies, plaintiffs might argue, are in fact no healthier (and may be worse) because of the real-world effect of human compensation: The makers of low-fat or sugar-free cookies thus would face lawsuits because—just as smokers allegedly compensate for lowered tar and nicotine yields through "more

frequent puffs" or "smoking more cigarettes," J.A. 30a-31a (Am. Compl. ¶ 27)—consumers allegedly compensate for fat reduction and sugar reduction by eating more cookies. Indeed, research shows that, when given "low fat" and "sugar-free" foods as substitutes for higher-fat versions of the same item, consumers do eat more, just as smokers allegedly compensate by "smoking more cigarettes."[7] If endorsed by this Court, plaintiffs' theory thus would essentially allow a wholesale state-law assault on uniform federal labeling standards based on the premise that they do not fully reflect what plaintiffs claim are "real-world" conditions.

Other examples abound. In the automobile context, phrases like "Five Star" or "Four Star" have become useful shorthands that allow consumers to compare the relative crashworthiness of various vehicles under government-regulated tests. Congress intentionally promoted the development of such easy and informative labels, directing the NHTSA to promulgate a number of Federal Motor Vehicle Safety Standards, 49 U.S.C. § 30111(a), preempting States from creating their own standards, 49 U.S.C. § 30103(b), and giving the NHTSA the authority to carry out any testing necessary to create and enforce those standards, 49 U.S.C. § 30168. That testing includes crash-testing passenger vehicles and publishing the results. 49 C.F.R. § 571.208; see

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[7] See Brian Wansink & Pierre Chandon, *Can "Low Fat" Nutrition Labels Lead to Obesity?*, 43 J. Marketing Res. 605 (2006); Barbara J. Rolls & Debra L. Miller, *Is the Low-Fat Message Giving People a License to Eat More?*, 16 J. Am. College of Nutrition 535 (1997); Dianne Engell, *et al.*, *Effects of Information About Fat Content On Food Preferences in Pre-Adolescent Children*, 30 Appetite 269 (1998). That effect is compounded by the fact that foods with artificially reduced fat content are often higher in calories and sugar than their ordinary counterparts, and thus potentially more fattening in and of themselves. See Rolls & Miller, *supra*, at 535.

www.safercar.gov. Under the Automobile Information Disclosure Act ("AIDA"), 15 U.S.C. § 1232, automobile manufacturers now must include window stickers that display the results of NHTSA crash tests, including the rating—as indicated by a number of stars—the car received. 15 U.S.C. § 1232(g); see also 49 C.F.R. pt. 575. Manufacturers that receive favorable crash-test ratings often use those ratings in their advertisements, and consumers may use the data to decide whether a car meets their safety requirements.

Under plaintiffs' theory, however, consumers could bring fraud claims against automakers that accurately advertise their crash-test ratings. A plaintiff might argue, for instance, that advertising a "Five Star" rating is misleading because the government's test does not reflect all real-world conditions. (No test ever does.) Even the factor of "compensation" that features prominently in this case could be brought to bear: Some studies suggest that the human factor of "compensating" behavior—a tendency to drive more aggressively if the car is safer—may also operate in the crashworthiness context. See, *e.g.*, Steve Peterson, George Hoffer & Edward Millner, *Are Drivers of Air-Bag Equipped Cars More Aggressive? A Test of the Offsetting Behavior Hypothesis*, 38 J.L. & Econ. 251 (1995) (finding drivers of air-bag equipped cars tend to drive more aggressively); Anindya Sen, *An Empirical Test of the Offset Hypothesis*, 44 J.L. & Econ. 481 (2001) (offering support for the hypothesis that drivers take more risks when wearing seat belts). This case thus raises the prospect that all safety ratings—while literally true under federal standards and approved by a federal agency—could be the basis of a fraud action under state law because they allegedly do not account for all real-world conditions.

Programs ranging from appliance efficiency certifications to wine labeling likewise would be at risk.[8] Indeed, at least one automaker currently confronts a putative class action because its advertisements reported the car's fuel economy according to the EPA's methodology, *despite* a preemption provision that prohibits States from imposing non-identical laws on disclosure of fuel economy. *True* v. *Am. Honda Motor Co.*, 520 F. Supp. 2d 1175 (N.D. Cal. 2007). Like the decision below here, that cannot be reconciled with statutory text or common sense. Under federal law, the EPA must establish a methodology for testing fuel economy, and carmakers must post labels on their cars providing, among other things, "the fuel economy of the automobile." 49 U.S.C. § 32908(b). The EPA has promulgated exhaustive regulations governing the methodology for testing fuel economy. 40 C.F.R. §§ 600.002-08 *et seq.* And Congress expressly preempted States from imposing any law "*on disclosure of fuel economy* or fuel operating costs" unless it is "identical" to the federal standards. 42 U.S.C. § 32919 (emphasis added). Yet *True* allowed the claim to proceed because, in its view, Congress did not intend to "preempt states from regulating false or misleading advertising of a vehicle's fuel efficiency." 520 F. Supp. 2d

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[8] For example, the Energy Policy and Conservation Act ("EPCA") regulates the testing and labeling of consumer products in connection with energy consumption. See, *e.g.*, 42 U.S.C. §§ 6293 & 6294; 16 C.F.R. pt. 305; 42 U.S.C. § 6297(a)(1)(A & B). Under that statute, the EPA and the Department of Energy ("DoE") have created the "Energy Star" program, which allows manufacturers to label their products as "Energy Star" certified if they meet certain requirements. See, *e.g.*, 10 C.F.R. pt. 430; 16 C.F.R. § 305.11. The Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*, regulates wine labels and requires federal approval of each label. 27 U.S.C. § 205(e); see *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422 (Cal. 2004).

at 1181. But surely a claim that a particular statement is "false" under state law must be preempted when the statement is a 100 percent accurate recitation of the results of federally mandated testing under federally mandated standards. To hold otherwise would allow States, in effect, to indict a statement as "fraudulent" when it appears in an advertisement, even though federal law—in the interest of consumer education—requires the exact same statement to appear prominently on the vehicle's window.

* * * * *

If federal laws regulating product labels are to succeed, they must be accorded appropriate respect. The federal government cannot promote the efficiency and cost savings that result from uniform labeling standards if adherence to the federal mandate—accurately reporting testing results under federal standards—can be indicted by juries as fraud. The federal government cannot ensure the proper mix of information is conveyed to consumers if jurors can invoke state-law standards to second-guess federal regulators about whether federal testing produces results that should be described or included on product labels, or otherwise require the addition of caveats or statements that contradict or undermine the federal standard. And if jurors in individual States can second-guess federal testing methods on an *ad hoc* basis, the federal government simply cannot prevent the confusion that inevitably results when an increasingly mobile American public confronts otherwise identical products bearing different brand names, different informational labels, and different disclosures based on the happenstance of geography.

CONCLUSION

For the foregoing reasons, and those stated in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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April 7, 2008

AMICUS CURIAE BRIEF

File Date:
June 18 2008

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No. 07-562

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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15 U.S.C. §§ 45 *et seq* 31

15 U.S.C. § 57a(a)(1)(A) 31

15 U.S.C. § 57a(a)(1)(B) 32

15 U.S.C. §§ 57a(b), 57b-3 32

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15 U.S.C. § 717c 34

15 U.S.C. § 1331 27

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15 U.S.C. § 1333(c) 29

15 U.S.C. § 1334(b) 14

15 U.S.C. § 1336 ..... 21, 25, 29

15 U.S.C. 1341(b)(1)(A) 29

15 U.S.C. § 2311(b)(1) 17

15 U.S.C. § 4406 18

29 U.S.C. § 1144(b)(2)(A) 18

46 U.S.C. § 4306 33

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Act of Jan. 4, 1975, Pub. L. No. 93-637, §206, *creating* 15 U.S.C. §57b 23

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 34 (1974) 23

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 45 (1974) 24

H. R. Rep. No. 93-1606, 93d Cong., 2d Sess. 41 (1974) 24

Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, §2, 84 Stat. 89 (1970) 23

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S. Rep. No. 93-151, 93d Cong., 1st Sess. 9-10 (1973) 22

S. Rep. No. 93-151, 93d Cong., 1st Sess. 27 (1973) 24

CONSTITUTIONAL PROVISIONS

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OTHER AUTHORITIES

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ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (1962) 19

Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) 9

CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990) 8

Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008) 31

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Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 19

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TABLE OF AUTHORITIES---Continued

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Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) 16

Report of the ABA Commission to Study the Federal Trade Commission 28-32 (1969) 22

Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952) 20

Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) 7

THE FEDERALIST No. 51, p. 349 (J. Cooke ed., 1961) 20

Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008) 28

William N. Eskridge, Jr. & Philip P. Frickey, Quasi-*Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) 9

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IN THE

Supreme Court of the United States

No. 07-562

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI*

Amici are law professors who teach and write in the areas of constitutional and administrative law and legislation.[1] Erwin Chemerinsky is Dean of the

[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or

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submission of this brief, and that no person other than *Amici* and their counsel made such a monetary contribution.

Telecommunications Law. Ernest Young is Professor of Law at Duke Law School, where he teaches Constitutional Law and Federal Courts.

Each of us has written on the general question of federal preemption of state law, and many of us have focused on the particular question of preemption under federal regulatory statutes that delegate important roles to administrative agencies. This brief is an effort to bring that scholarship to bear on the particular case now before the Court.

SUMMARY OF ARGUMENT

This brief seeks to make four principal points. The first is simply to situate the particular statutory preemption issues in this case in the broader context of this Court's federalism doctrine. Preemption cases in different areas—e.g., cigarette labeling, medical drugs and devices, banking, auto safety—often present themselves as unrelated disputes raising specific questions under specific statutes. But they also present common questions concerning the relevant canons of statutory construction and the role of administrative agencies. How the Court answers these sorts of questions has an even greater impact on the constitutional value of balance between State and National authority than the outcomes of this Court's relatively rare decisions under the Commerce Clause or the Eleventh Amendment. Because of the difficulty of developing workable and stable constitutional doctrine that meaningfully protects state autonomy under the relevant constitutional provisions, statutory rules like this Court's "presumption against preemption," *see Rice v. Santa*

Fe Elevator Co., 331 U.S. 218, 230 (1947), are the most critical component of this Court's federalism doctrine. To say this is not to determine the outcome of any particular case, but it does suggest a lens through which this Court should view preemption disputes.

The second and third points bear on Petitioners' express preemption argument. Petitioners read this Court's recent cases as stating a general proposition that "state-law claims are preempted where they seek to apply a generally applicable state-law obligation to specific factual allegations that fall within the scope of an express preemption clause." Pet'rs' Br. at 18. None of the relevant cases says this, and in fact such a rule would directly contradict the way this Court treats generally applicable laws in other contexts. Petitioners' novel notion that preemption clauses automatically create "carve-outs" from all generally applicable state laws would radically destabilize state law enforcement.

Petitioners' argument that the Labeling Act delegates exclusive regulatory authority to the Federal Trade Commission likewise implicates an important general point: Congress frequently delegates enforcement authority to federal agencies, but such delegations are generally concurrent with state authority. State regulation will often have distinctive institutional and remedial advantages not captured by federal agency action: it may provide compensation for victims, and it may be more democratically accountable. Hence, the Court should presumptively construe delegations to federal agencies as concurrent, rather than exclusive. This

approach is particularly appropriate in the case of the FTC, particularly at the time that the Labeling Act was enacted, when the FTC's own enforcement powers were both quite limited and plainly concurrent with those of the States.

Finally, Petitioners' *implied* preemption claim turns on the sort of agency action that can preempt state law. We urge that any preemptive effect of agency action must be grounded in *Congress*'s action. An agency may preempt state law when it either (1) interprets a federal statute as preempting state law, or (2) exercises delegated authority to act with the force of law. Petitioners do not seriously contend that Maine's consumer protection law conflicts with the Labeling Act; instead, the asserted conflict stems from the FTC's "low tar policy." Pet'rs' Br. at 46. But agency "policies" do not preempt state law unless they are promulgated pursuant to delegated authority to act with the force of law. Here, no one contends that the FTC has articulated its policy through the specific rulemaking procedures prescribed by Congress or through an authoritative adjudication.

ARGUMENT

I. This Court should narrowly construe the preemptive effects of federal regulatory statutes.

Every preemption case implicates a specific body of statutory law, but preemption also occupies a critical place in the overall structure of federalism doctrine. Although the constitutional doctrine of enumerated powers imposes some limit on Congress's

reach, *see U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000), this Court has not questioned its New Deal-era cases according broad scope to the Commerce Power, and it has continued to uphold federal legislative action that reaches deep into areas of traditional state regulation, *see Gonzales v. Raich*, 545 U.S. 1 (2005). Practically speaking, the most important limits on federal authority are found not in the Constitution itself but in the terms of the statutes that Congress enacts. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Attorney General exceeded his statutory authority in attempting to preempt Oregon's physician-assisted suicide law). It is those statutory limits that are at issue in preemption cases. As Justice Breyer has observed,

> [I]n today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges, . . . or to protect a State's treasury from a private damages action, . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting). Preemption doctrine should thus be constructed and applied with an eye toward its effect on the federalism balance more generally.

The keystone of this Court's preemption doctrine is the "presumption against preemption" articulated in *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218 (1947). Under the *Rice* presumption, the judicial inquiry in preemption cases "start[s] with the

assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230. This rule of statutory construction developed during the same era that this Court was expanding its interpretation of Congress's legislative powers. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942). This timing was no coincidence: the pre-Rice approach, which generally held that any federal regulation in a field broadly preempted state law, *see, e.g., Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913), was workable so long as federal regulation was narrowly confined; once federal authority expanded to presumptively cover most areas of life, however, a rule of presumptive field preemption would have obliterated state regulatory authority altogether. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994). The presumption against preemption thus maintains a viable role for state regulation in a world in which state and federal regulatory authority are largely concurrent.

The *Rice* presumption fits well with the institutional role that this Court has staked out in enforcing the federal balance.[2] The Court has struggled to derive clear constitutional lines limiting Congress's authority from the spare structural provisions of the constitutional text. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial*

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[2] *See generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130-34 (2004).

Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1450-53 (1995). More than two centuries of doctrinal history suggests that this Court is unlikely to develop Commerce Clause criteria that are sufficiently determinate to be stable and avoid the appearance of judicial policy-making, on the one hand, and sufficiently constraining to protect a meaningful sphere of state regulatory autonomy, on the other. Instead, the Court has recognized that political and institutional factors built into the Constitutional structure itself often work to protect the federal balance, *see Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-54 (1985), and it has tailored the judicial role to facilitate and enhance the operation of these political and institutional checks.[3] *See, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that state law generally can be displaced only by the operation of the federal legislative

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[3] Much the same thing has happened in administrative law. Recognizing the difficulty of formulating judicially-enforceable principles limiting the delegation of Congress's legislative authority to federal administrative agencies, the Court has instead focused on enforcing the *statutory* limits of agency authority through judicial review under the Administrative Procedure Act. *See, e.g.*, *Whitman v. American Trucking Assns.*, 531 U.S. 457, 474-75 (2001) (acknowledging the Court's reluctance to second-guess Congress on the scope of permissible delegations); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990) ("Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.").

process); *Printz v. U.S.*, 521 U.S. 898 (1997) (requiring Congress to internalize the political and financial costs of its actions by forbidding the "commandeering" of state officers to enforce federal law). Two aspects of these checks are critical: the political representation of the States in Congress, *see* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), and the procedural difficulty of federal lawmaking through the Article I legislative process, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001). These political and procedural safeguards of federalism ensure that federal measures that supplant state regulatory authority can be opposed by the States' representatives in Congress, and the procedural hurdles to federal legislation tend to hold down the overall output of preemptive federal law.[4]

This Court has facilitated these political and procedural safeguards of state autonomy by developing a variety of "clear statement" rules of statutory construction. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). These rules are not

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[4] The signatories to this brief have different views as to the extent to which this Court should exercise an independent check on Congress's authority, *see, e.g., U.S. v. Lopez*, 514 U.S. 549 (1995), in addition to enforcing the process-based checks recognized in *Garcia*. But we all agree that, *at a minimum*, the Court should enforce process-based rules like the presumption against preemption.

"constitutional" in the sense that they require invalidation of federal statutes, but they serve the constitutional function of helping to maintain the tenuous balance between state and federal authority. Hence, Congress must speak clearly when it subjects state governments to generally-applicable federal laws, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1992), imposes conditions on the States' receipt of federal funds, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), subjects the States to liability under federal statutes, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), or regulates at the outer limits of its authority under the Commerce Clause, *Jones v. U.S.*, 529 U.S. 848, 858 (2000). This Court explained the rationale for such rules in *Gregory*:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. 'To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'

501 U.S. at 464 (quoting L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988)).[5]

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[5] *See also U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

Rice's presumption against preemption is the most important such rule. Preemption cases routinely implicate the core regulatory concerns of state governance—concerns that are protected imperfectly, at best, by this Court's *constitutional* distinction between "economic" and "noneconomic" activity. *See Morrison,* 529 U.S. at 613. Recent preemption cases in this Court have concerned, *inter alia*, regulatory control over the local telephone market, *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366 (1999), protection of state waterways from catastrophic oil spills, *U.S. v. Locke*, 529 U.S. 89 (2000), state policy experimentation in health care, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), and medical ethics, *Gonzales v. Oregon*, 546 U.S. 243 (2006), as well as the States' traditional ability to provide tort remedies for their citizens, *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005). The stakes for federalism in preemption cases are thus very high. That is why it is important to see these cases not simply as concerning the particular statutory regime under which they arise, but also the broader *constitutional* concern with balance in our federal system.

II. Plaintiffs' Claims Are Not Expressly Preempted.

This Court held in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (plurality), that the Labeling Act does not preempt all state-law claims

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For a decision specifically applying this "political safeguards" rationale for clear-statement rules to limit the preemptive effect of the FTC's rulemaking authority, *see California St. Bd. of Optometry v. FTC*, 910 F.2d 976, 979-82 (D.C. Cir. 1990).

having to do with cigarette advertising. That outcome requires close parsing of plaintiffs' claims to determine whether they fall within or without the scope of federal preemption—a task that we leave for the Respondents' Brief. Our concern is rather to refute two key arguments advanced by Petitioners: first, that "a general state-law obligation—such as the duty not to engage in deceptive advertising—is preempted when it is applied to a specific set of facts encompassed by the terms of an express preemption," Pet'rs' Br. at 22-23, and second, that the Labeling Act should be construed to confer *exclusive* regulatory authority over cigarette advertising upon the Federal Trade Commission, *id.* at 26-29. This Court should not lightly construe federal statutes to confer exclusive regulatory authority upon federal agencies. That is particularly true of the particular agency at issue in this case.

A. Generally-applicable state laws are presumptively not preempted by specific preemption clauses.

Petitioners read this Court's recent preemption cases to embody a novel proposition that "state-law claims are preempted where they seek to apply a generally applicable state-law obligation to specific factual allegations that fall within the scope of an express preemption clause." Pet'rs' Br. at 18. These cases do not actually say this, and their reasoning in each instance turns on a more nuanced analysis. That is not surprising, because Petitioners' reading is flatly inconsistent with this Court's general approach to generally applicable laws.

This Court has held that even constitutional protection for an individual right does not require an automatic exemption from the coverage of generally applicable laws. In *Employment Division v. Smith*, 494 U.S. 872, 878-87 (1990), this Court held that the right to free exercise of religion did not require that religiously-motivated use of peyote be exempted from generally-applicable narcotics laws, so long as those laws were not directed at religion.[6] The same approach applies in cases concerning federal causes of action adjudicated in state courts: state procedures are preempted only if they discriminate against or (possibly) if they unduly burden the exercise of federal rights. *Johnson v. Fankell*, 520 U.S. 911, 918-19 (1997); *Felder v. Casey*, 487 U.S. 131, 141-42 (1988). In each of these situations, state law does not give way simply because it intersects with an area of federal right; rather, state law is generally invalid only where it targets or directly interferes with federal law.

To be sure, there are cases in which a generally applicable state law sufficiently burdens a federal right that state law must yield. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to

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[6] *See also Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 610, 623-24 (2003) (upholding enforcement of generally-applicable state antifraud laws against political fundraisers); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding a generally-applicable state law requiring closure of any place of prostitution, even when that law was applied to a book store selling constitutionally-protected literature).

send their children to school). But such cases simply demonstrate that principles of *conflict* preemption remain available to protect federal policy from generally applicable state laws. Moreover, this Court has recognized that it need not construe the preemptive effects of federal statutes broadly where a federal agency retains power to take preemptive action in the event of a conflict with federal policy. *Hillsborough Cty. v. Automated Laboratories, Inc.*, 471 U.S. 707, 721 (1985). This Court's cases thus suggest that narrow express preemption clauses should ordinarily *not* be read to preempt generally applicable state laws.

Congress may wish for federal law to provide the only operative rules of a particular kind—e.g., prescribed labels for cigarette packages—but it is difficult to anticipate the full range of generally applicable state laws that might conceivably overlap with a particular federal regulation in specific circumstances. Petitioners' broad rule of preemption would thus introduce considerable uncertainty into state regulatory efforts, as state actors will have to anticipate a virtually infinite range of possible exemptions where general state laws apply to the same factual situations as particular federal rules. Express preemption should thus be confined to circumstances where state regulators have sought to regulate the actual subject matter encompassed by a statutory preemption clause.

The Labeling Act saves generally-applicable state laws by limiting preemption to laws "based on smoking and health." 15 U.S.C. § 1334(b). Our argument supports reading this provision to prohibit States from second-guessing the particular health

judgments that Congress has made in requiring the warnings in the statute—not, as Petitioners suggest, to limit any state regulation that might rest on some sort of health concern. If the States act on a different principle—that any label should be truthful, for example—then that is not preempted even if health is a reason for requiring such truthfulness.

The flaw in Petitioners' reading is readily discernible from a hypothetical case in which a cigarette manufacturer labeled its product as "low tar" even though the cigarettes in the package were, in fact, exactly the same as other cigarettes marketed without the "low tar" label. This would be a simple case under the generally applicable prohibition on fraud and misrepresentation. But surely a primary reason for prohibiting that fraud would be concern for the health of persons who might choose to smoke the ersatz "low tar" cigarettes. Prohibiting this form of mislabeling would not second-guess Congress's own judgments about "smoking and health" and accordingly should not be preempted under the Act.

B. The Labeling Act does not confer exclusive regulatory authority upon the Federal Trade Commission.

Petitioners' second key contention, that the Labeling Act confers exclusive regulatory authority over cigarette advertising on the FTC, is wrongheaded in both a general and a specific sense. The general point is that courts should read grants of authority to administrative agencies, which incorporate neither the political nor the procedural safeguards of federalism, narrowly. This is particularly true of the FTC—an agency whose

lawmaking capacity has always been controversial, limited, and concurrent with state authority.

1. This Court should not lightly construe federal statutes as conferring exclusive jurisdiction on federal agencies.

In our federal system, field preemption is rare. *See, e.g., Hillsborough Cty.*, 471 U.S. at 715-19 (1985). The more common situation is for the two sovereigns—federal and state—to exercise concurrent regulatory authority over a given area in a "cooperative federalism" arrangement. *See, e.g.*, Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696-98 (2001). We show in the next section that this is eminently true of the tobacco labeling regime, which contemplates concurrent authority shared by the FTC and state institutions.

One of the key advantages of cooperative federalism arrangements is that they are institutionally diverse—that is, they combine public with private enforcement, *ex ante* legislative and administrative rulemaking at the federal level with *ex post* review by state courts, and analysis by bureaucratic experts with more democratically accountable action by state legislators and juries. Cooperative arrangements also provide a diverse array of remedies: federal law may be enforced through injunctions and fines; state tort regulation generally relies on compensatory awards to victims.

Each of these approaches has advantages and disadvantages, and

American policymakers have, in most areas, chosen to combine them rather than rely exclusively on one particular institutional arrangement. In this situation, the *Rice* presumption against preemption serves to protect this general default position. This Court should require clear evidence that Congress intended to depart from the normal cooperative federalism arrangement.

Private enforcement under state law has long been a bedrock feature of the consumer protection regime in this country. *See, e.g.,* Geraint G. Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 307-308 (2000) (contrasting the U.S. and European systems). State lawsuits brought by private actors complement federal agency enforcement by supplementing limited federal enforcement resources and providing compensation for victims unavailable under federal law. Hence, even where Congress enacts legislation that brings particular aspects of consumer-related policy exclusively under federal auspices, it rarely displaces state remedies entirely.[7]

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[7] Congress often combines a preemption clause with a savings clause that leaves state remedies wholly or largely intact, *see e.g.,* Magnuson-Moss Warranty Act, 15 U.S.C. § 2311(b)(1); Federal Boat Safety Act, 46 U.S.C. § 4311(g); Airline Deregulation Act, 49 U.S.C. § 1506. Congress has expressly declined to extinguish state tort liability when preempting state-imposed labeling requirements on other tobacco products. *See* Comprehensive Smokeless Tobacco Health Education Act of

In the rare instances where Congress acts to displace all civil liability under state law, Congress generally provides an alternative means for private enforcement in federal courts. *Cf. Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1015 (2008) (noting that the MDA's failure to create any federal compensatory remedy "suggests that Congress did not intend broadly to preempt state common-law suits grounded on allegations independent of FDA requirements.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). Without the creation of such a scheme of federal remedies, the wholesale preemption of state law remedies deprives aggrieved individuals of redress for harms traditionally deemed compensable under the common law. *See Bates*, 544 U.S. at 449 ("The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.").

1986, 15 U.S.C. § 4406 (expressly preserving liability under state statutes and common law). Even where Congress elects to preempt state law causes of action in favor of a federal remedial scheme, it is likely to exempt from such preemption specific, potentially-overlapping areas of state law not arising out of the specific principle on which Congress has acted, *see, e.g.*, Employee Retirement Income Security Act, 29 U.S.C. 1144(b)(2)(A) ("nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities.").

State judicial remedies also supplement the *ex ante* action of federal legislative or administrative rulemaking with an *ex post* judicial perspective that can focus on particular instances of regulated behavior in concrete cases. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (1962). Although courts lack the specific expertise of federal agencies in a particular area—e.g., the medical effects of smoking—judicial application of general principles, such as fraud and misrepresentation, draws upon a longstanding common-law experience, and generalist courts may likewise be in a better position to harmonize consumer protection regulation with contiguous areas of law. Even with respect to expertise within a specific subject area, some degree of regulatory competition between federal and state regulators may provide incentives for developing expertise at each level that would not otherwise occur. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 213. And preserving a role for state judicial remedies will often protect the constitutionally-rooted role of the jury in civil disputes. *See* U.S. Const. amend. VII; AKHIL REED AMAR, THE BILL OF RIGHTS 91-118 (1998) (highlighting the central importance of the jury, in both criminal and civil cases, to the Constitutional Framers).

Joint federal and state authority acts as a protection against problems raised by "agency capture." The potential for an agency to become "captured" by concentrated industry interests and

disregard more diffuse public interests has been recognized for over 50 years.[8] In these circumstances, state law may provide a backstop of regulation. State institutions are not themselves immune from capture, but the traditional American remedy for these problems has been to divide power among multiple competing institutions. *See* THE FEDERALIST No. 51, p. 349 (J. Cooke ed., 1961). Moreover, state legislatures (and some state courts) are democratically accountable in more direct ways and to different constituencies than are federal agencies. And the processes of these state institutions, including civil trials open to the public, will often be more transparent to the public at large than federal agency processes.

None of this is to say that state regulation or enforcement is inherently superior to federal. The point is simply that they are *different*—each has its strengths and weaknesses, and Congress has generally chosen to combine these distinct institutional approaches in most regulatory regimes. Both Congress and this Court have long recognized the value of state experimentation across a wide range of policy areas. *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Because concurrent jurisdiction is the norm in the federalist United States system, and because policy considerations support this concurrent

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[8] *See, e.g.*, MARVER BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74-95, 169-71 (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 74-88 (1990).

jurisdiction system, this Court should not lightly construe a statute as granting exclusive jurisdiction in a federal agency.

2. It is particularly unlikely that Congress would have vested exclusive jurisdiction in the FTC.

Petitioners claim that the Labeling Act preempted state regulation of cigarette advertising and vested all power to protect consumers in the FTC. The only possible source for this grant of power is 15 U.S.C. §1336, which states: "Nothing in this chapter (other than the requirements of section 1333 of this title) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes." This refusal to limit the FTC's power cannot, however, bear the weight the Petitioners place on it.

Petitioners state that the Labeling Act had "no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health."[9] Pet'rs' Br. at 28. State laws are not necessary to prevent this from happening, it argues, because the Labeling Act granted power to the FTC, which has a "range of formal and informal regulatory tools that it has used to closely regulate tobacco companies claims about smoking and health since the 1920s." *Id.* But the

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[9] This Court has reached the same conclusion: "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Cipollone*, 505 U.S. at 529.

FTC did not possess an effective "range of formal and informal regulatory tools" at the time of the relevant amendment to the Labeling Act. Thus, a Congress that wished to preserve consumer protection from inaccurate statements would not have done so by placing exclusive regulatory powers in the FTC.

When the Labeling Act was amended in 1970, vesting all regulation of tobacco labeling and advertising in the FTC to the exclusion of generally applicable state laws would have left consumers with little protection against false and misleading advertising and labeling of cigarettes. The FTC initially had power to act only through cease and desist orders. It took a long time to get a cease and desist order, a problem that led to what was described as "regulatory anemia." S. Rep. No. 93-151, 93d Cong., 1st Sess. 9-10 (1973). An ABA report on the FTC stated that "Problems of delay have vexed the FTC ever since it was established." Report of the ABA Commission to Study the Federal Trade Commission 28-32 (1969). The same report discussed at least one cease and desist order issued more than seven years after the initial investigation. *See id.* Moreover, the slow and involved process of obtaining cease and desist orders against each wrongdoer gave offenders two bites at the apple: the FTC had to prove that the action was unlawful through the cease and desist proceeding, and then could only enforce the orders prospectively. This two-step process further limited the effectiveness of FTC regulation.

While the FTC began issuing "trade regulation rules" in 1962, its rulemaking power was very much in question in 1970. Congress specifically refused to

address whether the FTC had such power when it enacted the amendments to the Labeling Act. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, §2, 84 Stat. 89 (1970).[10] In 1972, the District Court for the District of Columbia concluded that the FTC did not have power to issue trade regulation rules. *National Petroleum Refiners Assn. v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972). The Court of Appeals reversed the next year. *National Petroleum Refiners Assn. v. FTC*, 482 F.2d 672, 690 (D.C. Cir. 1973). The issue was not completely settled until rulemaking power was explicitly granted to the FTC in 1975. Act of Jan. 4, 1975, Pub. L. No. 93-637, §202(a), 88 Stat. 2193, *creating* 15 U.S.C. §57a(1)(B).

In addition to arguably not having rulemaking power, the FTC was not granted general injunctive power until 1973. Act of Nov. 16, 1973, Pub. L. No. 93-153 §408(f), *amending* 15 U.S.C. §53(b); *see* H.R. REP. NO. 93-1107, 93d Cong., 2d Sess. 34 (1974). The FTC also was not granted power to sue for redress of injuries to consumers until 1975, well after the amendments to the Labeling Act. Act of Jan. 4, 1975, Pub. L. No. 93-637, §206, *creating* 15 U.S.C. §57b.

Finally, the jurisdiction of the FTC was somewhat limited until 1975, because the statute until then extended the agency's power only to actions "in commerce," rather than actions "in or affecting commerce." *Id.* at §201, *amending* 15 U.S.C.

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[10] This unanswered question is another indication that Congress did not intend to vest exclusive regulatory power in the FTC; it would be very odd to do so without even establishing what powers of enforcement the agency possessed.

§45. The FTC arguably could not have addressed any wholly intrastate action, which would have left any local frauds untouchable if state actions had been completely preempted. *See FTC v. Bunte Brothers*, 312 U.S. 349, 355 (1941).

Not only is it unlikely that Congress would have vested exclusive regulatory power in such an "anemi[c]" agency, but Congress would also have been likely to follow the general practice of the FTC acting in concert with state regulation, not as a replacement therefore. The FTC Act itself states explicitly: "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. 57b(e). The legislative history to the 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act supports this concept, stating that that the expansion of FTC jurisdiction is not intended to preempt state agencies from carrying out local protection of consumers. *See* S. Rep. No. 93-151, 93d Cong., 1st Sess. 27 (1973); H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 45 (1974). In addition, the Conference Report to the Act states that private actions for redress would not be barred by the FTC first filing suit for redress based on the same acts. H. R. Rep. No. 93-1606, 93d Cong., 2d Sess. 41 (1974).

In fact, the FTC itself worked with states to draft state deceptive trade practices acts. William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (1972). Within two years of the Labeling Act amendments, 36 states had enacted legislation like the model act proposed in 1967. Twelve of those states included a private right of action in their statutes—a feature of the model act

that went beyond any power held by the FTC at the time. Congress was acting against this background of concurrent actions by the FTC and the states in 1970.

This Court has determined that Congress would not lightly upset a traditional sharing of regulatory responsibilities between federal agencies and the states. In *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006), the Court recognized that Congress would not vest regulation of the medical profession—a traditional state matter—in a federal agency without clearly stating that it was doing so.[11] Similarly, in this case, vesting all regulatory power in the FTC would displace the state regulation that traditionally coexisted with FTC enforcement. Congress would not have used the "obscure grant of authority" in 15 U.S.C. §1336 to effect such displacement.

The particular regulatory context of this case thus reinforces the general points made earlier: Congress does not lightly or ambiguously confer exclusive authority on federal agencies, and the FTC is a particularly unlikely candidate for such authority.

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[11] "[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Gonzales*, 546 U.S. at 274. The Court went on to state: "It is unnecessary even to consider the application of clear statement requirements or presumptions against preemption to reach this commonsense conclusion." *Id.*

III. Plaintiffs' Claims Are Not Impliedly Preempted.

Just as Congress has not granted exclusive regulatory authority to the FTC, it has also not endowed every aspect of FTC "policy" with the same preemptive force as federal statutes. This fact forecloses the conclusion that the FTC's informal actions with regard to "low tar" cigarettes impliedly preempt Respondents' state law claims.

A. Preemption of State Law Must Always Be Rooted in *Congress's* Action.

The text of the Supremacy Clause identifies three categories of supreme federal law: "[t]his Constitution"; "the Laws of the United States which shall be made in Pursuance thereof"; and treaties. U.S. CONST. art. VI, cl. 2. This Court has recognized that "a federal agency *acting within the scope of its congressionally delegated authority* may pre-empt state regulation," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (emphasis added), but the italicized language confirms what the Supremacy Clause would in any event require: an agency's authority to preempt state law is entirely derivative of *Congress's* authority.[12] Even in cases involving

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[12] In *INS v. Chadha*, 462 U.S. 919 (1983), this Court affirmed the importance and exclusivity of the Article I lawmaking process. In response to Justice White's dissent, which noted the pervasive phenomenon of administrative lawmaking outside Article I processes, *id.* at 985–86, the Court insisted that

> [e]xecutive action under legislatively delegated authority that might resemble "legislative" action in some respects . . . . is always subject to check by the terms of the legislation that authorized it; and if that

administrative agency action, this Court has insisted that Congress's intent is the "touchstone" of preemption analysis. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

Congressional and agency action, of course, are often closely intertwined in preemption cases. But Petitioners' implied preemption argument in this case manages to separate them to a striking and unusual degree. Petitioners' argument that the federal *statute* in question—the FCLAA—impliedly preempts state law is quite literally a footnote to their primary contention, which is that Respondents' claims conflict with "the FTC's low-tar policy." Pet'rs' Br. at 46 n.11. The statutory argument consists entirely in the assertion that the Labeling Act "was enacted to establish a 'comprehensive Federal program to deal with' health-related statements in 'cigarette labeling and advertising.'" *Id.* (quoting 15 U.S.C. § 1331). But this unelaborated assertion of field preemption flatly contradicts the holding of *Cipollone* that some state regulation in this area remains permitted, *see* 505 U.S. at 523-24 (plurality), as well as the United States' position that FTC regulation is meant generally to operate alongside state law. U.S. Br. at pp. 2-4.

This Court has never, to our knowledge, found conflict preemption based solely on an agency's own articulated policy, where that policy does not purport

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> authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

Id. at 953–54 n.16.

either to be an interpretation of Congress's own mandate or an exercise of authority delegated by Congress to the agency to act with the force of law. Just as Congress's intention is the "touchstone" of express preemption analysis, so too *conflict* preemption depends on the identification of a conflict between state law and either a federal statutory policy or an agency course of action pursuant to a congressional delegation of authority to act with legal force. Even if the FTC had articulated a clear policy allowing the use of Respondents' "low tar" descriptors—a disputed matter outside the scope of this brief—it would fit neither of these conditions for preemption.

B. The FTC's "low tar" policy cannot preempt state law.

There are two sorts of cases in which agency action can preempt state law, either as a matter of express or conflict preemption. First, the agency may interpret a statute as preempting state law. These cases present an unresolved question concerning whether courts should accord the agency's interpretation some degree of deference, given the general "presumption against preemption" in statutory construction. *See Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 (2007) (noting but not resolving this question).[13] Second, an agency may itself take action, pursuant to a delegation of authority from Congress, that preempts state law.

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[13] *See also* Nina A. Mendelson, *A Presumption Against Agency Preemption: Federal Agency Authority to Preempt State Law*, 102 NW. U. L. REV. 695 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008).

The question in this category of cases concerns which sorts of agency action may have this effect.[14]

The present case falls in the second category. The FTC's "low tar" policy is not an interpretation of the Labeling Act; as the *amicus* brief submitted by the former FTC Commissioners makes clear, this policy's origins pre-dates the Labeling Act, which simply recognizes (and refuses to expand) the FTC's preexisting authority. Fmr. Comm'r Br. at 10-13.[15] The "low tar" policy is thus a creature of the FTC's general authority to prevent unfair trade practices. *See id.* at 7-8 (citing the FTC's general rulemaking and adjudication authority as the basis for the policy). Nor has the FTC interpreted its organic

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[14] *Cf. Global Crossing Telecomms., Inc v. Metrophone Telecomms., Inc.*, 127 S. Ct. 1213, 1528 (2007) (Scalia, J., dissenting) (distinguishing between "interpretive regulations (by which I mean regulations that reasonably and authoritatively construe the statute itself) and . . . substantive regulations (by which I mean regulations promulgated pursuant to an express delegation of authority to impose freestanding legal obligations beyond those created by the statute itself)"). In our view, either sort of regulations may be preemptive, but they raise different questions.

[15] *See* 15 U.S.C. § 1336 ("Nothing in this Act (other than the requirements of section 4 [15 USCS § 1333]) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practice in the advertising of cigarettes."). Aside from requiring FTC approval of plans for rotating the congressionally-prescribed warning labels on tobacco packaging, 15 U.S.C. § 1333(c), and providing for an FTC representative on the Interagency Committee on Smoking and Health, 15 U.S.C. 1341(b)(1)(A), § 1336 is the Labeling Act's only reference to the FTC.

statute to preempt state law here. As all concede, the FTC Act does not generally preempt concurrent state authority over unfair trade practices.

Congress has, of course, delegated authority to the FTC to identify and prohibit "unfair or deceptive acts or practices." *See* 15 U.S.C. § 45(a). The question is which sorts of agency action, taken pursuant to a delegation of this kind, have the preemptive force of supreme federal law. This Court's *Chevron* jurisprudence has made clear that all agency actions are not created equal: sometimes agencies act "with the effect of law," and sometimes their actions lack such force. *See, e.g., U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Christensen v. Harris Co.*, 529 U.S. 576, 586-87 (2000). In the preemption context, it is particularly critical that this Court establish rules that are as predictable and stable as possible to indicate which agency actions have preemptive force and which do not.[16]

Petitioners in this case appear to invite an open-ended inquiry into the history, consistency, and policy weight of particular agency practices as a means to determine the weight of those practices. That sort of approach is unlikely to give state and federal regulators fair notice of the preemptive effects of federal agency action; likewise, it provides little constraint on reviewing courts to prevent them from holding preempted state policies that do not accord with their own policy preferences (or at least appearing to rule in this way). We recognize that

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[16] *Cf. Lopez*, 514 U.S. at 630-31 (Breyer, J., dissenting) (emphasizing the importance of legal certainty in defining the relative scope of state and federal regulatory authority).

this Court' *Chevron* jurisprudence, which differentiates between agency actions with the force of law and other, less authoritative actions, is not always a model of clarity. But we think it is preferable to the more open-ended approach offered by Petitioners, and in any event it makes sense that the *Chevron* and preemption inquiries should dovetail.[17]

Applying this criterion, the FTC's "low tar" policy can have no independent preemptive force.

1. The FTC has not exercised the exclusive rulemaking procedures required by Congress.

The extent to which the FTC is authorized to make rules with the force of law has been controversial for much of its history. Congress resolved the matter in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, 88 Stat. 2183 (codified at 15 U.S.C. §§ 45 *et seq.*), which conferred explicit power on the

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[17] As the Court has explained, the reason for *Chevron* deference is that Congress has delegated authority to the agency to fill a statutory gap by taking action with legal force. *Mead*, 533 U.S. at 229. This same quality—legal force, derived from congressional delegation—is what makes agency action preemptive under the Supremacy Clause.

We note, however, that the power of substantive agency action to preempt state law is a distinct issue from the deference owed to an agency's interpretative judgment that a particular federal measure has preemptive effect. *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008). Even where an agency can act with legal force, we do not concede that the agency's interpretive judgments should receive *Chevron* deference. *See id.* and sources cited in note 13, *supra*.

Commission to make "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 57a(a)(1)(A), as well as "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 57a(a)(1)(B). When the FTC makes substantive or legislative rules under the latter provision, however, the Act requires it to follow specific rulemaking procedures that are generally stricter than the usual requirements under the Administrative Procedure Act. *See* 15 U.S.C. §§ 57a(b), 57b-3.

These heightened procedural requirements reflect Congress's desire to empower the FTC to act with the force of law, but also to confine that authority within relatively narrow limits. Whether or not the FTC in fact has a coherent "low tar" policy, there is no dispute that the agency has never embodied any such policy in substantive rules promulgated pursuant to § 57a. To accord preemptive weight to "policies" that have been articulated in less formal fashion would obviate the specific procedural requirements of § 57a. See FTC Operating Manual (June 25, 2007) ch. 8.3.2, available at http://www.ftc.gov/foia/ adminstaffmanuals.shtm (stating that the industry guide "does not have the force or effect of law and is not legally binding on the Commission or on the public in an enforcement action").

We are unaware of any cases where preemptive effect has been accorded to agency "policies" not embodied in rules that have the force of law; indeed, preemption of conflicting state policies is

part and parcel of what it *means* to act with the force of federal law.[18] Petitioners cite *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), for the proposition that "even an agency's decision *not* to engage in regulation can preempt state law." Pet'rs' Br. at 52. But that case—which found that the agency decision in question did *not* preempt state law—involved a statutory preemption clause which arguably rendered any supplemental state regulation preempted.[19] Hence, if the agency had considered state law preempted, that would have amounted to an interpretation of the statute with no need to rely on the preemptive force of the agency's own actions. Moreover, the Coast Guard's regulatory approach to the matters considered in *Sprietsma* was to promulgate all regulations that it intended to have the force of law by notice and comment rulemaking. *See* 537 U.S. at 59-62. *Sprietsma* is thus a very odd case to cite for the proposition that agency decisions not to regulate have broad preemptive consequences. *See id.* at 65 ("It is quite wrong to view that decision ["the Coast Guard's decision not to adopt a regulation"] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation.").

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[18] *See Wabash Valley Power Assn. Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (Easterbrook, J.) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication.").

[19] *See* 46 U.S.C. § 4306 (preempting state regulation "not identical to" federal regulation unless affirmatively "permitted by the Secretary").

The other cases relied upon by Petitioners are likewise off target. Petitioners cite *Geier v. American Honda Motor Co.*, 529 U.S., 861, 885 (2000), for the proposition that preemption does not require "a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking," *see* Pet'rs' Br. at 52, but this statement goes to the clarity with which an agency must express its intent to preempt—not to the character of the agency action that must form the *basis* for the preemption. *Geier* concerned the preemptive impact of a Federal Motor Vehicle Safety Standard, which is a legislative rule promulgated after notice and comment rulemaking. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-41 (1983). *Geier* certainly did not hold that preemption could occur based on a conflict between state law and some lesser form of agency action.

Petitioners' invocation of the filed rate doctrine, Pet'rs' Br. at 52, is equally unhelpful. Although Congress has prescribed particular ratemaking procedures, distinct from notice-and-comment rulemaking or formal adjudication *see, e.g.*, 15 U.S.C. § 717c (specifying the natural gas ratemaking procedures at issue in *Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981), relied upon by Petitioners), no one can dispute that Congress has authorized ratemaking agencies to act with the force of law. *See also* 5 U.S.C. § 551(4) (defining ratemaking as a "rule" under the APA). Nor could anyone assert that ratemaking action taken in disregard of the particular procedures specified by Congress would have legal force. Similarly, the FTC is empowered to act in a variety of informal ways, but if it wishes its

actions to preempt state law, it must utilize the rulemaking procedures specified in the statute.

2. **FTC consent orders do not have the force of law with respect to non-parties.**

Other than informal statements of policy, the most concrete embodiment of the FTC's alleged "low tar" policy is a series of consent agreements that the FTC entered into with various tobacco companies indicating the use of certain descriptors, in certain situations, would not be regarded as deceptive *per se*. It is true that for much of its history, the FTC proceeded primarily by adjudication rather than rulemaking, and this Court has considered formal adjudication as largely equivalent to notice-and-comment rulemaking in its *Chevron* jurisprudence. *See Mead*, 533 U.S. at 230-31. But a consent order is not a formal adjudication, and Petitioners' position flies in the face of this Court's clear precedent that consent orders ordinarily bind only the parties to the dispute. *See Martin v. Wilks*, 490 U.S. 744 (1989); *Wabash Valley Power Assn. v. Rural Elec. Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (Easterbrook, J.) (relying on *Martin* to reject argument that an FTC consent order preempts state law). As Judge Easterbrook has pointed out, "[w]hether the decree has [preemptive] effect should depend on whether it was adopted by the agency as its own policy following the procedures the APA requires; then the preemption would come from substantive rules rather than the parties' assent." *Id.*

We suspect, moreover, that according preemptive effect to agency consent orders would make it considerably more difficult for federal

agencies to settle cases. See, e.g., *In re Beatrice Foods*, 86 F.T.C. 1, 50 (1975) ("[A] determination that consent orders are controlling precedents would severely limit the use of the consent settlement process."). Any state with a regulatory policy that might be affected by such a settlement would have an incentive to intervene in the proceedings in order to argue against a preemptive outcome. This impractical scenario highlights the basic considerations of administrative fairness and federalism at issue here: administrative action that affects broad categories of persons should not occur without some opportunity for affected persons to participate, and federal action that affects the *States* is particularly subject to checks based on representation and participation. *See Garcia*, 469 U.S. at 550-54.

CONCLUSION

Current constitutional doctrine affords Congress broad authority to preempt state law. If meaningful balance in our federal system is to be preserved, the courts must not overread the preemptive scope of the legislation that Congress enacts. It is for Congress, not the federal courts, to expand the preemptive force of federal regulation into areas of health and safety regulation that have long been subjects of state authority. And courts must be particularly careful not to accord preemptive force to action by federal *agencies*—which elude both the political and procedural safeguards of federalism—except when such agencies are either interpreting Congress's statutes or acting within clear delegations of authority to act with the force of law. In this case,

these principles require Respondents' state law claims to go forward.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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FILED
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SUPREME COURT, U.S.

(10)

No. 07-562

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,

Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF FORMER COMMISSIONERS AND SENIOR STAFF OF THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

61673 A 51p

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Federal Trade Commission Act
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§ 5(m), 15 U.S.C.§ 45(m) 7
§ 6(g), 15 U.S.C.§ 46(g) 7
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16 C.F.R. § 1.5 (2008) 8
16 C.F.R. § 2.34 (2008) 27
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Legislative Materials
134 Cong. Rec. E1579-01 (May 17, 1988) 32
Accuracy of the FTC Tar and Nicotine Rating System: Hearing Before the Senate Comm. on Commerce, Science, and Transp., 110th Cong. (Nov. 13, 2007) 30

TABLE OF AUTHORITIES
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"Cigarette Testing and Liability Act of 1988," H.R. 4543, 100th Cong. (1988) 32
FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, & Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong. (May 7, 1987) 22, 23, 31, 32
False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. Of the Comm. on Gov't Operations H.R., 85th Cong. (1957) 11, 12
Nomination—1970: Hearing Before the S. Comm. on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, 91st Cong. (1970) 19
Strengthening the Cigarette Labeling Act, 112 Cong. Rev. 17,270 (July 27, 1966) 15

Federal Register Releases

Advertising of Cigarettes: Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule, 35 Fed. Reg. 12,671 (Aug. 8, 1970) 17, 18
The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment, 59 Fed. Reg. 51,980 (Oct. 13, 1994) 27

TABLE OF AUTHORITIES
(Continued)

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Cigarette Advertising and Other Promotional Practices; Announcement of Decision, 43 Fed. Reg. 11,856 (Mar. 22, 1978) 29
Cigarette and Related Matters: Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing, 31 Fed. Reg. 14,278 (Nov. 4, 1966) 14
Cigarettes: Testing for Tar and Nicotine Content, 32 Fed. Reg. 11,178 (Aug. 1, 1967) 14
Cigarette Testing; Request for Public Comment, 62 Fed. Reg. 48,158 (Sept. 12, 1997) 25
Cigarette Testing Results, Tar and Nicotine Content, 36 Fed. Reg. 15,074 (Aug. 12, 1971) 15
Cigarette Testing; Tar and Nicotine Content Results, 42 Fed. Reg. 21,155 (Apr. 25, 1977) 28
Commission Determination re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications, 48 Fed. Reg. 15,953 (Apr. 13, 1983) 28, 29
Report of the "Tar," Nicotine, and Carbon Monoxide Content of 370 Varieties of Domestic Cigarettes, 55 Fed. Reg. 42,768 (Oct. 23, 1990) 16

TABLE OF AUTHORITIES
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Report on the "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1249 Varieties of Domestic Cigarettes For the Year 1995, 63 Fed. Reg. 3576 (Jan. 23, 1998) 16

Other Authorities

1960 FTC Ann. Rep. 82 13
Br. for Federal Trade Commission as *Amicus Curiae, Gen. Motors Corp. v. Abrams*, No. 86 Civ. 9193 (CSH) (July 6, 1988) 9
C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Overview, in* National Cancer Institute, *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* (1996) 10, 13, 29
Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955) 12
Coalition on Smoking OR Health, Petition Before the Federal Trade Commission (1992) 30
Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Nov. 9, 1970) 19
Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Dec. 21, 1970) ... 19, 20

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Correspondence from Cyril F. Hetsko, Senior Vice President and General Counsel, American Brands, Inc., to Thomas G. Egan, FTC Attorney (Oct. 21, 1971) 36
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Correspondence from FTC to Hon. Thomas Luken (July 1988) 32
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Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky (Nov. 24, 1998) 31
Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to John Vance Hewitt (Dec. 17, 1959) 12, 13
Explanatory Memorandum Relating to Voluntary Program for "Tar" and Nicotine Disclosure (Dec. 17, 1970), *available at* http://tobaccodocuments.org/pm/2021574547-4551. html 36
FTC Consent Order Forbids Unlimited 'Low Tar' Claims by Cigarette Maker, FTC News (July 13, 1971) 27
FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content, Federal Trade Commission News (Oct. 1, 1970) 19
FTC News Release (Mar. 25, 1966) 14
FTC News Release (Oct. 26, 1967) 24
FTC News Release, *FTC to Begin Cigarette Testing* (Aug. 1, 1967) 14, 15, 16, 20, 28
FTC Operating Manual, available at http://www. ftc.gov/adminstaff-manuals.shtm 8, 27
FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan, Federal Trade Commission News (Dec. 23, 1970) 20

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Federal Trade Commission 90th Anniversary Symposium—Program Brochure (Sept. 22-23, 2004), *available at* http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf 9
Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998) 31
Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* (June 30, 1968) 17, 24, 25
Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1979* 25, 34, 35
Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1980* 25
Federal Trade Commission, *Report to Congress Pursuant to the Public Health Smoking Act* (Dec. 31, 1970) 9, 10, 18, 20
Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* (1971) 35
Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Staff Report to the Federal Trade Commission* (June 1979) 25

TABLE OF AUTHORITIES
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Letter from Joseph W. Shea, Secretary to Howard H. Bell (Oct. 25, 1967) 24
Letter from Terrence J. Boyle, Attorney, Federal Trade Commission to Consumer, Caruthersville, Missouri (Mar. 27, 1975) 35, 36
Lynn T. Kozlowski *et al.*, *Cigarette Design, in* National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* (2001), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/13/ 26
Matthew L. Myers *et al.*, *Staff Report on the Cigarette Advertising Investigation* (1981) 25, 35
Memorandum from Carol T. Crawford, Director, to Commission re "FTC Cigarette Testing Methodology" (Sept. 4, 1985) 30
Memorandum from Thomas G. Egan, FTC Attorney, to Secretary (May 15, 1973) 36
Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved, 92 F.T.C. 1035 (1978) 16, 20

TABLE OF AUTHORITIES
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Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, REGULATION (1997), *available at* http://www.cato.org/pubs/regulation/reg20n4d.html 23

Statement of Paul Rand Dixon, Federal Trade Commission Chairman, on Activation of Cigarette Testing Laboratory (May 15, 1967) 15

U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981), *available at* http://profiles.nlm.nih.gov/NN/B/B/S/N/ 26

INTEREST OF *AMICI CURIAE*

Amici curiae are former Commissioners and senior staff of the Federal Trade Commission (the "FTC" or the "Commission") who collectively reflect decades of FTC leadership:[1] George W. Douglas (Commissioner, 1982-1986), Margot Machol (Commissioner, 1988-1989), Roscoe Starek (Commissioner, 1990-1997), Thomas B. Leary (Commissioner, 1999-2005), Robert D. Tollison (Director, Bureau of Economics, 1981-1983), Wendy Gramm (Director, Bureau of Economics, 1983-1985, and Assistant Director, Division of Consumer Protection of Bureau of Economics, 1982-1983), John Peterman (Director, Bureau of Economics, 1988-1993, and various other senior positions beginning in 1976), Fred McChesney (Associate Director for Policy and Evaluation, 1981-1983), Joseph Mulholland (Economist, Division of Consumer Protection of Bureau of Economics, 1968-2007), John E. Calfee (Economist, Special Assistant to Director for Consumer Protection, Bureau of Economics, 1980-1986), and Jeffrey A. Eisenach (Special Advisor for Economic Policy and Operations,

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. R.J. Reynolds Tobacco Company and Lorillard Tobacco Company have each made a monetary contribution to this brief's preparation and submission. Messrs. Peterman and Mulholland have in the past been retained as consultants or expert witnesses for Petitioners, but neither they nor any other *amici* joining this brief are being compensated for their role as *amici* in this case.

Office of the Chairman, 1984-1985, Economist, Bureau of Economics, 1983-1984).

Amici respectfully submit this brief to assist the Court in understanding the full context and nature of the FTC's comprehensive regulatory control over the conduct at issue in this case.[2] *Amici*'s experience at the FTC give them a unique perspective on the Commission's regulatory approach generally and on the specific role that the FTC has played, and continues to play, in the regulation of cigarette advertising. In particular, *amici* are intimately familiar with the FTC's decades-long efforts to ensure that consumers receive useful and accurate information about the tar and nicotine smoke content of competing brands of cigarettes. These efforts include employing a variety of formal and informal regulatory tools to foster a uniform standard for measuring tar and nicotine yields, to compel disclosures of those measurements in cigarette advertisements, and to define and authorize the use of various descriptors, such as "low-tar" and "light," as shorthand, consumer-friendly references to those measurements.

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[2] This brief is substantially similar to briefs filed by undersigned counsel for similar groups of *amici* in *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007), and *Aspinall v. Philip Morris, Inc.*, No. SJC-09981 (Mass. Sup. Ct.), both cases in which the history of the Commission's regulatory control over the testing, disclosure and advertising of tar and nicotine yields in cigarettes was also relevant. The brief has been adapted to address the issues relevant to this case.

SUMMARY OF ARGUMENT

This case involves, *inter alia*, the scope and preemptive effect of the FTC's comprehensive and detailed regulation of the testing, disclosure and advertising of tar and nicotine yields in cigarettes. Respondents contend that the use by Petitioners Philip Morris USA Inc. and Altria Group, Inc. of the descriptors "lights" and "lowered tar and nicotine" on packages of Marlboro Lights was deceptive under Maine's Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, § 207, because, according to Respondents, those descriptors created the allegedly false impression that consumers would receive lower amounts of tar and nicotine from Marlboro Lights than from regular Marlboro cigarettes.[3] But the application of state law to the use of these descriptors may subject Petitioners to liability for engaging in conduct specifically permitted and authorized by the FTC, and would stand in direct conflict with the FTC's decades-long policy of providing a standardized baseline of information about tar and nicotine yields that permits smokers to choose cigarettes based on a specific FTC-defined metric.

The FTC has, for decades, exercised comprehensive and detailed oversight over cigarette companies'

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[3] Marlboro Lights is just one of many brand varieties of "light cigarettes" advertised and sold using descriptors such as "low tar" or "light." As explained below, the FTC has authorized the use of these descriptors as shorthand references to specifically defined ranges of tar yield as measured by FTC-mandated testing.

claims about the tar and nicotine yields of their products. It has done so using the wide array of formal and informal regulatory tools at its disposal, including rulemaking, policy statements, case-by-case adjudication and consent decrees, advisory opinions, and nominally "voluntary" agreements among the major cigarette manufacturers. Through these measures, the FTC has compelled the cigarette companies to comply with the agency's policy determinations concerning the most effective and efficient way to ensure that consumers receive reliable information about the tar and nicotine levels in various cigarettes. Among other things, the FTC:

- developed and mandated the use of a uniform method for determining tar and nicotine yields (referred to as the modified Cambridge Filter Method or the FTC Method), with full awareness of the limitations of the standardized method;
- took the unique step of conducting the tests itself in its own testing laboratory for over twenty years, before eventually ceding testing responsibility to the tobacco industry under FTC specifications and supervision, and publishing those results;
- required cigarette companies to disclose tar and nicotine yields, based on the FTC Method, in all non-permanent cigarette advertisements; and
- defined and authorized the use of the descriptors challenged by Respondents in this case under conditions in which the Commission determined they function as shorthand,

consumer-friendly references to FTC Method results.

The FTC took these actions for two reasons: so that consumers would be able to consider tar and nicotine yields in making their brand choices, and so that cigarette manufacturers would be encouraged to compete on the basis of tar and nicotine yields.

The First Circuit's view that these regulations are not compulsory because they resulted from agency action short of rulemaking ignores the realities of the Commission's regulatory strategies. While the disclosure of tar and nicotine yields results from an agreement among industry participants, that agreement is "voluntary" in name only. The FTC chose to compel such disclosure, but decided—based on past experience and with the support of members of Congress—that securing an agreement with the major cigarette manufacturers would be more efficient and effective than promulgating a formal rule. The Commission therefore coerced industry participants to enter into an agreement in lieu of rulemaking, demanded that the agreement comply with the agency's exact requirements, and made clear that the FTC would monitor compliance and initiate rulemaking if the agreement turned out to be ineffective. The FTC has similarly demanded, without the need for a formal rule, that cigarette companies strictly limit their use of descriptors such as "light" and "low tar" to cigarettes falling within certain tar ranges as measured by the FTC Method.

Accordingly, when Petitioners undertook the conduct challenged in this lawsuit—*i.e.*, testing the tar and nicotine yields of their light cigarettes and

making representations about those yields—they did so pursuant to, and in full compliance with, the FTC's detailed and comprehensive regulatory directives. The imposition of state-law liability for such conduct would therefore interfere with and frustrate the accomplishment of the FTC's considered policy objectives in this area.

ARGUMENT

The First Circuit held that Respondents' state-law fraud claims challenging tar and nicotine descriptors are not preempted, even though such descriptors are concededly accurate under the FTC Method. This holding is incorrect. Petitioners were entitled to judgment as a matter of law because the application of Maine's Unfair Trade Practices Act to Petitioners' use of descriptors such as "light" and "low tar" conflicts with, and stands as a direct obstacle to the accomplishment and execution of, the FTC's policy goals and objectives concerning the testing, marketing, and selling of light cigarettes.

I. THE USE OF DESCRIPTORS SUCH AS "LIGHT" AND "LOW TAR" AS SHORTHAND REFERENCES TO FTC METHOD TESTING RESULTS FURTHERS THE FTC'S SPECIFIC AND IMPORTANT POLICY OBJECTIVES

Over the course of decades, the FTC has used a broad array of regulatory tools to impose detailed and specific requirements relating to the testing of, and advertising claims about, tar and nicotine yields in cigarettes. In doing so, the FTC adopted, announced and pursued specific policy objectives—namely, encouraging the development of progressively lower yield cigarettes as measured by the FTC Method, and

providing smokers with FTC Method tar and nicotine yield information so that they may use that information when making brand choices. Moreover, the FTC adopted and implemented these regulatory and policy directives in the context of the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"), a statute by which Congress sought to create a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." FCLAA § 2, 15 U.S.C. § 1331. When, in 1988, Congress considered legislation that would have repealed some or all of the Act's preemption provisions, so as to permit state consumer-fraud lawsuits like this one, the FTC opposed the legislation, informing Congress that permitting such suits would lead to "irreconcilable conflicts" with the FTC's policies.

A. The FTC Employs a Broad Range of Regulatory Tools To Compel Compliance With Its Consumer-Protection Policies

As an independent agency with far-reaching regulatory powers, the FTC employs a variety of tools to implement its broad mandate to protect consumers from "unfair or deceptive acts or practices." Federal Trade Commission Act ("FTC Act") § 5(a)(1), 15 U.S.C. § 45(a)(1). The FTC Act authorizes the Commission to promulgate rules, known as trade regulation rules, through notice-and-comment rulemaking. *See id.* §§ 6(g), 18, 15 U.S.C. §§ 46(g), 57a. The Act also empowers the Commission to initiate administrative adjudication, and to seek injunctive and monetary relief in federal court. *See id.* §§ 5(m), 13, 19, 15 U.S.C. §§ 45(m), 53, 57b.

The FTC also uses several less formal mechanisms to achieve regulatory compliance. For example, it frequently issues Industry Guides that serve as "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." 16 C.F.R. § 1.5 (2008). These Guides "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry," *id.*, and are especially useful in getting firms to abandon practices simultaneously where each firm may be reluctant to lose a competitive advantage by doing so unilaterally. *See FTC Operating Manual*, ch. 8, § 3.3, *available at* http://www.ftc.gov/foia/adminstaff-manuals.shtm (visited Apr. 1, 2008). The FTC also issues Advisory Opinions in response to requests by private parties. *See* 16 C.F.R. § 1.1 (2008). Such Opinions are "binding upon the Commission with respect to the person or group to whom such opinion is issued with regard to the acts, practices, or conduct described in the request." *FTC Operating Manual*, ch. 8, § 4.3.

Finally, the FTC uses the threat of formal agency action, such as rulemaking or litigation, to encourage industry participants to agree voluntarily to prevent unfair or deceptive practices. The FTC thus frequently enters into consent decrees to avoid or resolve litigation. *Id.*, ch. 6, § 3. While not formally binding on non-parties, a position taken by the FTC "in cases settled by consent" is "entitled to great weight." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959); *see also Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (holding that an administrative agency cannot "arbitrarily appl[y] different decisional

criteria to similarly situated [parties]"). The FTC intends that its enforcement actions resulting in consent orders will signal the FTC's policies to the industry, letting other participants know what practices result in an enforcement action by the Commission, and providing them with the opportunity to adjust their behavior accordingly. The FTC has thus expressed its understanding and intent that, where appropriate, "Commission rules, litigated cease and desist orders, and consents may preempt state law." Br. for Federal Trade Commission as *Amicus Curiae* at 1, *Gen. Motors Corp. v. Abrams*, No. 86 Civ. 9193 (CSH) (July 6, 1988); *see also id.* at 5-7 (arguing that FTC consent orders may preempt state law).

The FTC similarly encourages industry participants to adopt "voluntary" agreements as a substitute for trade regulation rules. Between 1919 and the 1960s, for instance, the FTC regularly held trade practice conferences to encourage industries to draft their own rules, subject to final approval by the Commission. *See Federal Trade Commission 90th Anniversary Symposium—Program Brochure* 6-7 (Sept. 22-23, 2004), *available at* http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf (visited Apr. 1, 2008). Because formal agency action typically entails the expenditure of significant resources by both the FTC and the industry, the solicitation of such "voluntary" agreements is often the most efficient way for the FTC to achieve its regulatory objectives; indeed, the FTC has characterized such agreements as "Regulatory[] Activity." *See* Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* 15 (Dec. 31,

1970) [hereinafter *1970 Report to Congress*] (J.A. 569a, 571a-72a).

As explained below, during the FTC's long history of regulating cigarette advertising, it has successfully employed all of these regulatory tools. It litigated against tobacco companies to challenge misleading tar and nicotine claims; it provided Industry Guides governing cigarette advertising; it issued Advisory Opinions regarding tar and nicotine claims; it used the threat of rulemaking to orchestrate a "voluntary" agreement among the major cigarette companies to provide tar and nicotine data in print advertisements; and it published policy statements concerning tar and nicotine advertising in the *Federal Register* and in its own FTC News Releases.

B. The FTC Has a Long History of Regulating Claims About Tar and Nicotine Yields

The FTC's history of regulating claims about the tar and nicotine yields of cigarettes dates back many decades. *See generally* C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Overview*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* 1, 2 (1996) (J.A. 649a-650a). The FTC took its first regulatory action involving tar and nicotine yields in 1941, compelling one tobacco company to stop asserting that the mouthpiece of its cigarettes appreciably removed nicotine from tobacco smoke. *See In re Benson & Hedges*, 33 F.T.C. 1659, 1659-60 (1941). A few years later, the FTC successfully enjoined three tobacco companies from making claims

about the nicotine yields of certain brands when medical experts and FDA testing indicated that the nicotine levels of these brands were not significantly lower than those of competing brands. *See In re R.J. Reynolds Tobacco Co.*, 46 F.T.C. 706, 729-31 (1950); *In re P. Lorillard Co.*, 46 F.T.C. 735, 748-51, *aff'd*, 186 F.2d 52 (4th Cir. 1950); *In. re Am. Tobacco Co.*, 47 F.T.C. 1393 (1951).

By the 1950s, the cigarette industry had responded to the growing awareness of the health risks of cigarettes by creating and marketing filtered cigarettes as lower in tar and nicotine. Given uncertainties at the time about the health effects of tar and nicotine, the FTC initially sought to enjoin questionable advertising claims about filters and tar and nicotine yields. *See False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. of the Comm. on Gov't Operations H.R.*, 85th Cong. 274-75 (1957) (statement of FTC Acting Chairman Robert T. Secrest) [hereinafter Secrest Statement]. But because the FTC was not equipped to test cigarettes and there was no standardized test, it was difficult to prove that any particular claims were deceptive or unfair. *Id.* at 275-76.

As an alternative to litigation, therefore, the FTC elected to work with the industry to establish guidelines for cigarette advertising. In September 1955, following consultation with cigarette manufacturers, the agency formally adopted the Cigarette Advertising Guides for the use of its staff in evaluating cigarette advertisements. *Id.* at 276. Among other things, the Cigarette Advertising Guides permitted claims about tar, nicotine, and other ingredients of cigarette smoke, so long as such

claims had been "established by competent scientific proof." Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955). By 1957, working under the Guides, the FTC had obtained voluntary discontinuance of seventy-five advertising claims it found objectionable, without having to institute any formal proceedings; many other objectionable advertisements were abandoned before they ever reached the public. Secrest Statement, at 278-79. During his congressional testimony in 1957, FTC Chairman Secrest expressed satisfaction with the FTC's regulatory achievements:

> [The] adoption and administration of the guides did more to prevent deceptive advertising of cigarettes and to fulfill the Commission's responsibility to the public than it could possibly have accomplished by any other means.

Id. at 279-80.

Despite these efforts, during the second half of the decade, cigarette companies continued competing to produce and advertise cigarettes with lower tar and nicotine yields. During this "tar derby," as the period of competition became known, cigarette companies and others (*e.g.*, *Readers' Digest* and the Consumers' Union) employed different tar and nicotine testing methods to substantiate their claims about the lower yields of certain brands. Concerned that the lack of a uniform testing method was confusing to consumers, the FTC in December 1959 ended the "tar derby" by demanding that cigarette companies eliminate all references to low or reduced tar or nicotine in their advertisements. *See* Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to

John Vance Hewitt (Dec. 17, 1959) (J.A. 401a-02a). The FTC threatened to refer non-complying advertisements to the agency's enforcement bureaus. *Id.* The FTC subsequently sought and obtained signed undertakings from the seven major cigarette manufacturers to eliminate all references to tar and nicotine claims from cigarette advertising. *See* 1960 FTC Ann. Rep. 82.

FTC Chairman Paul Rand Dixon described these measures as notice to the industry that the FTC would deem any "reference to tar or nicotine content" sufficient to "support a complaint" for false and misleading advertising. *See* Correspondence from Paul Rand Dixon, FTC Chairman, to Warren G. Magnuson, Chairman of U.S. Senate Committee on Commerce 3 (Apr. 11, 1966) [hereinafter *Dixon-Magnuson Correspondence*] (J.A. 381a). Although the measures stopped short of formal regulatory action, C. Lee Peeler, then Deputy Director of the FTC's Bureau of Consumer Protection, described them as a "ban" on tar and nicotine advertising. Peeler, *supra*, at 2 (J.A. 651a).

C. The FTC Requires Uniform Testing of Tar and Nicotine Yields

During the 1960s, as mounting scientific evidence indicated that the health risks of smoking could be diminished through reductions in tar and nicotine yields, the public-health community questioned the FTC's total ban on tar and nicotine advertising. The American Cancer Society, for example, expressed its "conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of

the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes." *Dixon-Magnuson Correspondence*, at 8-9 (internal quotation marks omitted) (J.A. 387a).

In response to such demands, the FTC notified the nation's cigarette manufacturers that factual statements about tar and nicotine yields would no longer be deemed to violate the FTC Act or the 1955 Cigarette Advertising Guides, so long as no collateral health claims were made and claims about tar and nicotine content were supported by testing conducted in accordance with a uniform testing protocol approved by the FTC. *See* FTC News Release (Mar. 25, 1966) (J.A. 478a-479a). The FTC solicited comments and held public hearings on the proper testing protocol, *see Cigarette and Related Matters: Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing*, 31 Fed. Reg. 14,278 (Nov. 4, 1966), and, in reliance on comments and testimony, ultimately adopted as its testing protocol a modified version of the Cambridge Filter Method, which became known as the "FTC Method." *See Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (Aug. 1, 1967) (J.A. 294a-95a); FTC News Release, *FTC to Begin Cigarette Testing* (Aug. 1, 1967) [hereinafter *Testing Release*] (J.A. 485a-489a).[4]

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[4] The FTC Method uses a machine to measure the tar and nicotine yielded when a cigarette is smoked according to specific parameters:

Responding to calls by members of Congress for the FTC itself to conduct cigarette testing, *see, e.g.*, *Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17,270, 17,274-75 (July 27, 1966) (Sens. Magnuson and Kennedy), the FTC took the very unusual step of opening its own testing laboratory in May 1967, and began testing cigarettes under the FTC Method on August 1, 1967. *See* Statement of Paul Rand Dixon, Federal Trade Commission Chairman, on Activation of Cigarette Testing Laboratory (May 15, 1967); *Testing Release*, at 1 (J.A. 485a). The FTC published the testing results approximately every year in the *Federal Register* and in its annual reports to Congress. *See, e.g.*, *Cigarette Testing Results, Tar and Nicotine Content*, 36 Fed. Reg. 15,074 (Aug. 12, 1971).

In 1987, the FTC ceded testing responsibility to the private Tobacco Industry Testing Lab (the "TITL"). *See* Correspondence from John P. Rupp, Attorney for cigarette manufacturers, to Judith P. Wilkenfeld, Program Director of Cigarette Advertising and Testing at FTC (June 30, 1987). Testing at the TITL is conducted under FTC monitoring and supervision,

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The FTC regulations involve the use of a cigarette smoking machine. The machine is set to specific parameters governing the depth to which the cigarette is inserted, the volume of air drawn through the burning cigarette with each "puff," the number of puffs drawn per minute and the amount of the cigarette consumed. The tar and nicotine captured by a filter in the machine are then measured.

Pearson v. Philip Morris, Inc., No. 0211-11819, 2006 WL 663004, at *1 (Or. Cir. Ct. Feb. 23, 2006).

Report of the "Tar," Nicotine, and Carbon Monoxide Content of 370 Varieties of Domestic Cigarettes, 55 Fed. Reg. 42,768, 42,768 (Oct. 23, 1990), including periodic unannounced inspections, and the FTC uses compulsory process to require the tobacco companies to submit the TITL's measurements to the FTC in sworn statements under penalty of perjury. *See, e.g., Report on the "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1249 Varieties of Domestic Cigarettes For the Year 1995*, 63 Fed. Reg. 3576 (Jan. 23, 1998).

The FTC does not permit deviation from the FTC Method. To the contrary, the Commission adopted an official method precisely in order to provide a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." *Testing Release*, at 1 (J.A. 486a). The FTC thus made clear from the start that it would deem deceptive the use of measurements derived from any method other than the FTC Method, because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." *Id.* at 1-2 (J.A. 487a). Indeed, in 1978, the FTC issued an Advisory Opinion rejecting a request to use a measurement method other than the FTC Method, even if the method would produce *higher* tar and nicotine yields, because of the potential for consumer confusion. *See Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved*, 92 F.T.C. 1035, 1035 (1978).

In its 1968 Report to Congress, the FTC made clear its motivation for replacing its earlier ban on tar and nicotine advertising with its new testing regime:

> Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes.

Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 17 (June 30, 1968) [hereinafter *1968 Report to Congress*] (J.A. 527a).

D. The FTC Requires Disclosure of Tar and Nicotine Yields

The FTC's 1966 policy reversal was only the first step taken by the FTC to inform consumers about machine-measured tar and nicotine yields of cigarettes. Soon after, the FTC took steps to require manufacturers to include tar and nicotine yield disclosures in all cigarette advertising. Furthermore, the FTC determined that it would authorize and permit other representations of tar and nicotine—including the very sort of product descriptors challenged by Respondents in this action, such as "low tar" and "light"—so long as such representations and advertising claims were substantiated by FTC Method test results.

On August 8, 1970, the FTC formally proposed a trade regulation rule requiring cigarette manufacturers to "disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties [of cigarettes] . . . based on the most recently published Federal Trade Commission test results." *Advertising of Cigarettes:*

Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule, 35 Fed. Reg. 12,671, 12,671 (Aug. 8, 1970). The FTC explained that such disclosures were necessary to encourage "greater interest in obtaining a low tar and nicotine cigarette" and to facilitate "competition among the cigarette companies to meet that interest." *1970 Report to Congress*, at 15 (J.A. 566a).

Congress and the FTC recognized, however, that it would be preferable to avoid the attendant costs and delays of notice-and-comment rulemaking. During his confirmation hearings, FTC Chairman-designate Kirkpatrick was asked about the possibility of pursuing an industry-wide agreement as an alternative:

> The Chairman: I wanted to ask you if [the proposed Trade Regulation Rule on tar and nicotine listing in advertising] can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?
>
> Mr. Kirkpatrick: In my judgment; yes, sir.
>
> . . . .
>
> The Chairman: [I]t seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.
>
> Mr. Kirkpatrick: It would be a highly desirable arrangement, sir; indeed, yes.

Nomination—1970: Hearing Before the S. Comm. on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, 91st Cong. 172 (1970) (J.A. 637a-638a).

Accordingly—as it did a decade earlier in successfully ending the tar derby—the FTC took steps to prompt cigarette manufacturers to comply "voluntarily" with the FTC's desired requirements. With the proposed trade regulation rule looming, the Commission directed participants in the tobacco industry to submit a description of a proposed agreement to disclose tar and nicotine yields in cigarette advertising. *See FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content*, Federal Trade Commission News (Oct. 1, 1970) (J.A. 481a-482a). The Commission subjected the initial industry proposal to a round of public comment, and Commission staff ultimately recommended rejecting the industry proposal and threatened to continue the rulemaking process unless a number of changes were made. *See* Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Nov. 9, 1970) (J.A. 317a-328a); Correspondence from FTC Chairman Miles W. Kirkpatrick to Commission (Nov. 24, 1970) (J.A. 349a). On December 22, 1970, after the agreement had been revised to meet the FTC's requirements, the FTC voted to accept the agreement (the "1970 Agreement"), suspend the rulemaking proceeding indefinitely, and thereby "afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan." Correspondence from Allen F. Brauninger, Attorney, FTC Bureau of Consumer

Protection, to Commission (Dec. 21, 1970) [hereinafter Brauninger Dec. 21, 1970 Correspondence] (J.A. 330a-333a); Correspondence from Joseph W. Shea, Secretary, to General Counsel, Director of Bureau of Consumer Protection, Director of Public Information, and Legal and Public Records (Dec. 22, 1970) [hereinafter Shea Memorandum] (J.A. 377a-378a].

The 1970 Agreement requires that tar and nicotine yield measurements be disclosed in non-permanent cigarette advertising. Brauninger Dec. 21, 1970 Correspondence (J.A. 331a). The FTC characterized its exaction of the agreement as "Regulatory[] Activity" in its 1970 report to Congress, *see 1970 Report to Congress*, at 17-20 (J.A. 569a, 571a-572a), and warned the cigarette industry that it would reinstitute rulemaking proceedings if the agreement was not effective in compelling tar and nicotine yield disclosures. *See* Shea Memorandum (J.A. 378a); *FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan*, Federal Trade Commission News (Dec. 23, 1970).

In addition to using the 1970 Agreement to mandate testing and disclosure pursuant to the FTC Method, the Commission notified the cigarette industry that it intended to bring an enforcement action, for unfair and deceptive practices, against any cigarette company that used a measurement method other than the FTC Method, even if that method yielded higher tar and nicotine yields. *See supra* pp. 16-17 (describing *Testing Release* and 1978 FTC Advisory Opinion).

That the testing-and-disclosure regime established by the 1970 Agreement effectively binds the industry is exemplified by the 1983 enforcement action that the FTC brought against Brown & Williamson. In that case, Brown & Williamson had attempted to market a cigarette using tar and nicotine yields established by an independent testing method, rather than the FTC Method. *See FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and rev'd in part*, 778 F.2d 35 (D.C. Cir. 1985). Despite conceding the "literal truth" of the company's advertising claims, 580 F. Supp. at 984, the FTC sought and obtained an injunction barring use of that claim.

The D.C. Circuit upheld the district court's injunction without direct evidence of consumer confusion on the ground that deviation from the FTC Method was "inherently deceptive." 778 F.2d at 41-42. Noting that "tar milligram figures have significance only as comparative values," the court of appeals upheld the FTC's and district court's conclusions that no disclaimer disclosing use of a method other than the FTC Method could possibly eliminate the deception that would necessarily arise from the use of another testing method. *Id.* at 42-43. The court based this conclusion on the district court's findings that "after 12 years of exposure to FTC ratings, consumers have become 'habituated' to the tar and nicotine 'legends' in cigarette advertisements" and would likely not understand that any disclaimer "signified a departure from the long-utilized FTC Report numerical ratings." *Id.* at 43. The D.C. Circuit's holding thus endorsed the FTC's view that departure from the system of testing and disclosure

established by the 1970 Agreement constitutes a violation of federal law.[5]

In 1987, then-chairman of the FTC, Daniel Oliver, recognized the value of setting FTC policy through lawsuits like the one against Brown & Williamson. Chairman Oliver testified before Congress that "it is more efficient," and therefore "serves the consumers' interest better," for the FTC "to bring a single case against the first offender in order to stop the practice" without the need for rulemaking. *FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, & Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong. 17-18 (May 7, 1987) [hereinafter *Nicotine Program Hearing*] (testimony of FTC Chairman Daniel Oliver). Chairman Oliver explained further that, in the case of the cigarette industry:

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[5] The D.C. Circuit narrowed the scope of the district court's injunction, which had permanently enjoined any and all such future departures, but only after envisioning a theoretical scenario in which one cigarette company conducted independent testing of all competing brands and prominently displayed the comparative results in its advertisements. 778 F.2d at 45. Because such a hypothetical advertisement might not be inherently deceptive, the D.C. Circuit reasoned, the FTC would, in the absence of a specific trade regulation rule, retain the burden of proving deceptiveness under the FTC Act. *Id.* The court's refusal to enjoin this highly unrealistic theoretical deviation from the FTC's testing-and-disclosure regime was based on First Amendment concerns about an "impermissibly broad prior restraint," *id.* at 43, and is fully consistent with the court's broader endorsement of the FTC's position.

> [I]t is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Id. at 19; *see also, e.g.*, Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, REGULATION, at 24, 25-26 (1997), *available at* http://www.cato.org/pubs/regulation/reg20n4d.html (visited Apr. 1, 2008) (FTC Commissioner explaining that the FTC "interprets and implements the FTC Act primarily through the prosecution and adjudication of individual cases").

E. The FTC Authorizes and Defines Descriptors Such As "Low Tar" and "Light" for Use As Shorthand References to Tar and Nicotine Yields

As the final prong of its regulatory program, the FTC approved the use of descriptors, such as "low tar" and "light," to refer to specified ranges of tar yields. The Commission recognized that, to the extent the descriptors function merely as shorthand, consumer-friendly references to FTC Method results, using them would support the FTC's dual goals of providing consumers with information about tar and nicotine yields and encouraging the manufacture of lower-yield cigarettes.

When the FTC reversed its policy in March 1966 and allowed the advertising of tar and nicotine yields, it was not initially clear to what extent the Commission would permit representations beyond the numerical test results, especially given the FTC's statement that it would permit no "collateral" representations *See supra* p. 14. Ultimately, the FTC adopted and publicized an "enforcement policy" providing that "representations relating to[] tar and nicotine content of cigarettes" are permissible "where they are shown to be accurate and fully substantiated by" FTC Method results. FTC News Release (Oct. 26, 1967) (J.A. 480a); Letter from Joseph W. Shea, Secretary to Howard H. Bell (Oct. 25, 1967) (J.A. 368a). That policy statement was specifically directed to "low tar" advertising claims, and the FTC emphasized that "[a]dvertisements which correctly report official FTC tar and nicotine yield data are within this category" of permitted and substantiated advertising claims. *Id.* (J.A. 369a)[6] The FTC repeated its position on this issue in its 1968 Report to Congress. *See 1968 Report to Congress*, at 18 (J.A. 527a-529a).

In its 1968 Report to Congress, the FTC also adopted the convention, since then continuously followed both inside and outside the industry, of

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[6] As explained below, the FTC's required disclosure of FTC Method results related only to advertising, and not to labels on cigarette packages, because the Commission lacks the power to impose disclosure requirements relating to cigarette packages. *See infra* Part II.

using the descriptor "low tar" to refer to 15 milligrams or less of tar yield, measured by the FTC Method. *See id.* (J.A. 529a). The FTC has reiterated over the years that it "formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar.'" Matthew L. Myers *et al.*, *Staff Report on the Cigarette Advertising Investigation* 1-50 n.175 (1981) [hereinafter *Staff Report*]; *see also* Correspondence from FTC Chairman Janet D. Steiger to Samuel Broder, Director of National Cancer Institute 3 (July 20, 1994) (using the term "lower tar" to refer to cigarettes with less than 15 milligrams of tar).[7] Additionally, the FTC has generally treated the descriptor "light" as interchangeable with "low tar." *See, e.g.*, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997).

The FTC's definitions of these descriptors are well-understood in the public-health community. The 1981 Surgeon General Report, for example, stated that "[l]ower 'tar' cigarettes conventionally have been

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[7] *See also* Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1979* 11 n.8 ("'The FTC defines ['low tar'] as 15.0 mg. or less tar") (J.A. 587a); Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1980* 18 n.11 (same) (J.A. 604a); Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Staff Report to the Federal Trade Commission* 35 (June 1979) (referring to the FTC's "official definition of low-tar cigarettes (15 or less milligrams of tar)").

defined as yielding 15 mg of 'tar' or less per cigarette." U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* 23 (1981), *available at* http://profiles.nlm.nih.gov/NN/B/B/S/N/ (visited Apr. 1, 2008). Similarly, the National Cancer Institute has explained:

> In the United States, cigarette brands yielding approximately 1-5 or 6 mg tar by [the FTC] method are generally called "Ultra-Light"; brands yielding between approximately 6 or 7-15 mg tar are called "Light"; and brands yielding more than 15 mg tar are called "Regular" or "Full Flavor." By convention, cigarettes yielding 15 mg tar by the FTC method are called "low tar."

Lynn T. Kozlowski *et al.*, *Cigarette Design*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 13 (2001), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/13/ (visited Apr. 1, 2008).

Consistent with its policy of allowing descriptors as short-hand references to FTC Method results—and as a signal to the industry—the FTC in 1969 launched a proceeding against a cigarette manufacturer for stating that certain brands were "lower" in tar in the absence of substantiation by the FTC Method. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971). In a 1971 decree resolving the case, the FTC reaffirmed that it would permit the use of descriptive terms such as "low," "lower," "reduced," and "like qualifying terms" only if their use was substantiated by the FTC Method and was accompanied in advertising by a

disclosure of the underlying tar and nicotine numbers under the FTC Method (as is required for all cigarette advertising by the 1970 Agreement discussed above). *Id.* at 258-59. Years later, in another consent decree, the FTC again reaffirmed that "express or implied representation[s] . . . that [a] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine" are not misleading or deceptive only if those representations are substantiated by FTC Method results. *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995). Before entry of this order, the FTC described this statement as providing "a limited 'safe harbor' for advertising that complies with certain specific requirements in its use of official tar and nicotine ratings." *The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment*, 59 Fed. Reg. 51,980, 51,982 (Oct. 13, 1994).[8]

F. The FTC Maintains Its Policies Despite Awareness of Their Limitations

From the beginning of its testing program, the FTC was aware that while the FTC Method accurately measures the comparative tar and nicotine yields among different brands of cigarettes when smoked

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[8] Consistent with the FTC's policy for all consent decrees, 16 C.F.R. § 2.34, the *American Brands* and *American Tobacco* consent decrees were published for notice and comment. *See* 59 Fed. Reg. 51,980; *FTC Consent Order Forbids Unlimited 'Low Tar' Claims by Cigarette Maker*, FTC News (July 13, 1971). The FTC engages in notice and comment for consent decrees because it recognizes that consent decrees provide industry-wide guidance as to the FTC's regulatory policies. *See FTC Operating Manual* ch. 6, §§ 11-15.

under the identical circumstances simulated by the machines, it is of limited use in measuring or predicting actual tar and nicotine intake by individual smokers. The Commission explained to the public at the time it began testing that:

> [t]he [FTC] Method does not and cannot measure the[] many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by [a] machine in accordance with the prescribed method.

Testing Release, at 2 (J.A. 488a).

Nor did the adoption of the FTC Method end the Commission's investigation of its method's limitations. Since it began testing in 1967, the FTC has repeatedly considered whether it should abandon or modify its regulatory program in response to the very theories and allegations asserted by Respondents in this case. On each occasion, the FTC has declined to change its program, and use of the FTC Method is still required today. *See, e.g.*, *Cigarette Testing; Tar and Nicotine Content Results*, 42 Fed. Reg. 21,155, 21,155 (Apr. 25, 1977) (noting questions about method but declining to take further action); *Commission Determination re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine,*

and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications, 48 Fed. Reg. 15,953, 15,954-55 (Apr. 13, 1983) (seeking public comment on implications for testing of "compensatory smoking behavior"); *Cigarette Advertising and Other Promotional Practices; Announcement of Decision*, 43 Fed. Reg. 11,856, 11,856-57 (Mar. 22, 1978) (recognizing that smokers may "compensate" for low-tar cigarettes by covering ventilation holes and thereby increasing the amount of tar inhaled, but nonetheless deciding to retain FTC Method testing).

In declining to change its regulatory program notwithstanding evidence of smoker compensation, the FTC relied on epidemiological studies showing that persons who smoked cigarettes that measured lower in tar under the FTC Method were less likely to acquire smoking-related diseases than persons who smoked cigarettes that measured higher in tar under the FTC Method. *See* Peeler, *supra*, at 7 (J.A. 661a). As the FTC's Bureau of Consumer Protection subsequently explained:

> [A]bandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's.

Id. In fact, at the time, FTC staff specifically opposed abandoning the FTC's program because of fears that without the program, "cigarettes will gradually become higher in tar and nicotine," which "[e]vidence clearly

indicates . . . would be harmful." Memorandum from Carol T. Crawford, Director, to Commission re "FTC Cigarette Testing Methodology," at 42 n.41 (Spet. 4, 1985). More recently, in response to a question during Senate committee testimony whether the FTC would "object if Congress prohibited tobacco companies from continuing to make claims based on the FTC method," Commissioner Kovacic stated that he "would strongly prefer" that Congress first ask whether "there is an alternative measurement that would be an improvement." *Accuracy of the FTC Tar and Nicotine Rating System: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 110th Cong. (Nov. 13, 2007).

The FTC also investigated the use of descriptors in view of allegations similar to those made by Respondents here. For example, in 1992, at the behest of a consumer group, the FTC launched an investigation focused specifically on whether the terms "light" and "low tar" should be prohibited as deceptive. *See* Coalition on Smoking OR Health, Petition Before the Federal Trade Commission (1992) (J.A. 296a-308a). The FTC decided to continue to permit the use of these descriptors, as substantiated by FTC Method results. *See* Correspondence from John D. Graubert, FTC's Deputy General Counsel, to Lucia M. Valente, Counsel to New York Attorney General (Sept. 10, 1998) (J.A. 363a-365a). Similarly, in 1998, Senator Lautenberg requested that the FTC "begin a proceeding to suspend the right of tobacco companies to market any cigarettes as 'Light' or 'Ultra Light' or list supposed nicotine and 'tar' ratings on their products and advertisements until and unless an accurate system of measuring the health

implications of cigarettes is established." Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky (Nov. 24, 1998) (J.A. 398a-400a). The FTC again declined the request, explaining that the request "raise[d] issues currently under review at the Commission." Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998) (J.A. 483a-484a).

G. The FTC Opposed Legislation That Would Have Permitted State-Law Claims Like Those Raised Here

In 1987, Congress considered a proposal to repeal the preemption provisions of the FCLAA so as to permit state-law claims based on allegations about light cigarettes identical to those Respondents make here. *See, e.g.*, *Nicotine Program Hearing*. Subcommittee Chairman Thomas Luken opened that hearing by opining that "there are serious consequences regarding the public's understanding of the health consequences of smoking low tar and nicotine cigarettes." *Id.* at 2. The Subcommittee reviewed then-current cigarette advertisements, including ads for "light" cigarettes, *id.* at 28-42, and received testimony regarding low "tar" and nicotine cigarettes from Alfred Munzer, Chairman of the American Lung Association's Government Relations Committee, and Scott Ballin, Vice President and Legislative Counsel of the American Heart Association, *see id.* at 48-53. These officials from the public-health community opined that the FTC Test Method itself misleads consumers because smokers smoke differently than FTC Test Method parameters

(*e.g.*, by engaging in compensatory smoking behavior). *Id.*

Shortly thereafter, Representative Luken introduced the "Cigarette Testing and Liability Act of 1988," H.R. 4543, 100th Cong. (1988). The bill would have repealed the FCLAA's existing preemption of state-law deceptive advertising claims directed against low "tar" and nicotine cigarettes. *See* 134 Cong. Rec. E1579-01 (May 17, 1988). The FTC opposed that proposal, warning that the bill "would make it virtually impossible to advertise cigarettes on a national basis." *See* Correspondence from FTC to Hon. Thomas Luken 1, 6 (June 17, 1988). Responding to a follow-up request from Congress, the FTC further explained that the bill would permit a "single state" to "impose[] its decisions on citizens of other states or the entire country," and would increase the "potential for significantly inconsistent results" and an "irreconcilable conflict" with FTC policies regarding tar and nicotine disclosures, in that "one state [could] determine[] that tar, nicotine and carbon monoxide figures were per se deceptive, while another state [could] determine[] that disclosure of these data should be required in all cigarette advertising." Correspondence from FTC to Hon. Thomas Luken 8 (July 1988). Congress did not enact the bill.

H. Other Courts Have Recognized the Preemptive Force of the FTC's Regulatory Scheme

Numerous courts have held that the FTC's detailed regulatory oversight in this area precludes efforts to attack, under state law, the cigarette companies' use of descriptors. For example, in *Brown v. Brown &*

Williamson Tobacco Corp., 479 F.3d 383 (5th Cir. 2007), the Fifth Circuit held that "the use of FTC-approved descriptors [such as 'lights' and 'lowered tar and nicotine'] cannot constitute fraud." *Id.* at 392. The Court explained that "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement. In fact, [cigarette m]anufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method." *Id.* The panel thus concluded that "[t]he terms 'light' and 'lowered tar and nicotine' cannot, therefore, be inherently deceptive or untrue." *Id.* Moreover, it concluded, "[t]o hold that the [m]anufacturers' use of the FTC-approved terms relating the FTC-approved measurement system constitutes affirmative misstatement under State law would directly undermine the entire purpose of the standardized federal labeling system and most courts have been reluctant to find liability on this basis." *Id.*

Another court has recently observed that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams of the smoke produced by the advertised cigarette," and held that this precluded the imposition of liability for such conduct under a state consumer-protection statute. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 50 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006).

II. THE FTC PERMITS THE USE OF DESCRIPTORS ON CIGARETTE PACKAGES WITHOUT ACCOMPANYING DISCLOSURES OF FTC METHOD RESULTS

The First Circuit held that the Respondents' claims do not conflict with the FTC's long-standing regulation of tar and nicotine descriptors because, in the court's view, while the Commission permits cigarette companies to use descriptors such as "lights" and "low tar" on cigarette packages, it does so only insofar as the packages also display actual FTC Method results. This holding is based on a misunderstanding of federal law and a misinterpretation of the FTC's 1971 Consent Order with American Brands.

As explained above, the FTC does require cigarette manufacturers to display FTC Method results in cigarette advertising. *See supra* Part I.D. But the Federal Cigarette Labeling and Advertising Act prohibits the FTC or anyone else (other than Congress itself) from imposing any corresponding disclosure requirement on cigarette *packages*. That statute expressly provides that "[n]o statement relating to smoking and health, other than the [required Surgeon General's warning], shall be required on any cigarette package." FCLAA § 5(a), 15 U.S.C. § 1334(a).

In accordance with the express terms of the FCLAA, the FTC has long recognized that "[c]igarette manufacturers have *never* been required to disclose 'tar' and nicotine content on cigarette packages." Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and*

Advertising Act 3 (1979) (emphasis added) (J.A. 580a);[9] *see also Staff Report*, at 5-11 to 5-12 (noting that FTC had not sought to require disclosure of FTC Method results on packages "because Congress, in [the FCLAA], had retained jurisdiction over all health disclosures on cigarette packages"). Consistent with this understanding, the FTC has on several occasions requested that Congress impose such a requirement, *see, e.g., id.* at 5-47 n.85, but Congress has not seen fit to do so.

Nor, contrary to the misapprehension of the court below, does the FTC's 1971 Consent Order with American Brands require such disclosures. Rather, in accord with the FCLAA, the 1971 Consent Order, by its express terms, restricts only claims made in "advertising," and does not extend to claims made on packages. *See In re Am. Brands*, 79 F.T.C. at 258-59. It is clear, moreover, that the FTC understood and intended the Consent Order to be so limited. For one thing, any other understanding would have, flatly contradicted the FTC's subsequent statements, quoted above, that manufacturers have "never" been required to disclose tar and nicotine yields on packages. *See supra* p. 34; *see also* Letter from Terrence J. Boyle, Attorney, Federal Trade

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[9] The FTC was fully aware when it made this statement that Petitioners were marketing Marlboro Lights as a "light" cigarette with "lowered tar and nicotine," and that other cigarette manufacturers were marketing cigarettes with "lights" and "low tar" descriptors. *See, e.g.*, Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* 10, 12 (1971).

Commission to Consumer, Caruthersville, Missouri at 1 (Mar. 27, 1975) (citing the 1971 consent order but nonetheless explaining that "[t]here is no law or Government regulation requiring disclosure of 'tar' and nicotine contents on cigarette packages"). Moreover, American Brands submitted a compliance report under the consent order, representing that compliance with the 1970 Agreement—which all agree does not extend to cigarette packages, *see Explanatory Memorandum Relating to Voluntary Program for "Tar" and Nicotine Disclosure* (Dec. 17, 1970), *available at* http://tobaccodocuments.org/pm/2021574547-4551. html (visited Apr. 1, 2008) (specifying covered advertising)—constituted compliance with the Consent Order. *See* Correspondence from Cyril F. Hetsko, Senior Vice President and General Counsel, American Brands, Inc., to Thomas G. Egan, FTC Attorney 1 & Ex. 65 (Oct. 21, 1971). The FTC expressed no disagreement with this proposition and accepted the report. *See* Memorandum from Thomas G. Egan, FTC Attorney, to Secretary (May 15, 1973).

Finally, in the years following the 1971 Consent Order, the FTC closely monitored American Brands' compliance, as well as the other manufacturers' compliance with their disclosure obligations under the 1970 Agreement. The Commission was well aware, moreover, that these companies were using descriptors such as "lights" on their packages without also including numerical tar and nicotine yields. Yet the FTC never objected generally to this conduct, although it did take action where the descriptors were not substantiated by FTC Method results. *See, e.g., Brown & Williamson*, 580 F. Supp. at 981.

Accordingly, the holding of the court below—that the use of descriptors on packages is impermissible without corresponding disclosure of FTC Method results—simply cannot be reconciled with the FTC's long-standing and consistent enforcement position of permitting the use of descriptors on packages without corresponding disclosures of FTC Method results.

CONCLUSION

For the reasons set forth above, in marketing and selling Marlboro Lights cigarettes, Petitioners have acted pursuant to a decades-long effort by the FTC to implement a national, uniform policy of informing the public about the health risks of smoking. In particular, to further its policies of encouraging the manufacture and use of lower tar cigarettes, the FTC authorized and permitted the use in advertising and on cigarette packages of short-hand, consumer-friendly references, such as "lights" and "low-tar," to refer to specific ranges of FTC Method results, without requiring any corresponding disclosure on packages of those actual results. Holding Petitioners liable under Maine's Unfair Trade Practices Act

would interfere with and frustrate the FTC's considered policy objectives in this area.

Respectfully submitted,

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April 7, 2008

AMICUS CURIAE BRIEF

16

FILED
JUN 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

14

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC. AND PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, LORI A. SPELLMAN,
AND ALLAIN L. THIBODEAU,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF FORMER COMMISSIONERS OF THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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June 18, 2008

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http://www.ftc.gov/ogc/stats.shtm 6

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Justin Dingfelder & Sandra Brickels, *To Protect Consumers, The FTC Means Business*, 45-JAN Fed. Law. 24 (1998) 10

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Commissioners of the Federal Trade Commission. Michael Pertschuk was a Commissioner from 1977 to 1984, serving as Chairman of the Commission from 1977 to 1981. Commissioner Pertschuk served as consumer counsel and later chief counsel and staff director to the U.S. Senate Committee on Commerce, Science and Transportation, from 1965 to 1976, where he was instrumental in drafting the Federal Cigarette Labeling and Advertising Act, landmark legislation that required warnings on cigarette labels. Patricia P. Bailey served as a Commissioner from 1979 to 1988. Commissioners Bailey and Pertschuk both served during the investigation and prosecution of the Barclay cigarette case (discussed below) and were signatories to the FTC's Policy Statement on Unfairness in 1980. Christine A. Varney was a Commissioner from 1994 to 1997. She served during the Carlton cigarette investigation and prosecution (discussed below), as well as the FTC's investigation of R.J. Reynolds Tobacco Company's Joe Camel ad campaign. Sheila F. Anthony served as a Commissioner from 1997 to 2003, when the Commission opened its still-ongoing investigation into discontinuing or changing the FTC protocol for measuring tar and nicotine delivery of cigarettes.

As former Commissioners of the Federal Trade Commission, *amici* have practical agency experience and a thorough working knowledge of federal and

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[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici curiae* contributed monetarily to the preparation and submission of this brief. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

state unfair trade regulation, both in a general sense and specifically with regard to the Commission's regulation of cigarette advertising. *Amici* submit this brief to assist the Court in understanding the FTC's historical status as a relatively small agency faced with the substantial task of policing unfair trade practices of almost all industries throughout the country, a job which the agency cannot accomplish without partners—both public and private, state and federal. *Amici* are likewise well-versed in the Commission's enforcement activities, such as the use of consent orders, which generally prohibit conduct by certain parties, not authorize or immunize that conduct on an industry-wide basis. Although the FTC Act prohibits deceptive cigarette advertising, the Commission has never defined, authorized, or encouraged cigarette companies' use of descriptors such as "lights" or "low tar."

SUMMARY OF ARGUMENT

Petitioners' argument that the Federal Trade Commission has impliedly preempted state consumer protection laws, insofar as they would be applied to cigarette manufacturers' deceptive claims about their cigarettes, rests primarily on the Commission's history of prosecuting deceptive cigarette advertising claims dating to the 1940's, the so-called FTC Method for measuring tar and nicotine delivery of cigarettes, and on a handful of consent orders the Commission has entered into with tobacco companies. Notably, however, throughout that 60-plus year history, the FTC has never remotely hinted that it has preempted state consumer protection laws prohibiting deceptive or misleading claims, even as applied to cigarette advertising. Indeed, Petitioners ignore the fact that it was the FTC which actively campaigned for States to adopt little FTC acts of their own and co-authored one of the uniform acts—at precisely the same time the Commission was supposedly "impliedly" preempting state consumer law as applied to cigarette advertising. Petitioners' claims are not grounded in FTC history.

Similarly, Petitioners' claims are not consistent with the realities of the tasks confronting the Commission. The consumer protection wing of the FTC, tasked with combating consumer fraud throughout the nation, consists of only a few hundred employees. That is just one of the many reasons the FTC proactively seeks to partner with the States; its consumer mission is too big for any one agency, particularly a relatively small one like the FTC.

Finally, Petitioners ask the Court to make the FTC's consent orders in isolated cases do the preemptive work of trade regulation rules without re-

gard for any of the safeguards Congress went out of its way to incorporate into the FTC scheme when it granted the Commission rulemaking authority in 1975. Not only would that result fly in the face of clear Congressional intent, it would also interfere significantly with the Commission's use of the consent settlement process, as discussed below.

Permitting state law claims like Respondents' to proceed will further FTC objectives, not frustrate them. Cigarette companies have no immunity from generally applicable anti-fraud laws like Maine's, and there is no sound reason claims of deception should not be actionable under state law. The judgment below should accordingly be affirmed.

ARGUMENT

The First Circuit held that the FTC's oversight of tar and nicotine claims in cigarette advertising does not "authorize" or impliedly preempt Respondents' claims that Petitioners' use of the cigarette descriptors "lights" and "lowered tar" are deceptive and misleading under Maine's Unfair Trade Practices Act. That holding is sound. The FTC has had very little to say about such descriptors, it has never officially defined them, and it has never granted the cigarette industry wholesale immunity for their use. The FTC has never pursued any policy that would be frustrated by a state law ban on the use of such misleading and deceptive terms. The First Circuit's judgment should be affirmed.

I. ENFORCEMENT OF STATE CONSUMER PROTECTION STATUTES COMPLEMENTS THE COMMISSION'S REGULATORY GOALS.

Petitioners acknowledge that, in enacting the Labeling Act, "Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health." Petitioners' Br. at 28. But Petitioners contend that Congress intended to give the FTC exclusive authority to police deceptive advertising by cigarette companies. *Id.* That is a fundamental misunderstanding of the history, functions, and resources of the FTC.

The Federal Trade Commission is a small agency, consisting predominately of lawyers and economists. It is headed by five Commissioners, nominated by the President and confirmed by the Senate. As currently configured, the Commission is divided into three bureaus: the Bureau of Consumer Protection, the Bureau of Competition (the Commission's anti-

trust arm), and the Bureau of Economics which provides economic analysis and support to the other two bureaus. FTC website (*available at* http://ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm#be).

The Commission is responsible for enforcement of more than 30 statutes, including federal antitrust laws. *See* 16 C.F.R. § 0.4; FTC website, http://www.ftc.gov/ogc/stats.shtm ("The Commission has enforcement and administrative responsibilities under 46 laws."). The breadth of the FTC's statutory and regulatory responsibilities is substantial. As former Commissioner Thomas Leary explained:

> The first thing we have to recognize is that the FTC can not cover the waterfront. It is a relatively small agency. There are about a thousand people working at the FTC, roughly divided between our competition mission and consumer protection mission, which includes advertising. I think there are approximately 550 people on the consumer protection side.

Remarks delivered on January 16, 2003, at the Conference on Dietary Supplements of the Food and Drug Law Institute (*available at* http://abacus-ms.com/speeches/leary/fdli.pdf). That is an incredibly small force for combating virtually all unfair trade practices affecting commerce in the U.S.

When Congress passed the Labeling Act in 1965, the Commission had a slightly larger staff than it currently has,[2] but even at that time, "the Commis-

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[2] *Compare* Federal Trade Commission, *1965 Annual Report to Congress* at 2 (*available at* http://ftc.gov/os/annualreports/ar1965.pdf) (1,175 employees), *and* Federal Trade Commission, *Performance and Accountability Report Fiscal Year 2007* at 5 (*available at* http://www.ftc.gov/opp/gpra/2007parreport.pdf) (1,100 employees).

sion's limited staff to cope with the volume of deceptive practice work confronting it[] require[d] careful planning so that sufficient effort w[ould] be expended on those matters reflecting the highest degree of public interest." Federal Trade Commission, *1966 Annual Report to Congress* at 17 (*available at* http://ftc.gov/os/annualreports/ar1966.pdf) (hereinafter cited as "*1966 FTC Report*"). Since then, the Commission's enforcement responsibilities have expanded considerably, and so have the opportunities for and occurrences of unfair, deceptive trade practices, especially with the advent of the Internet age.

Due to such scarce resources and the enormity of its assignment, the Commission has long encouraged and relied on a dual enforcement scheme with States enforcing their own consumer protection laws. In 1964, the Commission began urging States to adopt consumer protection legislation. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element*, 43 Harv. J. on Legis. 1, 15 (2006). That same year, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Deceptive Trade Practices Act ("UDTPA"). The UDTPA was intended "to bring state [consumer protection] law up to date by removing undue restrictions on the common-law action for deceptive trade practices." *Id.* at 15 n.103 (quoting *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Seventy-Fifth Year* 253-64 (1964)).

In 1970, the FTC and the Committee on Suggested State Legislation of the Council of State Governments issued another model statute, the Unfair Trade Practices and Consumer Protection Law,

which provided for private actions and class actions. Scheuerman, *supra*, at 16-17. "[B]y the early 1970s, nearly every State had enacted a statute designed to prevent consumer fraud." *Id.* at 18. "Indeed, many States adopted provisions at the Commission's urging that direct the state courts to the Commission's decisions and policies for guidance or exempt from state regulation practices found unlawful under the FTC Act. This has resulted in the integration of Commission precedent with state law." Patricia P. Bailey & Michael Pertschuk, *The Law Of Deception: The Past As Prologue*, 33 Am. U. L. Rev. 849, 862-63 (1984).

The D.C. Circuit has also noted the FTC's "policy of cooperation with state law enforcement agencies." *Fleming v. FTC*, 670 F.2d 311, 313 (D.C. Cir. 1982). "[T]he FTC Act has long enjoyed a cooperative relationship with state laws. The FTC itself has encouraged state deceptive practice laws because problems in the marketplace go beyond the enforcement capabilities of the federal government." *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991). The "Commission, through its division of Federal-State and Consumer Relations, works closely with state and local agencies, including state attorneys general, to coordinate enforcement." Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 26.3 (2007).

Congress itself has recognized the importance of cooperation between the States and the FTC. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 ("The [FTC] shall review its statutory responsibilities to identify those matters within its jurisdiction where Federal enforcement is particularly necessary or desirable and those areas that might more effec-

tively be enforced at the State or local level."). For these reasons, Petitioners' contention that the FTC has sole "responsibility" to police deceptive advertising by cigarette companies cannot be squared with the historical operation of the FTC.

Furthermore, with respect to Petitioners' implied preemption argument, it would be anomalous, to say the least, if after urging States to enact and enforce their own consumer protection laws, the Commission displaced those very same laws *sub silentio* through consent orders, as Petitioners maintain. The preemptive effect Petitioners attribute to such enforcement actions—particularly consent orders—reflects a fundamental misunderstanding of the dual nature of the state and federal enforcement scheme the Commission has uncompromisingly fostered. It also evinces confusion about the nature of the Commission's enforcement tools, as discussed below.

II. ALTHOUGH THE COMMISSION HAS ENTERED INTO CONSENT ORDERS WITH TOBACCO COMPANIES, THE COMMISSION NEVER AUTHORIZED PETITIONERS' USE OF LIGHTS AND LOW TAR DESCRIPTORS.

Petitioners assert that through "a series of consent agreements with tobacco companies, the FTC also authorized the use of tar and nicotine descriptors in cigarette advertising." Petitioners' Br. at 47. That contention does not square with those consent orders or with the way the FTC functions.

The FTC is a civil "law enforcement" agency with investigative, prosecutorial and adjudicative powers. Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 28:1 (2007). "The heart of the FTC's authority is Section 5 of the FTC Act, which prohibits unfair methods of

competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Justin Dingfelder & Sandra Brickels, *To Protect Consumers, The FTC Means Business*, 45-JAN Fed. Law. 24 (1998). That was not always the case, however.

When Congress first created the FTC with its passage of the Federal Trade Commission Act in 1914, it did not vest the Commission with the broad power to combat unfair trade practices it enjoys today. Rather, "[s]ection 5 of the Trade Commission Act [was] supplementary to the Sherman Anti-Trust Act and the Clayton Act," and "[t]he paramount aim of the act [was] the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree." *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931). In 1938 Congress expanded the Commission's authority with the passage of the Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 1028, amending the FTC Act to encompass "unfair or deceptive acts or practices" as well as "unfair methods of competition."

The 1938 amendments did not, on the other hand, significantly alter the Commission's arsenal for combating unfair trade practices. That arsenal included tools designed to secure voluntary compliance with the law, such as "advisory opinions" which did not have the force of law. Note, *"Corrective Advertising" Orders Of The Federal Trade Commission*, 85 Harv. L. Rev. 477, 482 n.33 (1971) (hereinafter cited as "*'Corrective Advertising' Orders*").

In addition, "since 1955, the FTC has created Trade Practice Guides pursuant to Trade Practice Conferences in order to establish nonviolative practices in many types of industry." W.H. Ramsay Lewis, *Infomercials, Deceptive Advertising And The*

Federal Trade Commission, 19 Fordham Urb. L.J. 853, 855-56 (1992). Industry guides do not have the force of law. 16 C.F.R. § 1.5 ("Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. ... Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions.").

Although the Commission also issued rules, it was widely believed that such rules did "not have the force of law." *Corrective Advertising Orders*, *supra*, at 482 n.33. They were thought "to provide definitive guidance and information for businessmen as to what the Commission believes is required by the laws the Commission enforces. The FTC ha[d] no specific statutory authority for issuance of the rules." Note, *Trade Rules And Trade Conferences: The FTC And Business Attack Deceptive Practices, Unfair Competition, And Antitrust Violations*, 62 Yale L.J. 912, 917-18 (1953) (hereinafter cited as "*Trade Rules*"). Indeed, even "the FTC, for approximately 50 years from the passage of the FTCA, never asserted the [rulemaking] authority." *National Petroleum Refiners Ass'n v. FTC*, 340 F. Supp. 1343, 1347 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973). Thus, the Commission's later "exercise of what had been a dormant rulemaking power (other than to make rules of procedure) proved to be extremely controversial." *United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1107, 1112 (7th Cir. 1985).

Given the "the Commission's limited staff to cope with the volume of deceptive practice work confront-

ing it,"[3] given the FTC's encouragement of States to enact broad consumer fraud protections, given the shortcomings of the FTC's own enforcement tools prior to 1975, and given the uncertainty surrounding the FTC's rulemaking authority as late as 1970, it is unlikely that in 1965 Congress would have vested exclusive authority in the FTC to combat cigarette companies' false and deceptive advertising practices. And it is equally unlikely that the FTC would without explanation have divested States of authority to police such practices.

In 1975 Congress laid the controversy of the FTC's rulemaking authority to rest through the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975). With the passage of that Act, Congress also expanded the FTC's authority, in recognition of the inadequate tools at its disposal.

> The Act confirmed the FTC's ability to promulgate rules and regulations concerning unfair and deceptive practices. Additionally, the Act authorized the Commission to bring civil actions in federal court for certain violations of the rules, without any prior cease and desist orders. The Commission can also bring civil actions on behalf of injured consumers. The breadth of the FTC's powers was also enhanced by further additions to section 5: "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful." With this increase in the jurisdiction of the FTC to include even those practices which merely affect com-

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[3] *1966 FTC Report*, *supra*, at 17.

> merce, Congress granted the Commission the broadest of powers to deal with deceptive practices.

Lewis, *supra*, 19 Fordham Urb. L.J. at 855-56.

Nevertheless, the Act "placed specific limitations on the use of the power to deal with unfair or deceptive practices" and imposed "'prolonged rulemaking procedures.'" *United Air Lines*, 766 F.2d at 1112 (quoting H.R. Rep. No. 793, 98th Cong., 2d Sess. 6 (1984)). The reason Congress "imposed upon the Commission rulemaking procedures and judicial review provisions stricter than those contained in the Administrative Procedure Act" was "[b]ecause of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts," making "greater procedural safeguards ... necessary." *American Optometric Ass'n v. FTC*, 626 F.2d 896, 905 (D.C. Cir. 1980) (quoting H.R. Rep. No. 1107, 93d Cong., 2d Sess. 45-46 (1974)).

In light of Congress' grant of broad, formal rulemaking authority to the FTC ("with the possible consequence of pre-empting substantive state laws"[4]), coupled with Congress' concern that such authority be exercised carefully and subjected to stricter judicial oversight, the Court should be hesitant to infer preemptive effect from actions taken by the FTC.

Inferring preemptive intent from consent orders would be particularly inappropriate and could result in wholly unintended displacements of state law.

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved

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[4] Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 26:3 (2007).

> in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. *Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.* For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (emphasis added, footnote omitted). Thus, "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, *without reference to the legislation the Government originally sought to enforce* but never proved applicable through litigation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975) (emphasis added).

The 1971 American Brands consent order on which Petitioners rely highlights the problem of attributing the specific "purpose" of authorizing the use of terms like "lowered tar" divorced from the FTC's specific charges of wrongdoing, which related to American Brands' comparative advertising. The consent order in that proceeding actually *prohibited* "use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, *unless the statement is accompanied by a clear and conspicuous disclosure of* ... [t]he 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette," among other things. *In re American Brands, Inc.*, 79 F.T.C. 255, 258 (1971) (emphasis added). The order did not unqualifiedly "authorize" the use of such terms without regard to other facts—like those Respondents have alleged here—that would make use of those words deceptive or misleading.

Similarly, in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), the Commission instituted proceedings against Brown & Williamson (B&W) over the latter's advertisements of its Barclay cigarettes which had "an innovative filter design." *Id.* at 37. B&W advertised Barclays as 1 mg in tar, 0.2 nicotine by the FTC method. *Id.* The FTC found that due to the filter design "the FTC testing method does not accurately measure the tar and nicotine delivery of the Barclay." *Id.* at 38. The district court agreed and enjoined B&W "from representing in any advertising, including packaging and labeling, any specific milligram tar yield or content" unless the rating was measured in a way acceptable to the FTC. *Id.* at 39. The court of appeals affirmed with one caveat: to the extent the injunction prohibited B&W from devising a new testing system which would provide sufficient

information about competing brands "to allow consumers to make informed decisions," the court found the injunction to be overbroad.

> Because the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette.

Id. at 44 (citation omitted). Such prior FTC approval "would enshrine the current FTC system as the sole legitimate testing method, *even though it was not passed pursuant to section 18 of the FTC Act*, 15 U.S.C. § 57a (1982), and subjected to the possibility of judicial review." *Id.* at 45 (emphasis added). Petitioners, in effect, seek the same improper result: giving the Barclay consent order or the FTC testing method the same preemptive effect of a trade regulation rule, even though they were not passed pursuant to the Commission's rulemaking authority.

Finally, the 1995 American Tobacco consent order settled the FTC's challenge to "an advertising campaign depicting 10 packs of Carlton cigarettes and single packs of other brands, with the relevant tar and nicotine ratings listed under each pack. The ads included statements such as, '30 packs of Carlton have less tar than 1 pack of these brands.'" *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995). American Tobacco represented "that consumers will get less tar by smoking 10 packs of Carlton brand than by smoking a single pack of the other brands depicted in the ads." *Id.* The consent order required American Tobacco to cease and desist from making such claims, and paragraph III of the consent order merely provided that "presentation of the tar and/or

nicotine ratings ... shall not, in and of itself, be deemed to" constitute a Carlton-like numerical comparison which would violate Paragraphs I and II of the order. *Id.* at 11. That is by no stretch of the imagination a blanket, industry-wide approval of use of terms like "lights" and "lowered tar."

In addition, affording consent orders industry-wide legal effect would significantly undermine the functioning of the FTC's consent settlement process. The FTC has said that "a determination that consent orders are controlling precedents would severely limit the use of the consent settlement process." *In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975); *see also* Stephanie W. Kanwit, 2 *Fed. Trade Comm'n* § 12.6 at 12-25 to 12-26 (2007). ("The courts and FTC have construed consent orders as contracts rather than as binding judicial precedent, reasoning that any other interpretation would hamper the consent settlement process.") (footnote omitted).

In the present matter, the FTC has never issued a trade regulation rule governing or defining terms like "lights" or "lowered tar." Indeed, in its most recent public comments on the issue, the FTC has said there are not even any "official definitions for these terms but they appear to be used by the industry to reflect ranges of FTC tar ratings." Cigarette Testing, Request for Public Comment, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997). Petitioners' claim that the Commission implicitly "authorized" the use of such undefined terms is unpersuasive and should be rejected.

CONCLUSION

The FTC's primary mission as a law enforcement agency is to *enforce* the FTC Act's Section 5 prohibition against unfair or deceptive conduct in commerce, rather than to give broad immunity to an industry from state police power. *See* 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."); *Fleming v. FTC*, 670 F.2d 311, 313 (D.C. Cir. 1982) (Commission's mandate is "to ferret out any unfair competition and unfair or deceptive trade acts or practices in or affecting commerce"). Nothing in the FTC's regulatory history suggests an intent to authorize, encourage, or immunize Petitioners' use of lights descriptors. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF MAINE, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act expressly preempts state-law claims that a cigarette company violated the Maine Unfair Trade Practices Act by falsely representing its "light" cigarettes to the public when the predicate state-law duty of such claims is the duty not to deceive.

2. Whether such claims are impliedly preempted where the FTC has never exercised its rule-making power to address the conduct at issue nor defined the terms at issue in this dispute.

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. The States have a vital interest in preserving their power to regulate businesses to protect consumers from unfair and deceptive practices, a traditional area of state concern. And the States have a specific interest in being able to prevent fraudulent or misleading cigarette advertising by tobacco companies. While this case involves a private suit challenging the use of certain descriptors regarding tar and nicotine, Petitioners' arguments would expand preemption under the Federal Cigarette Labeling and Advertising Act (the FCLAA), 15 U.S.C. §§ 1331 *et seq.*, well beyond the private realm. They would foreclose actions by the Attorneys General and other state law enforcement agencies against tobacco companies under state laws prohibiting deceptive or misleading advertising – not only those related to "light" cigarettes. The result urged by Petitioners, therefore, would be a serious blow to state law enforcement.

This case also affects the longstanding program of federal-state cooperation in combating deceptive practices, established under the Federal Trade Commission Act (the FTC Act), 15 U.S.C. §§ 41 *et seq.*, and the complementary state unfair trade practices and consumer protection statutes. The Court in *Cipollone v. Liggett*, 505 U.S. 504 (1992), recognized the continuing important role of state law enforcement in preventing deceptive conduct under the FCLAA. The

States and their citizens have relied upon that ruling, and thus have an interest in ensuring that the FCLAA's preemption provision is not construed more broadly than Congress intended.

Finally, it is common for a deceptive business's conduct to be pursued in parallel under federal law by the FTC and under state law by State Attorneys General. It would be a novel and disruptive precedent, having implications going beyond efforts to address tobacco company practices, for the actions of the FTC here to be found to impliedly preempt state consumer protection statutes. Reversal of the court of appeals' decision would dramatically alter the federal-state cooperative endeavor in a manner not intended by Congress or the FTC, and would do serious harm to the joint efforts under the FTC Act and state statutes that protect consumers.

SUMMARY OF ARGUMENT

This case presents the questions whether the FCLAA or the actions of the FTC preempt state-law deception claims arising out of Petitioners' practices with respect to "low tar and nicotine" and "light" cigarettes. Neither the FCLAA nor the actions of the FTC license Petitioners to deceive consumers in violation of state law. Immunizing Petitioners from the consequences of the alleged wrongful conduct is not a result that should be presumed without clear language and intent, neither of which is present here.

1. In *Cipollone v. Liggett*, 505 U.S. 504 (1992), the Court held that the FCLAA does not preempt claims resting upon false representation of a material fact or concealment of a material fact by tobacco companies where such claims are founded upon a general duty under state law not to deceive. The suit at issue here brings precisely such claims. It seeks economic, not personal injury, damages, under Maine's general prohibition against any "material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." Me. Rev. Stat. Ann. tit. 5, § 207 (Supp. 2007). Because the lawsuit before the Court is predicated upon a general statutory prohibition against deception (that the manufacturers made false statements and concealed information regarding "light" cigarettes), under *Cipollone* it is not preempted.

To find otherwise would disrupt and do serious harm to the sovereigns' complementary efforts to protect consumers, which would have adverse implications beyond the "light" cigarettes dispute before the Court here. State law suits pursuant to state unfair practices and consumer protection statutes combating deceptive practices are a critical complement to the administrative and prosecutorial efforts of the FTC. In fact, recognizing that it cannot combat consumer fraud on its own, FTC regulations direct the agency "to assist and cooperate" with state consumer protection efforts. One common outgrowth of that cooperation is that the FTC and the States often

target the same wrongdoers, which sometimes results in separate settlements that provide different forms of relief. There is no exception in this complementary regulatory scheme for fraud or deception by cigarette manufacturers. Indeed, the FTC acknowledges the States' vital part in prohibiting deception by tobacco companies.

2. Petitioners' arguments that the FTC has somehow impliedly preempted the state-law claims are patently incorrect. Nothing in the text, structure, or regulatory history of the FTC Act or in the actions of the FTC relating to "light" cigarettes supports implied preemption. Petitioners are not claiming that the FTC Act itself imposes requirements on tobacco companies that conflict with state law. Nor could they, given that the FTC Act lacks an express preemption provision and instead contains a broad saving clause protecting state remedies and causes of action. In addition, Congress imposed heightened requirements for FTC rulemaking, and the FTC's procedural rules require that it explain the impact of any of its rules on state law. And petitioners do not assert that the FTC has promulgated specific rules that preempt state-law actions with respect to "low tar" and "light" cigarettes. Rather, Petitioners' implied preemption claim is based on their assertion that the FTC has blessed tobacco companies' "light" cigarette advertisements through a history of less formal actions, such as consent decrees reached with individual companies. But neither the consent decrees nor the other actions relied upon by Petitioners mandated or

approved Petitioners' "light" and "low tar" advertisements. Moreover, in none of those actions did the FTC ever suggest that State consumer protection laws present an obstacle to, or are preempted by, some sort of FTC policy. Indeed, the FTC has eschewed any suggestion that its actions have resolved the issue of tobacco companies' deceptive practices regarding "low tar" cigarettes.

ARGUMENT

I. UNDER *CIPOLLONE*, STATE-LAW CLAIMS BASED ON DECEPTION ARE NOT EXPRESSLY PREEMPTED BY THE FCLAA.

In *Cipollone*, this Court addressed the preemptive scope of the FCLAA and held that the statute does not displace state-law claims predicated upon a generally applicable law dealing with deceptive practices. 505 U.S. at 527-31. Petitioners nonetheless argue that the FCLAA preempts state-law claims that tobacco companies deceived the public by falsely representing "low tar" cigarettes. Pet. Br. 22-45. By extension, Petitioners maintain that the FCLAA preempts, across the board, state-law claims based on deceptive statements of tobacco companies. Such a retrenchment of *Cipollone's* holding would dramatically impair the States' ability and responsibility to protect their citizens from deceptive marketing practices. As this subject is fully explored by Respondents and other *amici*, the States will limit their submission to the following points.

A. The FCLAA Does Not Preempt Generally Applicable State Laws Prohibiting Deceptive Marketing.

In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001), this Court reaffirmed *Cipollone's* holding that the FCLAA does not preempt a state-law claim against a tobacco company that is predicated on a generally applicable deceptive-practices law. The Court in *Lorillard* explained that "[r]estrictions . . . that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption provision." *Id.* at 551-52. The two decisions teach us that while state rules specifically targeting the tobacco industry are preempted if they concern smoking and health, as was the case in *Lorillard*, non-targeted requirements that apply not only to cigarette makers but to all sellers of products, such as state prohibitions on unfair or deceptive practices, are not. In addition, the decisions distinguish between an affirmative obligation that might be imposed under state law concerning smoking and health (that would be preempted), and a general prohibition (that would not). In other words, a state-law claim or regulation predicated on an affirmative duty applied only against a cigarette maker is much more likely to run afoul of the FCLAA than a general prohibition on falsity in representations about the product.

In this case, Respondents allege that Petitioners "violated Maine's Unfair Trade Practices Act by falsely stating on packages of Marlboro Lights and Cambridge Lights that such cigarettes delivered

'LOWERED TAR AND NICOTINE' and were, therefore, 'LIGHTS,'" and that Petitioners "knew that smokers would actually receive as much, or more, tar and nicotine from so-called 'light' cigarettes as they would receive from regular, non-light cigarettes." Resp. Br. in Opp. 4. Because, as the court of appeals explained (Pet. App. 15a-37a), the predicate of Respondents' claims is a classic violation of the Maine Act's general prohibition against deceitful practices – *i.e.*, Petitioners lied to consumers – there is no preemption under *Cipollone* and *Lorillard*. The claims rest upon a general prohibition that all sellers of goods not deceive consumers.

B. Finding FCLAA Preemption Here Would Significantly Impair the States' Efforts to Combat Deceptive Marketing of Tobacco Products.

If Petitioners' arguments that the Court abandon *Cipollone's* limitations on preemption were successful, there would be a dramatic, adverse impact on the continuing and successful efforts under state consumer protection laws to prohibit deceptive practices by tobacco companies. Petitioners' arguments would extend FCLAA preemption (1) to all claims of any deceptive or misleading conduct of tobacco companies, whether relating to "light" or other types of cigarettes, and (2) to claims made by state law enforcement, including the Attorneys General. This would have serious adverse consequences for the States as well as consumers.

Following *Cipollone*, many States brought individual lawsuits against the largest cigarette companies in the United States predicated upon, *inter alia*, violations of state consumer protection statutes. *See* Master Settlement Agreement (hereinafter MSA) (Nov. 1998), at 1, *available at* <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/> (visited June 15, 2008) ("the Settling States that have commenced litigation have sought to obtain equitable relief and damages under state laws, including consumer protection and/or antitrust law"). In these lawsuits, the States alleged that the cigarette companies conspired for decades to deceive the American public about the health risks related to smoking and the addictiveness of nicotine. Rather than litigate the cases to their conclusion, the four major domestic tobacco companies and the Attorneys General of 46 states and six territories signed the MSA in November 1998. *Id.*; *see Lorillard*, 533 U.S. at 533. The MSA provides for annual payments from the tobacco companies to the States, and also provides some restrictions on advertising practices. MSA § III. Under Petitioners' theories, however, the MSA may never have come about because a core component of the States' consumer protection claims – deceptive practices relating to tobacco marketing – would have been preempted.

Prospectively, rolling back *Cipollone* or reading that case as narrowly as Petitioners advocate would seriously limit state efforts in dealing with ongoing and future deceptive practices by tobacco companies. The MSA does not resolve or deal with all potential

deceitful conduct of all tobacco manufacturers. Most obviously, it is only enforceable against manufacturers who have signed onto it, and not against the ever-growing number of Non-Participating Manufacturers or the thousands of distributors, retailers, and Internet sellers who market cigarettes. Nor, unlike consumer laws in many States, is the MSA enforceable by other state law enforcement agencies, such as district attorneys, county counsel, and city attorneys. *See, e.g.*, Cal. Bus. & Prof. Code §§ 17204, 17206 (Deering 2007) (violations of California's deceptive practices statute enforceable by Attorney General, district attorneys, county counsel, and city attorneys). With the Internet and other forms of media becoming available, the future creativity of tobacco companies cannot be underestimated. Petitioners' arguments would foreclose States from combating present and future tobacco company deceptive practices.

C. The FTC Cannot Fill the Void If the States Are Foreclosed From Addressing Deceptive Marketing by Tobacco Companies.

Excluding States from regulating deceptive marketing by tobacco companies would have significant practical consequences – notwithstanding the FTC's continued ability to regulate that conduct itself. Combating the myriad means by which consumers are deceived is a monumental undertaking, beyond the capabilities of the federal government, the States, or private citizens alone. The FTC therefore

has as one of its expressly stated missions "to assist and cooperate with . . . state . . . agencies . . . in consumer protection enforcement and regulatory matters." 16 C.F.R. § 0.17 (2008).

In particular, recognizing that "problems in the marketplace go beyond the enforcement capabilities of the federal government," the FTC "has encouraged state deceptive practices laws." *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991) (citing Dee Pridgen, *Consumer Protection and the Law* § 3.02[1] (1986)). All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted consumer protection or unfair trade practices acts that, like the FTC Act, have broad applicability to most consumer transactions, and are aimed at preventing deception in advertising and promotion of products and services. Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* (6th ed. 2004), Appendix A (compilation of state consumer protection statutes). Enacted in 1969, the Maine Unfair Trade Practices Act is typical of these statutes. Under section 207, "deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." Me. Rev. Stat. Ann. tit. 5 § 207 (Supp. 2007). The Supreme Judicial Court of Maine has defined "deceptive act" to mean "a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." *State v. Weinschenk*, 868 A.2d 200, 205 (2005). "In enacting the UTPA in 1969, the Legislature intended 'to bring into Maine law the federal

interpretations of unfair methods of competition and unfair or deceptive acts or practices,' as set forth in the Federal Trade Commission Act." *Id.* at 205 (quoting *Bartner v. Carter*, 405 A.2d 194, 199-201 (1979)). Under section 209, the Attorney General may bring an action to restrain by injunction the use of any deceptive act or practice and to seek damages and restitution on behalf of any person who has suffered an ascertainable loss as a result of such an act or practice. Me. Rev. Stat. Ann. tit. 5 § 209 (2002). The right of a private citizen to sue under the Act was established in 1973 with the addition of section 213, subsections (1) and (2). Me. Pub. L. 1973, ch. 251, as amended by Me. Pub. L. 1973, ch. 788, § 13.

These statutes are "particularly important" because the FTC Act provides only for FTC enforcement, and not for state or private enforcement. Sheldon and Carter, *supra*, § 1.1, at p. 1; *see Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973) (an individual consumer may not bring a private action under the FTC Act); *Bartner*, 405 A.2d at 200 (same). "[B]y providing significant state and private remedies, [State statutes] allow for the widespread redress of marketplace misconduct and abuse of consumers." Sheldon and Carter, *supra*, § 1.1, at 1. These laws "are broad and flexible, so that they can apply to creative, new forms of abusive business schemes in almost all types of consumer transactions." *Id.*

The suggestion, therefore, that the States' interest in this matter is "modest," Brief of the National Association of Manufacturers as Amicus Curiae, at 4,

ignores the vital role that the state unfair trade practices statutes play in combating the sophisticated and numerous deceptive efforts of businesses. The common and cooperative effort of the FTC and the States in fighting deceptive practices is shown by their practice in entering into settlement agreements and consent decrees.[1] It is common for the FTC and the States to enter into settlement agreements and consent decrees with the same target for the same conduct.[2] It is also not unusual, moreover, for the FTC

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[1] The States settle claims in one of two ways. If the States file complaints in court and a settlement is reached, then a consent decree is filed. The consent decree might be sought on the date of filing if settlement was reached beforehand, or it may be sought sometime after the case was initiated at the time when the matter settles. Most States also have statutory authority to enter into settlement agreements called Assurances of Discontinuance or Assurances of Compliance ("AVC's") without filing an action in court. *See, e.g.*, Me. Rev. Stat. Ann. tit. 5 § 210 (2002). Some states enter into AVC's despite the lack of statutory references to this form of settlement. AVC's are often negotiated and entered into between a business and a large number of state Attorneys General; hence they are often referred to as multi-state settlements. Some multi-state settlements may be in the form of consent decrees in lieu of AVC's.

[2] *See, e.g., United States v. Choice Point, Inc.*, No. 1:06-cv-198 (N.D. Ga. Feb. 15, 2006), and *In re Choice Point, Inc., Assurance of Discontinuance,* May 2007 (on file Kennebec County Superior Court, Me.) (failure to adequately protect confidential information and misleading consumers about its privacy policies); *FTC v. Alyon Technologies, Inc.*, No. 1:03-cv-1297 (N.D. Ga. Dec. 6, 2004), and *Maine v. Alyon Technologies, Inc.*, No. CV-03-324 (Ken. Cty. Sup. Ct. Jan. 22, 2005) (settling claims for unauthorized billing).

and State settlements to provide different sorts of relief.[3]

Indeed, the FTC has explicitly recognized and relied upon the role of state consumer protection laws in combating deception by tobacco companies. As explained by the FTC before Congress:

> In another example of a Commission action involving unfair and deceptive cigarette advertising practices, in 1997, the Commission issued a complaint against R.J. Reynolds

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[3] For example, both the FTC and 44 States in a multi-state agreement separately settled claims against America Online regarding its free trial offers, with the State settlement requiring additional injunctive relief. *In re America Online, Inc.*, 125 F.T.C. 403 (1998); *In re America Online, Inc., Assurance of Discontinuance,* May 1998 (on file Kennebec County Superior Court, Me.). And in *In re National Research Center for College and University Admissions, Inc.*, 135 F.T.C. 13 (2003), the FTC consent order bars the company from using previously collected student information for non-educational related marketing and bars the company from using data collected from students in the future for non-educational related marketing unless certain disclosures are made. By comparison, not long after, 42 States entered into a multi-state AVC with this same company based on the same set of facts, which went beyond the FTC consent order in several ways: (1) it bars the use of survey data from students who opted out or whose parents opted them out as minors, (2) it includes provisions relating to direct notice of use for non-educational-related marketing purposes should NRCCUA decide to again begin using survey data for that purpose, and (3) it requires NRCCUA to disclose why it uses the information and which sorts of entities receive the data. *In re National Research Center for College and University Admissions, Assurance of Discontinuance*, January 2005 (on file Kennebec County Superior Court, Me.).

> Tobacco Co. alleging that the company's Joe Camel advertising campaign caused or was likely to cause many young people to begin or continue to smoke, thereby exposing them to significant health risks. *R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999). The Commission's complaint was issued on May 28, 1997. On January 26, 1999, the Commission dismissed the complaint without prejudice because the relief sought had been achieved through, *inter alia*, the master settlement between the major tobacco companies and the attorneys general for 46 states.

Accuracy of the FTC Tar and Nicotine Rating System: Hearing Before the Senate Comm. on Commerce, Science and Transportation, 110th Cong. (Nov. 13, 2007) (Prepared Statement of the Federal Trade Comm.) ("FTC 2007 Prepared Statement") at 4 n.10, *available at* <http://www.ftc.gov/os/testimony/P064508tobacco.pdf> (visited June 15, 2008).

Because the FTC Act and the state unfair trade practices acts have a "common purpose" in preventing deceptive practices, the presumption against preemption has "special force" here. *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973)). The Court has already applied these principles to state-law claims relating to tobacco. *Cipollone*, 505 U.S. at 518 ("we must construe these provisions in light of the presumption against the pre-emption of state police

power regulations. This presumption reinforces the appropriateness of a narrow reading of" the FCLAA).

Petitioners' arguments would also effectively immunize Petitioners and other tobacco companies from paying for the damages caused by their unlawful deceptions. This Court has recognized that "common-law claims . . . – unlike most administrative and legislative regulations – necessarily perform an important remedial role in compensating . . . victims." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). For this reason, Congress should not lightly be viewed as "remov[ing] all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Yet Petitioners' arguments lead precisely to that result: they would effectively immunize Petitioners and other tobacco companies from paying for the damages caused by their unlawful deceptions. However successful the federal government may be in a suit against the major tobacco companies, such as one for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), appeals pending, Nos. 06-5237 *et al.* (D.C. Cir.), it will not compensate the victims of those deceptions. Petitioners' express preemption claim should be rejected.

II. STATE-LAW CLAIMS AGAINST TOBACCO COMPANIES BASED ON DECEPTIVE ADVERTISEMENTS OF "LIGHT" CIGARETTES ARE NOT IMPLIEDLY PREEMPTED BY PAST FTC ACTIONS.

Cipollone held, and *Lorillard* confirmed, that the FCLAA's express preemption provision forecloses implied preemption with respect to tobacco advertising. *Lorillard*, 533 U.S. at 541 ("our task is to identify the domain expressly pre-empted, because 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters'") (citations omitted); *Cipollone*, 505 U.S. at 517 ("we need only identify the domain expressly pre-empted by each of those sections") (plurality); *id.* at 531, 533 (Blackmun, J., concurring in part). The *stare decisis* effect of those holdings defeats Petitioners' implied preemption argument. Petitioners' implied preemption argument also fails on its own terms.

Petitioners are not claiming that the FTC Act itself imposes requirements on tobacco companies with which state law conflicts. Nor do Petitioners claim that the FTC has promulgated specific rules with respect to the marketing of "light" cigarettes that preempt state law. Rather, Petitioners assert implied preemption based on other actions the FTC has taken over the years that purportedly mandate or authorize the very conduct alleged to violate state law. Pet. Br. 46-56. The court of appeals properly rejected this argument because the FTC Act expressly saves

state-law actions; the FTC imposes procedural requirements, not implemented here, before it seeks to preempt state laws; and the FTC does not have a cohesive policy on the subject of marketing "light" cigarettes.

A. The FTC Act and the FTC's Preemption Policies Are Consistent with the Cooperative Relationship Between the FTC and the States.

1. The cooperative relationship between the States and the FTC, discussed in section I.C, *supra*, is reflected in the FTC Act, which has no express preemption provision and instead has a clause broadly preserving state remedies and rights of action. The saving clause could not be more clear or expansive:

> Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.

Pub. L. No. 93-637, § 206(a), 88 Stat. 2183, 2201 codified at 15 U.S.C. § 57b(e). When this provision was enacted in 1975, Maine and other states had unfair trade practices statutes that included private causes of action. *See, e.g.*, Me. Pub. L. 1973, ch. 251, as amended by Me. Pub. L. 1973, ch. 788, § 13. Nothing in the saving clause evinces any intent by Congress to preempt the States' enforcement of their unfair trade practices laws or state-law claims such

as those at issue here; indeed, the plain meaning of the provision leads to exactly the opposite conclusion.

The legislative history leading up to the 1975 amendments, contained in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183, demonstrates that preemption of state consumer laws was not to be done lightly. Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 236-40 (1976) (setting forth history). Congress certainly recognized the critical role of the States in combating deceptive practices. When discussing the meaning of "in or affecting commerce" for purposes of FTC regulation, the House Committee explained that the FTC "should not intrude" on the States' domain, nor "preempt state and local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the" FTC. H.R. Rep. No. 93-1107, at 45 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7726; Verkuil, *supra* at 239-40.

2. FTC practice has been consistent with the FTC Act's anti-preemption leaning. Since the enactment of the saving clause, the FTC has carefully and expressly dealt with the issue of preemption in order to afford States and others the opportunity to comment and provide input. The FTC requires that preemption be addressed in the "Statement of Basis and Purpose" when it promulgates a rule. 16 C.F.R. § 1.14(a)(1)(iv) ("If the Commission determines to promulgate a rule, it shall adopt a Statement of Basis

and Purpose to accompany the rule which shall include: . . . . (iv) A statement as to the effect of the rule on state and local laws. . . ."). FTC rulemaking also mandates procedural safeguards beyond those normally found in the Administrative Procedures Act. *Compare* 15 U.S.C. § 57a, *with* 5 U.S.C. §§ 551 *et seq.*; *see* Verkuil, *supra* at 243 (rulemaking procedures "serve[ ] to implement the felt concern of the 1975 Congress with keeping the preemption function of the FTC under strict control.") Additionally, if a rule were promulgated preempting state law, the state and its citizens could seek judicial review. 15 U.S.C. § 57a(e)(1)(A); *see American Financial Services Ass'n v. FTC,* 767 F.2d 957, 961 (D.C. Cir. 1985) (seeking review of FTC rules); Verkuil, *supra* at 243 ("ensure[s] that the courts look closely at [the preemptive rule's] basis and rationale.") This critical safeguard is unavailable for consent decrees, agreements between tobacco companies, or the other actions upon which Petitioners rely. Pet. Br. 2-13.

In light of the FTC Act saving clause and the FTC's procedural requirements, courts have been extraordinarily careful to protect state prerogatives when the FTC has attempted to preempt by formal rule. In *American Financial Services*, 767 F.2d at 990-91; for example, the court of appeals upheld an FTC rule against a preemption challenge in large part because the FTC "considered and modified the Rule to be as consistent with state laws as possible, explicitly expressed its intent not to occupy the field, and included a provision which allows states providing

equal or greater protections to obtain an exemption." In *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 662, 667 (2nd Cir. 1979), the court struck down an FTC rule that had an explicit preemption provision because it lacked precision and the FTC failed to comply with the procedural requirements of section 57a. Not surprisingly, therefore, no court has found an action of the FTC, other than formal rulemaking, to preempt state law. *See, e.g., United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003) ("State prohibitions of unfair or deceptive trade practices are not preempted unless they conflict with an express FTC rule."); *see also Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 453-54 (7th Cir. 1990) (explaining the importance of rulemaking safeguards for agency substantive rules to have the preemptive force of federal law).

3. Petitioners' implied preemption theory completely disregards this longstanding practice of protecting state laws from preemption unless the FTC explicitly and carefully does so by rule, and therefore would disrupt the complementary federal-state relationship in dealing with deceptive practices. The procedural protections of rulemaking – including the opportunity for judicial review of final rules – allow States, and those who wish to avail themselves of state laws, to provide insight into the effect of federal preemption on the joint and cooperative goals of state and federal law and to preserve state-law claims as appropriate. Under Petitioners' preemption

argument, no such protections would be available to States or their consumers.

In fact, not only did the FTC not engage in rulemaking to preempt state laws pertaining to deceptive marketing of tobacco products, it did not engage in rulemaking prescribing how "low tar" and "light" cigarettes are to be advertised. Had the FTC wanted to preempt the state laws at issue, it had a process in place for attempting to do so. Its failure to avail itself of that process speaks volumes about the FTC's intent – or lack thereof – to preempt those laws.

B. The FTC's Actions Relating to "Light" Cigarettes Do Not Impliedly Preempt State-Law Claims for Deception.

At the core of Petitioners' implied preemption theory is the notion that the FTC has resolved the underlying issue and has a cohesive and all-encompassing policy mandating how cigarette companies are to describe "light" cigarettes. Pet. App. 49; *see also* Brief of Former Commissioners as Amici Curiae. According to Petitioners, the FTC adopted that policy through a patchwork of FTC consent decrees and other actions such as an early role in testing cigarettes' tar and nicotine content, playing some sort of role in the 1970 voluntary agreement reached among the tobacco manufacturers, and not prohibiting tobacco companies from featuring the test results in their ads. The picture that Petitioners attempt to paint is a misleading one. The FTC did not

mandate or authorize Petitioners' representations of their "light" cigarettes to the public; Petitioners therefore did not act pursuant to a definitive federal policy.

1. The federal government's RICO lawsuit against the tobacco companies is the most obvious evidence that the federal government, including the FTC, has not adopted a policy mandating or authorizing the "light" cigarette advertisements challenged by the state-law action here. According to the United States, tobacco companies have engaged "in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, 'light' cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction." *Philip Morris*, 449 F. Supp. 2d at 26-27. These claims are manifestly inconsistent with the proposition that the FTC itself mandated or authorized the deceptive practices with respect to "light" cigarettes. And in that suit, the federal government has never suggested that other actions based on these deceptive practices are foreclosed. Of course, it is only the private state-law claims that can compensate victims for their losses from Petitioners' deceptive practices, and there is nothing indicating that the federal government believes that such claims are an obstacle to any federal scheme.

In addition, the United States has confirmed that it has not set forth a clear policy addressing the

subject upon which Petitioners rely so heavily: the definitions of the terms "light" and "lower tar and nicotine." The Solicitor General explained to the Court that the FTC "has never promulgated official regulatory definitions of terms such as 'light' or 'low tar,'" and that its previous statements "did not reflect an official FTC regulatory position." Brief for United States as Amicus Curiae, *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007), at 4-5; *see also* 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997) ("There are no official definitions for these terms"). And just last year, the FTC informed Congress that while cigarette companies "have adopted descriptors, such as 'light' and 'low,' to characterize cigarettes that have tar ratings of 15 mg. or less," "[t]hese terms are not defined by the FTC or any other government agency." FTC 2007 Prepared Statement, at 6 & n.16. The FTC went on to explain that "the Commission has been concerned for some time that the [FTC testing] method may be misleading to individual consumers who rely on the ratings it produces as indicators of the amount of tar and nicotine they actually will get from their cigarettes. In fact, the current ratings tend to be relatively poor predictors of tar and nicotine exposure." *Id.* at 7. It would be an astonishing conclusion that a federal scheme supporting preemption is based upon a method that not only is not mandated by the FTC, but is one that the FTC itself understands may be misleading.

2. Petitioners' contention that several FTC consent decrees with tobacco companies related to

the marketing of "light" cigarettes impliedly preempt state laws pertaining to such marketing is foreign to the practice and traditions of the FTC. As discussed above, the FTC and States work cooperatively in fighting deceptive practices, and it is not uncommon for the FTC and the States to enter into parallel consent decrees with the same target for the same conduct. It would seem, therefore, that if the FTC intended that a particular consent decree or set of decrees was to have the extraordinary, and as of yet unprecedented, effect of preempting state law for an entire industry, it would say so. Nowhere in the history presented by Petitioners is there any hint of such intent by the FTC. It is certainly not found in the FTC consent decrees themselves, *In re American Tobacco Co.*, 119 F.T.C. 3 (1995); *In re American Brands, Inc.*, 79 F.T.C. 255, 257 (1971); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985) (enjoining use of 1 mg rating unless further information provided to prevent consumer confusion). Indeed, the consent decrees do not discuss any effect on state law, and do not express any notion of exclusivity.

The lower court case Petitioners rely upon to argue that FTC consent decrees may preempt state law regarding unfair trade practices does not support their argument. In *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990), the court of appeals found no preemption of New York's Lemon Law as a result of an FTC consent order with General Motors prescribing a dispute resolution process for automobiles.

Most notably for purposes of this matter, the court made clear that, "[u]nlike an agency regulation which has industry-wide effect, a consent order is binding only on the parties to the agreement." *Id.* at 36. Thus, even under this case, the consent decrees upon which Petitioners rely so heavily do not preempt state action against other tobacco companies, such as Petitioner Philip Morris. And although the court opined that a consent order could theoretically preempt state law actions against the party to the consent decree, it expressly noted that "[t]he mere fact that the instant Order has been entered . . . is insufficient to preclude supplemental state regulation. As with any preemption analysis, the lodestar of our inquiry is the 'intent' of the FTC in entering into the Consent Order." *Id.* at 39. The court went on to apply a rigorous test in an effort to harmonize the FTC order and the state law, taking into consideration the presumption against preemption and the FTC's statements, if any, regarding preemption and the role of the States.

Nor did the FTC express the intent to preempt state law in any of its other actions, such as its role in the 1970 agreement between the tobacco companies. *See* Pet. Br. 2-13, 46-55. None of those actions on their face purported to preempt state law, discussed their effect on state law, or expressed any notion of exclusivity which would prompt a State or citizen to be concerned about preemption. Petitioners' argument therefore undermines the protections normally afforded by the FTC when dealing with the issue of

preemption, and – contrary to FTC practice – leaves the States entirely in the dark as to when the FTC intends to preempt state law. Petitioner's theory forces States and their citizens to guess regarding preemption every time the FTC signs a consent decree, files a lawsuit, or, indeed, does nothing at all. Preemption does not rest upon thin threads of the sort Petitioners spin.

3. Petitioners' reliance on *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000), for the proposition that preemption may be implied even in the face of a saving clause is misplaced. Pet. Br. 55-56. This Court has emphasized the "need for analysis of an individual statute's pre-emptive effects." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).[4] Several factors distinguish the present case from *Geier*. First, the Court in *Geier* focused on safety standards promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1988). Here, by contrast, no federal regulations support Petitioners' preemption claim. In other words, rulemaking protections were available in *Geier*, while none were available regarding the actions upon which Petitioners rely.

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[4] The laundry list of cases found at Brief of the National Association of Manufacturers as Amicus Curiae, at 19-20, dealing with other statutes is therefore irrelevant.

Second, the underlying statute at issue in *Geier* had an express preemption provision. The Court found that the express preemption provision and the saving clause, "read together, reflect a neutral policy, not a specially favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles." *Id.* at 870-71. By contrast, because Congress chose not to include a preemption provision in the FTC Act, the balance here is strongly in favor of "saving" and against preemption. And in the context of deceptive practices by tobacco companies, the Court in *Cipollone* has already struck that balance under the FCLAA preemption provision, by finding certain state-law actions preempted and others not. Nothing in the FTC Act or the FTC's actions changes that.

Finally, the FTC Act saving clause is more expansive than the one before the Court in *Geier*, which read: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e), formerly codified at 15 U.S.C. § 1397(k). Section 57b(e), by contrast, states that the remedies provided to the FTC by Congress "are in addition to, and not in lieu of, any other remedy or right of action provided by State . . . law." Section 57b(e) reinforces this Court's decisions in *Cipollone* and *Lorillard*. Nothing in the saving clause evinces any intent by

Congress to preempt state-law claims against deceptive practices such as those at issue here.

* * *

The common purpose of the FTC Act and State unfair trade practices and consumer protection acts, such as Maine's, is to protect consumers from deceptive practices. The FTC has been most sensitive to this relationship, as have the courts. Finding preemption here would run counter to how the FTC and the States have worked cooperatively together, and would do serious harm to that relationship and to the protections afforded consumers through their efforts. The particular claims of deception here fall squarely within those permitted under *Cipollone*, and the FTC has not established a cohesive policy impliedly preempting the States with respect to deceitful conduct by tobacco companies regarding "low tar" and "light" cigarettes. For these reasons, the Court should find that the state-law claims before it are not preempted.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

File Date:
June 18 2008

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No. 07-562

IN THE

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ALTRIA GROUP, INC., and PHILIP MORRIS USA INC.,
Petitioners,

v.

STEPHANIE GOOD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* MARYLAND CONSUMER RIGHTS COALITION AND LEGAL RESOURCE CENTER FOR TOBACCO REGULATION, LITIGATION & ADVOCACY IN SUPPORT OF RESPONDENTS

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Congressional Declaration of Policy and Interest, Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970) 13

OTHER AUTHORITIES

Family Smoking Prevention and Tobacco Control Act, H.R. 1108, 110th Cong. § 911 (b) (2) (A) (ii) (2007) 27

K. Michael Cummings et al., *What do Marlboro Lights smokers know about low-tar cigarettes?*, NICOTINE & TOBACCO RESEARCH 1, 4 (2004) 5

K. M. Cummings & R. W. Pollay, *Exposing Mr Butts' tricks of the trade*, TOBACCO CONTROL 11(Suppl I), i1-i4 (2002) 26

TABLE OF AUTHORITIES—Continued

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Lynn Kozlowski et al., Ch. 2: Cigarette Design, National Cancer Institute, *Risks associated with smoking cigarettes with low machine-measured yields of tar and nicotine*. Smoking and Tobacco Control Monograph 13 (NIH Pub. No. 02-5074) (2001) 5

National Cancer Institute, *Risks associated with smoking cigarettes with low machine-measured yields of tar and nicotine*, Smoking and Tobacco Control Monograph 13 (NIH Pub. No. 02-5074) (2001) 5

Neil D. Weinstein, Ph.D, Ch. 6: Public Understanding of Risk and Reasons for Smoking Low-Yield Products, National Cancer Institute, *Risks associated with smoking cigarettes with low machine-measured yields of tar and nicotine*. Smoking and Tobacco Control Monograph 13, (NIH Pub. No. 02-5074) (2001)... 5

Richard A. Leiter, Deceptive Trade Prac tices, Business Organizations; Consumer Protection, 50 State Statutory Survey 2007 8

Saul Shiffman et al., *Smokers' beliefs about "Light" and "Ultra Light" cigarettes*, TOBACCO CONTROL 10 (Suppl. I), i17-i23 (2001) 5

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MJ Thun and DM Burns, *Health impact of "reduced yield" cigarettes: a critical assessment of the epidemiological evidence*, TOBACCO CONTROL 10 (Suppl. I), i4-i11 (2001) 5

Alex Wayne, "Bill to Force FDA Tobacco Regulation Moves Through Energy and Commerce," *CQ Today-Regulatory Policy* (April 2, 2008) 27

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* MARYLAND CONSUMER RIGHTS COALITION AND LEGAL RESOURCE CENTER FOR TOBACCO REGULATION, LITIGATION & ADVOCACY IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE* [1]

Amicus the Maryland Consumer Rights Coalition is a non-profit organization of consumer advocates

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Blanket letters from the parties consenting to the filing of any and all *amicus curiae* briefs in this case have been filed with the Clerk's office.

focused on consumer rights and fairness and safety in the marketplace. The Coalition seeks to advance and protect the interests of consumers in the State of Maryland through research, education, and advocacy. The Coalition monitors legal proceedings across the country and engages with national partners on issues of concern to Maryland consumers. The Coalition seeks to insure that state consumer protection laws are fully enforceable and are not inappropriately limited by overbroad interpretation and application of preemption provisions in federal law.

Amicus the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy has significant interests in and expertise on legal, policy, and public health issues surrounding tobacco control in the State of Maryland and throughout the United States. In addition to monitoring tobacco-related legal proceedings across the country, the Center, on its own and with the Tobacco Control Legal Consortium, prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Center staff authored and submitted *amicus curiae* briefs to the U.S. Supreme Court in *Rowe v. New Hampshire Motor Transport Association* at both the *certiorari* and merits phases. As a legal resource for cigarette consumers in Maryland, the Center seeks with this brief to insure that injured smokers are not precluded from bringing legitimate consumer fraud claims under State law.

SUMMARY OF ARGUMENT

Respondent Stephanie Good has stated a legitimate cause of action for deceptive acts or practices under the Maine Unfair Trade Practices Act ("MUTPA") against Petitioners Philip Morris USA

Inc. and its parent company, Altria Group, Inc. (collectively "PMUSA"). Good alleges that through its advertising and promotion of Marlboro Lights as a product presenting less risk of harm than regular Marlboro cigarettes, PMUSA deceived Good and other Maine consumers into purchasing a product that did not deliver as promised. Hence, Good seeks compensation for the lost benefit of the bargain.

A plurality of this Court made clear in *Cipollone v. Liggett Group, Inc.* that a claim of fraud or misrepresentation premised on a cigarette manufacturer's duty not to deceive consumers is not preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"). *Cipollone* held that while some state law claims alleging deception in the advertising and promotion of cigarettes are preempted by the FCLAA, some claims are not preempted. The critical factor in determining whether a claim is preempted is the predicate duty upon which a claim is based. Causes of action that allege warning neutralization or constitute failure to warn are preempted; those that are based on the cigarette manufacturer's duty not to deceive are not preempted. Based on the MUTPA's imposition of a general duty to not deceive on all commercial actors in Maine, Good's claims are not preempted by the FCLAA.

To construe the FCLAA or *Cipollone* in any other manner would result in immunity for cigarette manufacturers to deceive consumers on matters that concern smoking and health. Given the explicit documentation of PMUSA's deception in the advertising and promotion of its light and low tar and nicotine cigarettes, allowing Good to pursue her consumer fraud claims will result in an equitable and legally sound outcome.

ARGUMENT

Stephanie Good stands as a fine example of thousands of light cigarette smokers in Maine and millions across the country. Good chose to smoke Marlboro Lights because she was led to believe that the product presented lower risk of health hazards than smoking regular Marlboro cigarettes. Good and the other lights smokers in Maine and across the United States were intentionally duped by PMUSA on this issue. In response, Good simply seeks to recover for the lost benefit of the bargain—the typical recovery in consumer fraud cases. She invokes Maine's consumer fraud statute, the standard cause of action for a deceived consumer, to recover the cost of purchasing a product that was in a condition different from that promised. This traditional state consumer fraud claim is no different from the type of state law tort claim held permissible against cigarette manufacturers under this Court's interpretation and application of the FCLAA in *Cipollone v. Liggett Group*.

I. Petitioner PMUSA Intentionally and Fraudulently Marketed Marlboro Lights as a Lower Health Risk Alternative to Regular Cigarette Brands Like Marlboros in Violation of the Maine Unfair Trade Practices Act

Smokers of Marlboro Lights cigarettes, the most popular brand of cigarettes on the market,[2] have long been

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[2] Marlboro Lights brand is a cigarette product of Petitioner Philip Morris USA (PMUSA), a subsidiary of Petitioner Altria Group, Inc. *See* http://www.philipmorrisusa.com/en/cms/Company/Financial_Information/default.aspx?src=top_nav (last visited April 8, 2008) (stating that Marlboro brand cigarettes have a U.S. market share of 41%, and that this market share is larger

unaware that they are inhaling the same amount of cancer-causing toxins and nicotine as if they were smoking regular Marlboro brand cigarettes. National Cancer Institute (NCI), *Risks associated with smoking cigarettes with low machine-measured yields of tar and nicotine*, Smoking and Tobacco Control Monograph 13 (NIH Publication No. 02-5074) (2001) [hereinafter "NCI Monograph 13"]. Tragically, since the 1960s, smokers have unwittingly switched from regular to "light" cigarettes under the pretense of decreased health risk and with the false hope of assistance in quitting their deadly habit. Saul Shiffman et al., *Smokers' beliefs about "Light" and "Ultra Light" cigarettes*, Tobacco Control 10 (Suppl. 1), i17-i23 (2001); K. Michael Cummings et al., *What do Marlboro Lights smokers know about low-tar cigarettes?*, Nicotine & Tobacco Research 1, 4 (2004) (". . . Marlboro Lights [smokers]. . . are for the most part . . . misinformed about the health risk of using low-tar and filtered cigarettes."); *see also* Neil D. Weinstein, *Chapter 6: Public Understanding of Risk and Reasons for Smoking Low-Yield Products*, NCI Monograph 13, *supra*. The reduced risk anticipated by lights smokers has not come to fruition, however, as lung cancer, cardiovascular disease, and smoking-related mortality rates have not decreased for these smokers. MJ Thun and DM Burns, *Health impact of "reduced yield" cigarettes: a critical assessment of the epide-*

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than the combined share of the next ten tobacco companies). Generally light cigarettes are the product of choice of the supermajority of smokers. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 933 (D.D.C. 2006), *clarified*, 477 F. Supp. 2d 191 (2007), *appeals pending*, Nos. 06-5267 *et al.* (D.C. Cir.) (findings of fact stating that "[o]f the almost 47 million Americans who smoke cigarettes . . . more than 81% smoke "light" or "ultra light" cigarettes").

miological evidence, Tobacco Control 10 (Suppl. I), i4–i11 (2001). The findings in the NCI Monograph clearly demonstrate that people who switch to low-tar or light cigarettes from regular cigarettes are likely to inhale the same amount of cancer-causing toxins and that these smokers remain at high risk for developing smoking-related cancers and other diseases. *Id.*

What is most insidious and reprehensible, however, is the fact that cigarette manufacturers like PMUSA have, in fact, created and preyed on this false hope. PMUSA, which is in the best position to provide the true measure of its cigarettes' tar and nicotine delivery to consumers, falsely marketed light and lower tar and nicotine cigarettes as a lower health risk alternative to smoking regular brand cigarettes. Blinded by its overarching economic goals of "keep[ing] smokers smoking; stopp[ing] smokers from quitting; encourag[ing] people, especially young people, to start smoking; and increas[ing] corporate profits," *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 431 (D.D.C. 2006), *clarified*, 477 F. Supp. 2d 191 (2007), *appeals pending*, Nos. 06-5267 *et al.* (D.C. Cir.), PMUSA seized an opportunity to develop and market an ostensibly reduced risk product to induce smokers who otherwise would quit to continue smoking, thereby endangering their health. In so doing, PMUSA has deceived—and continues to deceive—all smokers of its Marlboro Lights cigarettes, and thereby has violated—and continues to violate—Maine's consumer fraud statute.

One of those deceived Maine consumers, Good, relied on PMUSA to provide accurate information about the Marlboro Lights cigarettes she smoked since 1992. At the very least, Good reasonably expected PMUSA not to deceive her about the cigarettes' true tar and

nicotine yields when smoked by a human—versus a machine. When PMUSA failed her, Good turned to Maine's Unfair Trade Practices Act ("MUTPA") for appropriate recourse. *See* Me. Rev. Stat. Ann. tit. 5, §207.

The authority to protect their citizens from unfair and deceptive trade practices that might result in the loss of money or property stems from the states' traditional police powers. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) ("neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers"); *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992) (consumer protection is one area "over which the states have traditionally exercised their police powers"). It is within the plenary police power that most states have adopted unfair trade practices acts. *See* Richard A. Leiter, Deceptive Trade Practices, Business Organizations; Consumer Protection, 50 State Statutory Survey 2007 (noting that most states have adopted the Uniform Deceptive Trade Practice Act or a similar law).

Making illegal "[u]nfair or deceptive acts or practices in the conduct of *any* trade or commerce," Me. Rev. Stat. Ann. tit. 5, §207 (emphasis added), the MUTPA was created as Maine's version of the Federal Trade Commission (FTC) Act. *Bartner v. Carter*, 405 A.2d 194, 199-201 (Me. 1979). The states' unfair trade practices statutes, like the MUTPA, provide a remedy to citizens who have been wronged by corporate conduct in the marketplace, as Good alleges in her Complaint. The term "deceptive act or practice" is not defined in the MUTPA, but has been inter-

preted by Maine courts to mean "a material misrepresentation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." *State v. Weinschenk*, 868 A.2d 200, 206 (Me. 2005) (citing *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-65 (1984)). "A material representation . . . 'involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding, a product.'" *Weinschenk*, 868 A.2d at 206 (quoting *In re Cliffdale Associates, Inc.*, 103 F.T.C. at 165). On a proper pleading as in the Good Complaint, the fact-finder determines whether an act or practice is deceptive in violation of the MUTPA. *Weinschenk*, 868 A.2d at 204, 206 (citing *Binette v. Dyer Library Association*, 688 A.2d 898, 906 (Me. 1996)). "To justify a finding of unfairness, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoided by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *Weinschenk*, 868 A.2d at 206 (citations omitted). The "defendant's good faith or lack of intent to deceive" cannot save an act or practice from being found deceptive under the MUTPA. *Id.* (citation omitted).

PMUSA's actions with regard to Marlboro Lights cigarettes clearly amount to material representations and deceptive acts under Maine consumer protection law. Good alleges that PMUSA "has misrepresented material facts by describing its 'Lights' as such or as having 'lower tar and nicotine,' and that [PMUSA] . . . did so with the intent to deceive." *Good v. Altria Group, Inc.*, 501 F.3d 29, 31 (1st Cir. 2007). Good alleges that, before it started marketing Marlboro and Cambridge Lights, PMUSA knew that through "compensation," smokers of its light cigarettes products

ingested the same amount of tar and nicotine as they did from smoking regular Marlboros. *Id.* Good would not have purchased and smoked Marlboro Lights but for PMUSA's deceptive marketing practices, which directly affected her choice to switch from traditional Marlboros. Good alleges that "the relative levels of [tar and nicotine] bear on a reasonable consumer's decision on which cigarette to purchase because consumers understand that reducing the quantities of tar and nicotine in cigarettes reduces their adverse health effects." *Id.*

As the U.S. District Court for the District of Columbia found in *United States v. Philip Morris*, 449 F. Supp. 2d at 431, PMUSA has long known that its light and low tar and nicotine cigarettes deliver the same amount of tar and nicotine as its regular brand counterparts due to smokers' practice of inhaling deeper and longer and smoking more light cigarettes. Further, PMUSA has been aware for some time that the Cambridge Filter Method,[3] which PMUSA uses as the basis for this representation, is also fatally flawed. *Id.* at 436. Despite this knowledge, the company continued to mislead consumers and deny the existence of smoker compensation behavior.

PMUSA claims that the terms light and low tar describe the strength of taste and flavor in its products. *United States v. Philip Morris,* 449 F. Supp. 2d at 512; *see also* http://www.philipmorrisusa.com-/en/cms/Products/Cigarettes/Tar_Nicotine/default.aspx?src=top_nav (last visited June 11, 2008) (stating that "PM USA frequently describes cigarette brands

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[3] The Cambridge Filter Method is also commonly referred to as the "FTC Method."

using these descriptors that facilitate a smoker's ability to distinguish among our products"); *but compare United States v. Philip Morris*, 449 F. Supp. 2d at 478 (former PMUSA CEO James Morgan admitting that PMUSA never meant for Marlboro Lights moniker to refer to product taste as opposed to "lower tar and nicotine"; stating "light" means nothing "in terms of taste"). Flavor is unlikely what most smokers had in mind when they decided to try Marlboro Lights, and flavor is most assuredly not the reason smokers chose to continue smoking these products. Market research definitively shows that smokers do not smoke light and low tar cigarettes based on any taste preference over regular, full-flavor cigarettes; on the contrary, PMUSA and other light cigarette manufacturers "are well aware from their own research that a majority of smokers believe that low-tar cigarettes are healthier, are willing to buy them for precisely that reason, and are willing to sacrifice taste for what they believe to be less harmful cigarettes." *United States v. Philip Morris,* 449 F. Supp. 2d at 912 (emphasis added).

Thus, PMUSA has not only known but has, in fact, *intended* that the descriptors would be understood to mean that smokers had a choice of a lower health risk cigarette that could also help them quit. *United States v. Philip Morris*, 449 F. Supp. 2d at 430-31. The company actively bolsters this misconception in its marketing. *Id.* MUTPA §207 protects Maine's citizens from exactly this type of fraudulent misrepresentation and ensures that companies like PMUSA who defraud consumers like Stephanie Good pay for such unlawful actions. *See State v. Weinschenk*, 868 A.2d 200, 206 (material representations in designer/builder's advertisements of homes to buyers who otherwise would not have purchased the homes—

which were defective due to poor construction—constituted deceptive acts that violated the MUTPA).

PMUSA's practice of deceiving consumers into believing that Marlboro Lights were "healthier" to smoke than Marlboro Reds created substantial injury by luring smokers into the false belief that they had made a better choice for their health—likely prompting some to switch rather than quit smoking altogether. Consumers could not have known that they were getting at least the same, if not greater, amounts of tar and nicotine from Marlboro Lights cigarettes as regular, full-flavored cigarette brands; the phenomenon of smoker compensation being beyond the ken of the ordinary consumer. And it is inconceivable that this purposeful deception was to the benefit of consumers or to competition in the marketplace; hence, nothing outweighs PMUSA's scheme to defraud Good and millions of American consumers. Stephanie Good should be permitted to pursue this properly pled consumer fraud claim.

II. Respondent Stephanie Good's Claim that PMUSA Violated the Maine Unfair Trade Practices Act is Not Expressly Preempted by the Federal Cigarette Labeling and Advertising Act

Understanding the nature of Good's claim is essential to answering the preemption question presented to this Court. Good does not claim personal health-related injury or seek damages based on the negative health consequences of her smoking Marlboro Lights cigarettes; instead Good asks for proper recourse for PMUSA's fraudulent behavior in deceptively marketing and selling those cigarettes. *Good v. Altria Group*, 501 F.3d at 30-31. As is her right under the MUTPA,

Good asks for reimbursement of the money she paid for a product she was deceived into believing presented a lower health risk than her usual brand, but which turned out to be otherwise.[4] This is precisely the type of claim that remains viable against a cigarette manufacturer. As the First Circuit properly concluded, PMUSA's argument that Good's claim is preempted is simply wrong.

In enacting the Federal Cigarette Labeling and Advertising Act ("FCLAA"),[5] Congress intended "to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
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> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Congressional Declaration of Policy and Intent, 15 U.S.C. §1331(1), *as amended by* the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970). To foster this uniform program, Congress included a provision that preempted

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[4] Good also seeks punitive damages and attorney's fees under MUTPA §213. *See Good v. Altria Group*, 501 F.3d at 31.

[5] Pub. L. No. 89-92, 79 Stat. 282 (July 27, 1965).

any state law affecting cigarette advertising: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. §1334(b).

By claiming that its deceptive advertising of lights and use of low tar and nicotine descriptors are protected from liability under §5(b) of the FCLAA, PMUSA expects to be treated differently from any other manufacturer conducting business in Maine. PMUSA essentially asks for a "free pass" to defraud those Maine citizens who unwittingly purchased and smoked Marlboro Lights cigarettes thinking they received a benefit vis-à-vis regular Marlboros. Congress in no way intended such a result.

A. This Court's 1992 Plurality Opinion in *Cipollone v. Liggett Group* Provides a Viable Exception for Good's State-Law Claim of Fraudulent Misrepresentation under the MUTPA.

A plurality of this Court recognized in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), that some state-law claims are not subject to FCLAA preemption. That decision created a framework regarding FCLAA preemption of state tort law claims that has survived for sixteen years and is applicable to the state deceptive and unfair practices statute at issue here. Indeed, Good's consumer fraud claim falls neatly within the plurality's description of viable causes of action.

Rose Cipollone smoked cigarettes for 42 years before her diagnosis of lung cancer and ultimate demise from that smoking-caused disease. Alleging that she

had been deceived into believing that smoking was not hazardous to her health, Cipollone sued cigarette manufacturers for damages resulting from her lung cancer; her family continued the case after her demise. Cipollone claimed, *inter alia*, that manufacturers fraudulently misrepresented health hazards to consumers and conspired to deprive the public of medical and scientific information about smoking, all in violation of New Jersey law. *Id.* at 504. Defendant cigarette manufacturers asserted that Cipollone's claims were preempted by the FCLAA. In *Cipollone*, this Court interpreted FCLAA preemption to mean that federally mandated warnings do not always bar smokers from suing manufacturers under state personal-injury laws. *Id.* at 528-29.

The *Cipollone* Court clarified two important steps in any FCLAA preemption analysis. First, for each claim, an evaluation should be made "whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion." *Id.* at 523-24.

Second, the preemption determination depends on the specific allegations that form the basis of the claim; a superficial review of the type of claim—intentional or unintentional tort or liability for an act or for an omission—is not sufficient to answer the FCLAA preemption question. State-law claims are neither uniformly preempted nor uniformly allowed by the FCLAA. *Id.* at 528-29. Ultimately, this Court found it necessary to look beyond the category attached to plaintiff's common-law claims and, instead, to evaluate each claim to determine whether it was in fact preempted by the 1969 Act. *Id.* at 523.

Fraudulent misrepresentation "claims based on allegedly false statements of material fact made in advertisements" for cigarettes are not preempted, because "such claims are predicated not on a duty 'based on smoking and health', but rather on a more general obligation – the duty not to deceive." *Id.* at 528-29. Only claims alleging that cigarette manufacturers' omissions or statements in advertising or promotion that constitute the "failure to warn" or the "neutralization" of federally mandated warning labels are preempted. *Id.* at 530.

To support its categorical framework, the *Cipollone* plurality pointed to Congressional intent. With the FCLAA, Congressional intent is that the phrase "based on smoking and health" be construed narrowly, so as not to proscribe the regulation of deceptive advertising.[6] As stated in the Senate Report, the FCLAA's "'preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health.* It would in no way affect the power of any State . . . with respect to . . . *police regulations.*'" *Cipollone,* 505 U.S. at 529 n. 26 (citing S. Rep. 96-566, at 12 (1969) (emphasis supplied by Court)). *See also Cipollone*, 505 U.S.at 518 (the Court must construe the FCLAA's preemption provision in view of the presumption against preempting state police power regulations).

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[6] Notably, the FCLAA explicitly reserves the authority of the Federal Trade Commission ("FTC") to identify and punish cigarette companies' deceptive advertising practices. 15 U.S.C. §1336. The FTC's failure to act pursuant to such authority should not foreclose Good from pursuing her rights as a deceived consumer under the MUTPA.

Congress did not intend to insulate tobacco companies from longstanding state laws governing fraud, promulgated pursuant to traditional state police powers, which are binding on all commercial actors. *Id.* at 528-29. The single, uniform standard of "falsity" distinguishes state-law requirements based on the general "duty not to deceive" from state-law requirements or prohibitions based on "smoking and health." *Id.* at 529.

This Court emphasized that its reading of "based on smoking and health" was not at cross purposes with Congress' intent to avoid the imposition of diverse labeling and advertising standards by the states. "State-law prohibitions on false statements of material fact" or "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. . . . [T]he phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements"—even if those statements pertain to smoking and health.[7] *Id.* (holding FCLAA does not preempt

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[7] Petitioners' arguments notwithstanding, this Court's holding in *Lorillard v. Reilly*, 533 U.S. 525 (2001), is completely inapposite to the case at hand. *See* Pet. Br. at 18, 32-37. *Reilly* involved the direct control of cigarette and tobacco advertising through regulations promulgated by the Massachusetts Attorney General under Mass. Gen. Laws ch. 93A, a consumer protection statute similar to the MUTPA. *See Good v. Altria Group*, 501 F.3d at 38. This Court held that the Massachusetts regulations, controlling the size and placement of cigarette ads, fell within §5(b)'s preemption of any "requirement or prohibition based on smoking and health . . . imposed under state law with respect to the advertising or promotion of any cigarettes," because the regulations were "motivated by" and "intertwined with the concern about cigarette smoking and health." *Reilly*, 533 U.S. at 548.

claims based on allegedly fraudulent statements made in tobacco companies' advertisements).

B. The First Circuit Court of Appeals Correctly Applied the *Cipollone* Framework to Determine that the FCLAA does not Expressly Preempt Good's Claim

The First Circuit held that Good's allegations that PMUSA "made material statements of fact that it knew to be false . . . to encourage smokers to purchase its products, and that smokers did so in reliance on those statements . . . state a claim for fraudulent misrepresentation" under the MUTPA. *Good v. Altria Group*, 501 F.3d at 42 (citing Restatement (Second) of Torts § 525 (1977)). The court thus correctly applied the *Cipollone* framework to conclude that Good's claim was not expressly preempted by the FCLAA. *Good v. Altria Group*, 501 F.3d at 58. Specifically, the court found that Good's fraudulent misrepresentation claim was based on a general "duty

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As the First Circuit in *Good v. Altria Group* correctly explained:

> [Respondents'] claims are indeed "intertwined with" the concern about cigarette smoking and health," just as surely as the regulations in *Reilly* were; the difference, however, is that those regulations were themselves the "prohibitions," while the prohibition here is the ban on "unfair or deceptive acts or practices in the conduct of any trade or commerce" under the [MUTPA]. And *Cipollone*, as we have noted, treats a state-law "duty not to deceive" as broader than a "duty 'based on smoking and health' and therefore beyond the reach of FCLAA preemption.

501 F.3d at 39 (citations omitted).

not to deceive" and not a requirement or prohibition based on smoking and health. *Id.* at 45-46.

In Stephanie Good's case, as in Rose Cipollone's, the predicate legal duty at issue is the manufacturer's duty not to deceive; more specifically, to refrain from making fraudulent misrepresentations about its products. This duty is pressed upon *every* manufacturer conducting trade or commerce in the State of Maine. *See* Me. Rev. Stat. Ann. tit. 5, §207. By analogy, if the claim at issue was that a purportedly "lower fat" candy bar was not, in fact, lower in fat than its regular counterpart, the duty not to deceive could be invoked to impose liability on the candy manufacturer for the misrepresentation.[8]

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[8] In its *amicus* brief, the U.S. Chamber of Commerce likens Good's labeling claim to that of a consumer who buys cookies labeled "Reduced Fat" to curb calorie intake, consumes large quantities of the cookies—thus eliminating any health benefits—and then sues the cookie manufacturer because the label does "not fully reflect what plaintiffs claim are 'real-world' [eating] conditions." Br. *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petitioners, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs-/07-08/07-562_PetitionerAmCuCoC.pdf. This analogy is not only inapposite, it is absurd. First, cookies are not deadly or addictive like cigarettes. Moreover, unlike tobacco products, cookies are regulated by the U.S. Food and Drug Administration; as such, packages are required to contain nutrition labels by which consumers can compare information such as sugar, fat, and calorie content based on a given serving size. Consumers therefore have sufficient information available to enable them to make a *conscious choice* to eat more than the recommended serving size. In stark contrast, cigarette manufacturers are not required to disclose product ingredients; the only labeling requirements are the warnings mandated by the FCLAA. PMUSA voluntarily added information about tar and nicotine yields and used terms like light and low tar to deceive consumers into believing that switching to light cigarettes offers a health benefit, knowing

Although the manufacturer's claim of lower fat content may be designed to entice health-conscious consumers, much like the light descriptor for cigarettes, the falsity of the descriptor and the consumer deception that occurs create liability pursuant to the longstanding duty not to deceive. The *Cipollone* framework requires that, in the context of the MUTPA's prohibition on deceptive acts, cigarette manufacturers like PMUSA be treated the same as that candy manufacturer.

Importantly, the First Circuit made clear that the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted, some of them not; consequently the same conduct can result in a claim that can be categorized as either a "warning neutralization" claim (preempted) or a fraudulent misrepresentation claim (not preempted)—or both. *Good v. Altria Group*, 501 F.3d at 44-45. Thus, even if this Court were to find that Good's claim about the descriptors constitutes a warning neutralization claim, by suggesting that the brand descriptors ameliorate the impact of the re-

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that the Cambridge Filter Method was inaccurate for measuring human consumption and that smoker compensation behavior would result in virtually no change in tar and nicotine yield in an individual consumer. And smokers do not knowingly "overconsume" light cigarettes. A smoker does not consciously take deeper, longer, or more frequent puffs or smoke a greater number of cigarettes; it is due to the addictive nature of nicotine that the smoker *unconsciously and without choice* compensates for any lowered nicotine by engaging in these behaviors, which lead to the inhalation of greater amounts of tar, thus negating any ostensible health benefits. Offering a reduced fat cookie with accurate nutritional information is not at all similar to offering a deadly and addictive product using deceptive terms in a misleading advertising and promotional scheme.

quired health warnings, it does not follow that those statements could not simultaneously support a non-preempted fraudulent misrepresentation theory of recovery, such as Good's claim that PMUSA deceived her into buying Marlboro Lights cigarettes.

Furthermore, the First Circuit stressed that Good's claim was not based on what PMUSA "should have said," which would render it a failure-to-warn claim, but what PMUSA "did in fact say: that Marlboro Lights . . . have 'lower tar and nicotine' than their full-flavor counterparts," *Id.* at 42, which is false.

C. Other Courts Have Properly Applied *Cipollone* to Exempt State-Law Claims from FCLAA Preemption

That Good's claim is precisely the type of claim found viable in *Cipollone* is supported by the clear majority of courts from around the country. Because a contrary conclusion would mean a reversal of *Cipollone* and a free pass to deceive for cigarette manufacturers—as long as the deception relates to smoking and health—these courts must be right.

Courts that have followed *Cipollone* examined closely the predicate duty on which the plaintiffs' claims against a cigarette manufacturer are based. Those courts have consistently found that claims based on the duty not to deceive, like Good's claims here, are not preempted by the FCLAA even if the misrepresentations or fraud relate to smoking and health. For example, the Second Circuit Court of Appeals found that a health insurer's claims that PMUSA distorted public knowledge of the health dangers associated with smoking, resulting in increased costs of treating insured smokers, were claims of misrepresentation, the predicate duty of which is the duty

not to deceive. As such, the insurer's claims were not preempted by the FCLAA. *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211 (2d Cir. 2003). Similarly, the Sixth Circuit Court of Appeals, although clearly frustrated with the plaintiff's inarticulately drafted Complaint, parsed through the claims and found that the fraud claims against cigarette manufacturers that were premised on a general duty not to deceive were not preempted by the FCLAA. *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 348 (6th Cir. 2000).

These courts have not ignored *Cipollone*'s determination that some claims are preempted by the FCLAA; rather, the courts have demonstrated a keen understanding of the distinct claims allowed and disallowed by this Court. In *Blue Cross Blue Shield*, the Second Circuit made clear that the jury instructions insured that "liability was predicated on [the cigarette manufacturers'] affirmative misrepresentations rather than on their alleged failures to disclose." 344 F.3d at 222. And in *Glassner*, the Sixth Circuit explained that common-law fraud claims were preempted by the FCLAA to the extent that the claims were predicated on a duty to issue additional or clearer warnings through advertising. 223 F.3d at 348. These decisions fall perfectly within the rubric created in *Cipollone*.

Other state and federal courts have similarly interpreted and applied *Cipollone* to preserve some, but not all, fraud claims even when the fraudulent misrepresentations relate to smoking and health.[9] Per-

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[9] *See, e.g., Gerrity v. R.J. Reynolds Tobacco Co.*, 399 F. Supp. 2d 87 (D. Conn. 2005) (common law tort actions based on state laws not motivated by health concerns, but rather by public policy to protect consumers from fraud were not preempted);

haps the best example here is *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 199 (Minn. Ct. App. 2007) in which the Minnesota Court of Appeals found that manufacturers of light cigarettes knowingly and intentionally engaged in fraud and misrepresentation in advertisements for the purpose of inducing consumers to purchase the low tar and nicotine cigarettes. As with the Second and Sixth Circuits, the Minnesota court distinguished between preempted and non-preempted claims, allowing fraud claims based on the duty not to deceive and disallowing claims that "suggest that [cigarette manufacturers] had a duty to warn consumers about the dangers of smoking light cigarettes." *Id.* at 199. The *Dahl* court examined both the First Circuit's decision in *Good* and a disparate Fifth Circuit Court of Appeals' decision in *Brown v. Brown & Williamson Tobacco Corp.*, 479

Izzarelli v. R.J. Reynolds Tobacco Co., 117 F. Supp. 2d 167 (D. Conn. 2000) (false representation claims based on duty not to deceive, not health and smoking, thus not preempted); *In re Simon II Litigation*, 211 F.R.D. 86 (E.D. N.Y. 2002) (fraud claims not preempted since involved state's traditional police powers, not advertising); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70 (N.D.N.Y.2000) (claim alleging that false statements misled smoker was not preempted); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837 (W.D. Ky. 1999) (non-failure-to-warn strict liability claims and fraud claims based on non-disclosure were not preempted); *Hollar v. Philip Morris Inc.*, 43 F. Supp. 2d 794 (N.D. Ohio 1998) (claims not preempted since based on a state law duty not to make false statements of material fact or to conceal such facts); *Scott v. American Tobacco Co., Inc.*, 949 So. 2d 1266 (La. Ct. App. 4th Cir. 2007) (claims not preempted because tobacco companies intentionally engaged in actions designed to distort the public knowledge concerning smoking and health); *Tomasino v. American Tobacco Co.*, 23 A.D.3d 546, 807 N.Y.S.2d 603 (2d Dep't 2005) (state-law causes for fraudulent concealment of facts regarding dangers of using tobacco products were not preempted).

F.3d 383 (5th Cir. 2007), concluding that the First Circuit's rationale was more persuasive and that the Fifth Circuit misapplied the *Cipollone* framework. *Dahl*, 742 N.W.2d at 194-95.

D. The Fifth Circuit Got it Wrong in *Brown v. Brown & Williamson Tobacco Corp.* by Considering the Merits of the Plaintiff's Claim Rather than the FCLAA Preemption Question

By deciding that the plaintiff's claims were without merit, rather than evaluating whether those claims were preempted, the Fifth Circuit in *Brown v. Brown & Williamson Tobacco Corp.* erred by placing the cart of merit before the horse of preemption. *See Good v. Altria Group*, 501 F.3d at 45; *Dahl*, 742 N.W.2d at 194-95. As such, the *Brown* decision stands as one court's finding, based solely on the pleadings, that one cigarette manufacturer—Brown & Williamson—did not deceive consumers in the marketing of its light cigarettes. The *Brown* decision is not at all helpful to resolution of the preemption question at issue here.

Although the Fifth Circuit began by correctly stating that "after *Cipollone*, cigarette manufacturers, under certain circumstances, may be held liable for fraud under state law for affirmative misrepresentation of material fact," *Brown*, 479 F.3d at 391, the court then failed to apply the *Cipollone* rubric. Instead, the court considered the merits of the fraud allegation, finding that because "cigarettes labeled as light or low-tar do deliver less tar and nicotine as measured" by the Cambridge Filter Method, the terms light and lowered tar and nicotine cannot be "inherently deceptive or untrue." *Id.* at 392. The court held that Brown failed to allege fraud or misrepresenta-

tion; therefore, Brown failed to allege claims that fit in the non-preempted category. *Id.* at 395. The Fifth Circuit's rationale is incorrect because it confuses an assessment of the merits of a fraudulent misrepresentation case with the determination of whether the claim is preempted under the FCLAA. *See Dahl*, 742 N.W.2d at 194-95.

This Court should be careful to determine only whether Good's claim is preempted by the FCLAA; consideration of the viability of Good's fraud claim is not appropriate here. As the First Circuit correctly stated, "the assertion that Marlboro Lights and Cambridge Lights rate lower in tar and nicotine than their full-flavored cousins according to the Cambridge Filter Method may ultimately affect whether the plaintiffs can show that the challenged statements are false;" however, the effect of the descriptors' claimed accuracy does not have any relevance in deciding the express preemption question under the FCLAA. *Good v. Altria Group*, 501 F.3d at 44-46; *see also Cipollone*, 505 U.S. at 524 ("We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume, *arguendo*, that they are."); *accord Dahl*, 742 N.W.2d at 194 (holding that "appellants may ultimately prove unsuccessful in their claims, but this does not influence our preemption analysis").

Because the First Circuit got it right, this Court should affirm the First Circuit's rationale and application of the *Cipollone* exception to FCLAA preemption for state-law claims grounded on the duty not to deceive, refuse to cut off the longstanding and crucial avenue of protection for citizens afforded by state consumer protection statutes, and give Good the

opportunity she deserves to have her MUTPA claim considered on the merits.

III. Considering the Outrageous Historical Conduct Revealed in Internal Tobacco Industry Documents, *Cipollone's* Fraudulent Misrepresentation Exception Should Be Kept Alive and Read Broadly

Petitioners seek to remedy their inability to escape the consequences of their egregious conduct toward Good and others by asking this Court to overturn the decision in *Cipollone* simply because the decision stands in Petitioners' way. Pet. Br. at 43 ("If this Court were to conclude that respondents' claims are not expressly preempted under the framework articulated by the *Cipollone* plurality, then [this Court] should reexamine that framework."). If there has ever been an appropriate context in which to reinforce the plurality's decision in *Cipollone*, the light and low tar and nicotine descriptor context is the one.

Fraudulent misrepresentation in the tobacco industry context has been given new meaning since the signing of the Master Settlement Agreement ("MSA") in 1998 by PMUSA and three other cigarette manufacturers.[10] At the time of the *Cipollone* opinion in 1992—six years before the MSA—a plurality of this Court understood that there may be valid state-law claims of fraud or misrepresentation specifically against the tobacco industry. This Court's decision

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[10] Originally signed by PMUSA, R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company, the MSA was later signed by over forty additional cigarette manufacturers. Master Settlement Agreement (Nov. 23, 1998), *available at* http://www.naag.org-/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605-_cigmsa.pdf.

was prescient, given the industry's outrageous historical conduct revealed in internal industry documents made public as a result of the MSA. *See, e.g.*, www.tobaccodocumentsonline.org for an extensive online compilation of these documents.

The internal documents reveal a persistent and pernicious approach by cigarette manufacturers to addict smokers and avoid liability for the consequences. Specifically, PMUSA actively reassured health-conscious smokers that light cigarettes were a less risky alternative to regular brands, knowingly used defective filters, and manipulated public opinion and policy by questioning research findings implicating smoking as a cause of cancer. K.M. Cummings & R. W. Pollay, *Exposing Mr Butts' tricks of the trade*, Tobacco Control 11 (Suppl I), i1–i4 (2002).

In 1992, a plurality of this Court determined that the fraudulent misrepresentation exception to FCLAA preemption was important for the protection of consumers, without knowing the true breadth of the tobacco industry's deceit. Not only has PMUSA defrauded its customers in the past but today—sixteen years after *Cipollone*—the company continues to sell and market the same Marlboro Lights cigarettes despite lingering consumer misperceptions about risk reduction. Keeping *Cipollone's* fraudulent misrepresentation exception alive and reading it broadly is imperative; otherwise cigarette manufacturers will be granted special protection from state police powers and allowed to deceive consumers on issues concerning smoking and health without penalty.

A broad interpretation is also consistent with recent domestic and international determinations in the judicial, legislative, and policy arenas that descriptors such as light and low tar and nicotine—

and similar offshoots—are fraudulent and should be banned. In 2006, the U.S. District Court for the District of Columbia permanently enjoined PMUSA from using the descriptors "low tar," "light," "ultra light," "mild," "natural," and like phrases on its cigarette packaging and in its advertising. *United States v. Philip Morris USA*, 449 F. Supp. 2d 1. That order has been stayed pending PMUSA's appeal.

Moreover, Congress is considering legislation that would empower the U.S. Food and Drug Administration to regulate tobacco products and to ban the use of descriptors such as "light" or "low tar." *See* Family Smoking Prevention and Tobacco Control Act, H.R. 1108, S. 625, 110th Cong. §911 (b) (2) (A) (ii) (2007).[11] Finally, the World Health Organization's Framework Convention on Tobacco Control (FCTC), an international public health treaty, requires parties to prohibit the use of deceptive descriptors in cigarette packaging and labeling by 2010, listing low tar, light, ultra light and mild as examples of such descriptors. *See id.*, Art. 11, Packaging and labeling of tobacco products, 56th World Health Assembly, 21 May 2003 (adopted unanimously). One hundred and fifty-six countries, many for whom tobacco growing is an essential component of the economy, have ratified the treaty. *See* http://www.who.int/tobacco/framework/countrylist/en/index.html (last visited June 11,

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[11] The Senate version has 55 co-sponsors and was approved by the Health, Education, Labor and Pensions Committee on August 1, 2007. The House companion bill has 219 co-sponsors—a majority of the House—and was approved by the House Energy and Commerce Committee on April 2, 2008, by a bipartisan vote of 38-12. *See* Alex Wayne, "Bill to Force FDA Tobacco Regulation Moves Through Energy and Commerce," *CQ Today-Regulatory Policy*, Apr. 2, 2008, *available at* http://public.cq.com/docs/cqt/news110-000002696077.html (last visited June 11, 2008).

2008) (listing countries that have signed and subsequently ratified, accepted, approved, and/or confirmed the FCTC). Under then-Secretary of the Department of Health and Human Services, Tommy Thompson, the United States signed the FCTC in 2004; the treaty has not been presented to Congress for ratification.

A federal judge, dozens of members of Congress, and more than a hundred countries recognize the devastating impact that the false consumer choice of light and low tar and nicotine cigarettes has had on public health. That such action is necessary to prevent continuing deception by cigarette manufacturers highlights the necessity for a sustained and broad reading of the fraudulent misrepresentation exception to FCLAA preemption provided under this Court's decision in *Cipollone*.

CONCLUSION

For the foregoing reasons, this Court should affirm the First Circuit's decision, find that Good's claim of fraudulent misrepresentation under the MUTPA is not expressly preempted by the FCLAA, and allow Maine to continue to protect its citizens from unfair or deceptive acts or practices by manufacturers like PMUSA.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(8)

No. 07-562

FILED
APR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ALTRIA GROUP, INC., *et al.*,

Petitioners,

v.

STEPHANIE GOOD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF REVERSAL

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FEDERAL TRADE COMMISSION MATERIALS

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S.M. Strook & Wade H. Ellis, *In the Matter of the Power of the Federal Trade Commission to Give "Advice, Definite Guidance and Information" to Business Men* (Apr. 28, 1915) (FTC Rec. No. A-1384) 14

EXECUTIVE MATERIALS

President Woodrow Wilson, *Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies*, Jan. 20, 1914, H.R. Doc. No. 625, 63d Cong., 2d Sess. 3 (Jan. 20, 1914).... 11, 12

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BOOKS AND TREATISES

JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004)..... 11

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WILLIAM H.S. STEVENS, UNFAIR COMPETITION: A STUDY OF CERTAIN PRACTICES (1917) 12

MISCELLANEOUS

THE FEDERALIST NO. 27 (Alexander Hamilton) (Clinton Rossiter ed. 1961) 6

James A. Emery, National Association of Manufacturers, *A Handbook of the Federal Trade Commisssion Act* (1915) (FTC Library No. HD-2777.E6) 12

Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) 11, 12, 14

Milton Handler, *The Constitutionality of Investigations of the Federal Trade Commission: I*, 28 COLUM. L. REV. 708 (1928) 11

Milton Handler, *The Constitutionality of Investigations of the Federal Trade Commission: II*, 28 COLUM. L. REV. 905 (1928) 14

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the nation's oldest and largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to the economic growth of the United States and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future and living standards.

The NAM does not condone deceptive conduct in any form or for any purpose. However, the NAM does seek reversal of the decision below, which holds that only a formally promulgated agency rule can preempt state laws of general application. If allowed to stand, the ruling below would subvert the functioning of a carefully crafted federal regulatory regime, thwarting the federal government's goal of maintaining a uniform national policy in the subject industry—with the likely result being the regulatory destabilization of a myriad of other industrial sectors under comprehensive federal regulation and oversight.

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[1] All parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Many of the nation's manufacturers participating in federally regulated industries could be profoundly affected by a ruling affirming the decision of the court of appeals in any number of ways, not least of which would be the ability of them to rely upon the guidance of their respective federal regulators with certainty and with confidence—whether or not the regulator's position is expressed in a formally promulgated rule. Manufacturers need the assurance of the Court that in relying upon the guidance of federal regulators, they will not expose themselves to state law liability in different courts across the country.

SUMMARY OF ARGUMENT

The authority vested in the Federal Trade Commission and the extensive exercise of that authority in this industry preempt the state law deceptive trade practices claims before the Court. Federal agencies have the power to preempt state law by a variety of means; no formally promulgated rule is required. As a state law tort claim cannot survive federal preemption where it frustrates the purposes and objectives of federal law, the enforcement of state law deceptive trade practices statutes must yield not only to federal statutes and formally promulgated regulations, but also to less formal regulatory guidance, such as policy statements, enforcement actions, and consent orders, where the application of those state statutes would conflict with such regulatory guidance. Were it otherwise, federal objectives would be subordinated to varying and competing state interests—precisely

the result that the Supremacy Clause should prevent.

Born of a national mandate and the product of a singular moment in the regulatory history of our nation, the Federal Trade Commission ("FTC" or "Commission") was created to provide prospective guidance to businesses in any number of ways. FTC guidance beyond that set forth in formally promulgated rules thus is of exceptionally strong preemptive force. In passing the Federal Trade Commission Act of 1914, 15 U.S.C. § 41, *et seq.* ("FTC Act"), Congress assembled a federal body of experts that would have the flexibility to provide prospective guidance to American businesses. Congress amended the FTC Act in 1938 to empower the FTC to forestall deceptive acts and practices, and again in 1975 to increase its enforcement authority while simultaneously imposing more demanding rulemaking procedures than those applicable to other federal agencies under the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.* ("APA"). Despite making the procedures for promulgating trade regulation rules more burdensome to the FTC, Congress, at the same time, expressly preserved the authority of the FTC to provide regulatory guidance on deception in the marketplace other than by way of formal rule. Empowered with the express statutory authority to issue guidance on what is (and what is not) deceptive, the Commission has defined the meaning of deception under the FTC Act not in a formally promulgated rule, but, rather, in a policy statement. Given the FTC's historical mandate and statutory authority, the preemptive effect of FTC

regulation does not depend upon the form that the regulation takes.

The Labeling Act, 15 U.S.C. § 1331, *et seq.*, at once reflects a desire to subject this industry to a single, uniform set of federal standards in order to provide consistency in the marketplace and leaves the FTC with the authority to further that goal. As contemplated by the Act, the FTC provides the expertise to ensure that the purposes and objectives of the Act are fulfilled. In keeping with its crucial role as an expert and advisory body in the area of advertising and labeling, the FTC has guided this industry and maintained uniformity and consistency through a variety of means. Taken together, the Labeling Act and FTC regulation preempt state law causes of action that would intrude upon the FTC's ability to police this industry as it sees fit. Allowing the state law claims pressed here to countermand the FTC's guidance would place in the hands of generalist judges and jurors what Congress has intended be placed within the hands of an expert federal agency. The Commission's focus has been trained on this industry continually since the early days of its existence, and it has accepted that which is challenged here. The substance and the manner of the Commission's regulation of this industry cannot lightly be set aside.

While the national interests at stake are substantial, the parochial interests advanced are modest. Private enforcement of the Maine Unfair Trade Practices Act, 5 ME. REV. STAT. § 205, *et seq.* ("MUTPA"), furthers no "traditional police power" that would save it from preemption; the act is

entirely derivative of the FTC Act. Indeed, the FTC has been regulating this industry far longer than MUTPA has been in effect, as it was only enacted in 1969. The deceptive trade practices claim before the Court is not one that would supplement an otherwise consistent federal enforcement regime. Rather, it would be wholly at odds with federal law and, therefore, is far less deserving of preservation than were it otherwise. The FTC is empowered to police and punish practices that might violate its guidance; private enforcement is neither warranted, nor needed.

Amicus curiae respectfully submits that the decision of the court of appeals should be reversed.

ARGUMENT

THE AUTHORITY VESTED IN THE FEDERAL TRADE COMMISSION AND THE EXTENSIVE EXERCISE OF THAT AUTHORITY IN THIS INDUSTRY PREEMPT THE STATE LAW DECEPTIVE TRADE PRACTICES CLAIMS BEFORE THE COURT

I. FEDERAL REGULATORY GUIDANCE PREEMPTS STATE LAW DECEPTIVE TRADE PRACTICES CLAIMS THAT CONFLICT WITH FEDERAL POLICY

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). "[I]n Order to form a more perfect Union," the Framers made certain that federal law would be "the supreme Law of the Land;

. . . any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. CONST. preamble & art. VI, cl. 2; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824) (Marshall, C.J.); THE FEDERALIST No. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed. 1961). "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). State law conflicts with federal law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872 (2000), including where it "penaliz[es] . . . conduct that Congress has . . . excluded from sanctions." *Crosby*, 530 U.S. at 378; *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Preemption is "compelled whether Congress' command is explicitly stated in [a] statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Federal agencies have the power to preempt state law by a variety of means; no formally promulgated rule is required. In fact, it would "stultify the administrative process," *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), to deprive less formal regulatory guidance of its rightful preemptive force. Moreover, "[t]o insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Geier*, 529 U.S. at 872. As with federal regulations, which

have "no less pre-emptive effect than federal statutes," *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), less formal agency guidance "warrant[s] respect." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004). Regulatory guidance, which may come in any number of forms, such as policy statements, enforcement actions, and consent orders, reflects a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Limiting preemption to formally promulgated rules ignores the fact that the Court has accorded deference "not only to agency regulations, but [also] to authoritative agency positions set forth in a variety of other formats." *Christensen v. Harris County*, 529 U.S. 576, 590 (2000) (Scalia, J., concurring) (citing cases).[2]

Federal agencies are not constrained to act only by way of formally promulgated rules because "any rigid requirement to that effect would make the administrative process inflexible and incapable of

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[2] *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (adjudication); *NationsBank of N. C., N. A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (letter of Comptroller of the Currency); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-48 (1990) (decision by Pension Benefit Guaranty Corp. to restore pension benefit plan); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 978-79 (1986) (FDA's "longstanding interpretation of the statute" reflected in no-action notice).

dealing with many of the specialized problems which arise." *Chenery*, 332 U.S. at 202; *see also NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974); *Beltone Electronics Corp. v. FTC*, 402 F. Supp. 590, 602 (N.D. Ill. 1975). Indeed, flexibility in the manner of regulation is integral to the administrative process, for agencies "do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457 (2007); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).[3]

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[3] Informal agency actions "comprise around 90 percent of all administrative action." WILLIAM J. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 261 (4th ed. 2000). In enacting the APA, Congress deliberately "avoided codifying informal procedures." FOX, *supra*, at 265 n.12. The chair of the committee whose report resulted in the APA explained that doing so "would not be of service to the citizen; that it would not be of service to the Government and that it [would be] an entirely futile thing to do." *Hearing Before the Subcomm. on the Judiciary on S.674, S.675, and S.918*, 77th Cong., 1st Sess. 804 (1941) (statement of Dean Acheson).

Among its many forms,[4] preemptive regulatory guidance may stem from an adversarial proceeding. "[W]here a guideline is laid down in an individual case it is, like many common law rules, generally obeyed by those similarly situated." *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 685 (D.C. Cir. 1973). A consent order binding on one party thus serves not only to guide fellow market participants, but also to preempt state laws that would conflict with the federal policy advanced by the order. *See, e.g., General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990).

As "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute," *BMW v. Gore*, 517 U.S. 559, 573 n.17 (1996), a state law tort claim cannot survive federal preemption where it frustrates the purposes and objectives of federal law. *See, e.g., Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1020 (2008); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 452 (2005);

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[4] *See, e.g., Geier*, 529 U.S. at 869 (interpretive statements and history of agency oversight); *McDermott v. Wisconsin*, 228 U.S. 115, 127 (1913) (advisory letter); *Cellco P'ship v. Hatch*, 431 F.3d 1077, 1081 (8th Cir. 2005) (adjudication); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1415-16 (4th Cir. 1994) (consent order); *General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (consent order); *Alaska v. Dep't of Transp.*, 868 F.2d 441, 446 (D.C. Cir. 1989) (exemption orders); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 23 (Cal. 2004) (letter order). Even an agency decision not to regulate may have preemptive effect. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002); *cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (non-enforcement is within the sole discretion of federal agencies).

Geier, 529 U.S. at 869; *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-28 (1995). This is especially so where "the subject matter is technical [and] the relevant history and background are complex and extensive," *Geier*, 529 U.S. at 883, as well as where the asserted claim would encroach upon "an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). In particular, state law deceptive trade practices claims that would have a "'significant' and adverse 'impact'" upon interstate commerce, such that enforcement could give rise to a "state regulatory patchwork," are preempted where a federal regulatory regime seeks to establish national uniformity and consistency. *Morales v. TWA*, 504 U.S. 374, 390 (1992) (quoted in *Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 995-96 (2008)).

II. FTC GUIDANCE OTHER THAN THAT SET FORTH IN FORMAL RULES CAN PREEMPT CONFLICTING STATE LAW

FTC guidance beyond that set forth in formally promulgated rules is of exceptionally strong preemptive force; the FTC was created to provide just such guidance to American businesses. The FTC is an independent agency with its own set of rulemaking procedures. It is specifically charged with the duty to provide guidance on deception in the marketplace beyond that which it promulgates in formal trade regulation rules. Indeed, it has defined "deception" within the meaning of the FTC Act in a policy statement. Given the FTC's historical mandate and statutory authority, any "legislative

rules vs. other action dichotomy," *EEOC v. ARAMCO*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring), is inapplicable to FTC guidance.

A. One of the Principal Reasons for the Existence of the FTC Is to Provide Regulatory Guidance

Congress created the Federal Trade Commission in the wake of the 1912 presidential campaign, in which candidates Taft, Wilson, and Roosevelt all ran on party platforms that sought to strengthen and redefine the federal government's role in regulating business. *See* Milton Handler, *The Constitutionality of Investigations of the Federal Trade Commission: I*, 28 COLUM. L. REV. 708, 724 (1928).[5] After winning election, President Wilson "proposed an investigatory and advisory agency" that would become the Federal Trade Commission. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 52 (2003). As the President implored Congress prior to its passing the FTC Act:

> [T]he business men of the country desire something more than that the menace of legal process in these

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[5] *See also National Petroleum*, 482 F.2d at 686 n.15; 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3703 (Earl W. Kintner ed. 1982); Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 ANTITRUST 71 (Spring 2002); *see generally* JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004).

> matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

President Woodrow Wilson, *Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies*, H.R. Doc. No. 625, 63d Cong., 2d Sess. 3, 6 (Jan. 20, 1914), *reprinted in* Kintner, *supra*, at 3748. Just "[t]wo days later, in publicly declared consonance with this recommendation, identical proposals were presented in the House by Mr. Clayton . . . and in the Senate by Mr. Newlands." James A. Emery, National Ass'n of Manufacturers, *A Handbook of the Federal Trade Commission Act*, at 7 (1915) (FTC Library No. HD-2777.E6). The "concern over judicial delay, inefficiency and uncertainty was echoed time and again throughout the 1914 debates over the form a commission would take." *National Petroleum*, 482 F.2d at 689; *see also* Kintner, *supra*, at 3703-05; WILLIAM H.S. STEVENS, UNFAIR COMPETITION: A STUDY OF CERTAIN PRACTICES 1-2 (1917); Milton Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 COLUM. L. REV. 527, 532-33 (1931). Ultimately, "[t]he FTC was created to Wilson's specifications." Winerman, *supra*, at 38.

As the President would confirm while running for reelection in 1916, the Commission was assembled in 1914 "to supply the business community, not merely with lawyers in the

Department of Justice who could cry, 'Stop!', but with men in such tribunals as the Federal Trade Commission, who could say, 'Go on,' who could warn where things were going wrong and assist instead of check." President Woodrow Wilson, *An Address to the Commercial Club of Omaha*, Oct. 5, 1916, *in* 38 THE PAPERS OF WOODROW WILSON 336, 341 (Arthur S. Link ed. 1982).[6] A memorandum filed with the Commission in only the third month of its existence reflects this understanding of the FTC's advisory role. *See* Minutes of the Federal Trade Commission, Apr. 28, 1915 (recording receipt of S.M. Strook & Wade H. Ellis, *In the Matter of the Power of the Federal Trade Commission to Give "Advice, Definite Guidance and Information" to Business Men* (Apr. 28, 1915) (FTC Rec. No. A-1384)). The memorandum reports that "the whole contemporaneous history of the passage of the [Federal] Trade Commission act establishes beyond question that its primary object was to afford to business men the opportunity to know in advance whether or not some contemplated business venture or some trade practice is going to be approved or disapproved." *Id.* at 19. Within the

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[6] President Wilson expressed similar sentiments throughout his 1916 reelection campaign. *See, e.g.*, Link, *supra*, at 129, 136 (explaining in his speech accepting the nomination that the creation of the FTC "relieved business men of unfounded fears" and "removed the barriers of misunderstanding" for manufacturers' enterprises); at 265 (observing that the FTC transformed the United States government from an "antagonist of business" into a "friend of business"); and at 478-79 (describing how the FTC's role is to "mediate between the law and business," thus providing businessmen with a "complete understanding" of the law).

first fifteen years of its existence, the Commission's reports providing American businesses with guidance would become "classics in the field of marketing." Milton Handler, *The Constitutionality of Investigations of the Federal Trade Commission: II*, 28 COLUM. L. REV. 905, 937 (1928).

With the powers granted by Congress, "then, as now, the agency combined formal powers to investigate . . . formal powers to prosecute . . . and informal authority to educate and work with business to facilitate compliance with the law (those [powers] emphasized by Wilson)." Winerman, *supra*, at 97. As this Court has recognized:

> [T]he language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service . . . free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

Humphrey's Executor v. United States, 295 U.S. 602, 625-26 (1935). The FTC Act is "one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process." *United States v. Morton Salt Co.*, 338 U.S. 632, 640 (1950). The Commission's "members are called upon to exercise the trained judgment of a body of experts

appointed by law and informed by experience." *Humphrey's Executor*, 295 U.S. at 624.

"[W]holly apart from the question of rule-making power [the FTC] exerts a powerful[] regulatory effect on those business practices subject to its supervision." *National Petroleum*, 482 F.2d at 685. Federal courts and state authorities alike agree that FTC consent orders have preemptive effect where state law would conflict with the policies advanced in such orders. *See, e.g.*, *Abrams*, 897 F.2d at 39 (FTC consent orders reflecting a "reasonable policy choice of a federal agency and issued pursuant to a congressional grant of authority may preempt state legislation"); *In re Nutri-System L.P.*, No. 96-773, Conn. Dep't of Consumer Protection (Nov. 1, 1996) (following *Abrams* in holding that an FTC consent order preempted state enforcement against conduct that otherwise may have violated the Connecticut Unfair Trade Practices Act). Indeed, the FTC has maintained that its "exercise of *any authority* under the FTC Act may preempt state law when it conflicts with it." Brief of *Amicus Curiae* Federal Trade Commission at 6-7, *General Motors Corp. v. Abrams*, 703 F. Supp. 1103 (S.D.N.Y. 1989) (No. 86 Civ. 9193) (emphasis in original). As with other expert agencies, this view "warrant[s] respect." *Alaska Dep't*, 540 U.S. at 488.

B. The FTC Has the Power and Expertise to Police Deceptive Practices in the Marketplace

The FTC defines what is (and what is not) a deceptive trade practice. Congress amended the FTC Act in 1938 by passing the Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111, which endowed the Commission with the express power under Section 5 of the FTC Act to forestall "deceptive acts or practices." 15 U.S.C. § 45(a)(1); *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). In so doing, Congress made a fundamental policy judgment regarding the FTC's "expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures were necessary." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 995 (D.C. Cir. 1973). This Court has deferred to FTC guidance on deceptive practices, in recognition that the "Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 48 (1965).

Congress confirmed the distinctive status of FTC guidance in this area when it passed the Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183, which once again amended the FTC Act to augment the Commission's powers, but, at the same time, imposed unique procedural constraints on the FTC's ability to formally promulgate trade regulation rules.

Unlike other agencies that are subject to the rulemaking procedures of the APA, the FTC has its own set of more elaborate rulemaking procedures to which it must adhere in promulgating rules. 15 U.S.C. § 57a. In putting in place the Commission's formal rulemaking procedures, however, Congress expressly reserved the FTC's "[a]uthority . . . to prescribe . . . general statements of policy with respect to . . . deceptive acts or practices." *Id.*, § 57a(a)(1)(A). While, to be sure, other federal agencies have the authority to issue policy statements under the APA, 5 U.S.C. § 553(b)(A), that the FTC power to do so was explicitly preserved, while, at the same time, its ability to promulgate rules was made more burdensome, confirms the significance of this power. Had Congress wanted to confine the FTC to regulate only by resort to its formally promulgated trade regulation rules, it would not have expressly preserved the Commission's power to provide regulatory guidance other than by formal rule in the 1975 Act. This express preservation of power "cannot be regarded as mere surplusage; it means something." *Potter v. United States*, 155 U.S. 438, 446 (1894) (quoted in *Carter v. United States*, 530 U.S. 255, 262 (2000)); *accord Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233 (1947).

In furtherance of its statutory authority, the FTC has issued a policy statement defining what is "deception." *See* FTC POLICY STATEMENT ON DECEPTION, *in* Letter from James C. Miller III, Chairman of the FTC, to Hon. John D. Dingell, 4 Trade Reg. Rep. (CCH) ¶ 13,205 (Oct. 4, 1983) (appended to *In the Matter of Cliffdale Associates,*

Inc., 103 F.T.C. 110, 174 (1984)), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm. While not the product of any formal rulemaking procedure, the policy statement represents the considered and expert judgment of the Commission and has the full force and effect of federal law; it was "developed as an authoritative interpretation of deception" that has been followed by the FTC and by federal courts since its issuance nearly twenty-five years ago. ROBERT M. LANGER, ET AL., UNFAIR TRADE PRACTICES, § 2.3 (2003) (discussing policy statement and citing cases).

The FTC has a "broad mandate to prevent public deception in the give and take of the market place," and federal courts have "consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labeling and advertising habits." *In the Matter of Colgate-Palmolive Co.*, 62 F.T.C. 1269, 1276 (1963). The FTC's guidance in this arena "serve[s] to inform the public and the bar of the interpretation which the Commission . . . will place upon advertisements using the words and phrases therein set out . . . . Only by consistent interpretation can some order be brought to the semantic jungle of advertising." *In the Matter of Gimbel Bros.*, 61 F.T.C. 1051, 1073 (1962). The "special competence of the Commission" in assessing deceptiveness is "for all practical purposes supreme." *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944). Given the FTC's mandate and statutory authority, the preemptive

effect of FTC regulation does not depend upon the form that it takes.

III. PREEMPTION OF THESE CLAIMS WOULD PROMOTE FEDERAL OBJECTIVES WITHOUT INTRUDING UPON ANY IMPORTANT STATE INTERESTS

The state law deceptive trade practices claims at issue would punish that which the federal government has accepted as part of a regulatory regime that seeks national uniformity and consistency. State laws presenting such conflicts with federal law have been preempted in numerous contexts, including: labeling bacon[7] and corn syrup;[8] manufacturing automobiles[9] and helicopters;[10] marketing medical devices,[11] pesticides[12] and alcohol;[13] operating tanker vessels,[14] airports[15] and

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[7] *Rath Packing*, 430 U.S. at 543.

[8] *McDermott v. Wisconsin*, 228 U.S. 115, 127 (1913).

[9] *Geier*, 529 U.S. at 883.

[10] *Boyle v. United Techs. Corp.*, 487 U.S. 500, 51[illegible]3 (1988).

[11] *Riegel*, 128 S. Ct. at 1020.

[12] *Bates*, 544 U.S. at 452.

[13] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984).

[14] *Locke*, 529 U.S. at 117; *Ray v. ARCO*, 435 U.S. 151, 178 (1978).

[15] *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 627 (1973).

paper mills;[16] removing hazardous waste;[17] and engaging in corporate takeovers.[18] A "specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking," is not a prerequisite to federal supremacy, for any such requirement surely would "tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Geier*, 529 U.S. at 872. Regardless of the form in which the regulation is expressed, state laws of general application are preempted where competing state interests would frustrate federal objectives.[19] The Commission has guided this

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[16] *International Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

[17] *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109 (1992).

[18] *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982). A majority of the Court decided *Edgar* on dormant Commerce Clause grounds, but, in cases such as this, the constitutional concerns are not dissimilar. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (striking down state labeling law that conflicted with the "Commerce Clause's overriding requirement of a national 'common market'").

[19] *See, e.g., Geier*, 529 U.S. at 869 (interpretive statements and history of agency oversight); *McDermott*, 228 U.S. at 127 (advisory letter); *Cellco P'ship*, 431 F.3d at 1081 (adjudication); *Feikema*, 16 F.3d at 1415-16 (consent order); *Abrams*, 897 F.2d at 39; *Alaska v. DOT*, 868 F.2d at 446 (exemption orders); *Dowhal*, 88 P.3d at 23 (letter order); *cf. also Aguirre-Aguirre*, 526 U.S. at 425 (adjudication); *NationsBank*, 513 U.S. at 256-57 (letter of Comptroller of the Currency); *LTV Corp.*, 496 U.S. at 647-48 (decision by Pension Benefit Guaranty Corp. to restore pension benefit plan); *Young*, 476 U.S. at 978-79 (no-action notice).

industry by its policy statements, enforcement actions, consent orders, and other actions not articulated in formally promulgated trade regulation rules. In doing so, the Commission has furthered the purposes and objectives of federal law. The claims before the Court would have a significant and adverse impact on the substantial federal interests at stake. Preemption would promote federal policy without improperly intruding upon any fundamentally important state interests. The state law claims must yield.

A. FTC Regulation of this Industry Has Been Extensive

This industry has been heavily regulated by the FTC. This Court has recognized as much on more than one occasion, and so *amicus curiae* will not recount here the storied regulation of this sector; the record, as reported elsewhere, *e.g.*, Pet. Br. at 2-13, 46-54, speaks for itself. Suffice it to say, that from its infancy, the Commission has kept a watchful eye on the industry and continues to do so. The FTC's already trained focus on this industry and on the conduct at issue was sharpened by the enactment and amendment of the Labeling Act. With its expertise and authority to decide what is (and what is not) deceptive, the Commission has mandated the use of the FTC Method, considered and rejected proposals to modify or abandon the FTC Method, brought enforcement actions and entered into consent orders to ensure compliance with the FTC Method, and otherwise accepted the use of the descriptors at issue. Such guidance in its myriad of forms reflects a "body of experience and informed

judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. This is especially so since the FTC has "applied its position with consistency." *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008).

While no formal rule mandating the descriptors in controversy was ever promulgated, to allow the state law claims at issue to proceed would grant private parties and state enforcers a "virtual power of review over the federal determination" that these trade practices are not deceptive. *Sperry v. Florida*, 373 U.S. 379, 385 (1963). It thus is "essential to the administration" of the Labeling Act and the FTC Act that these determinations be left to the Commission "if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). As with other agencies in other industries, "Congress has delegated to [the FTC] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive." *Geier*, 529 U.S. at 883. "In these circumstances, the agency's own views should make a difference." *Id.*; *cf. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

B. The Claims Would Have an Adverse Impact on Federal Policy

The Labeling Act at once reflects a Congressional desire to subject this industry to a single, uniform set of federal standards, and leaves the FTC with the authority to further that goal. 15

U.S.C. § 1336. The FTC's well-established powers taken together with the Labeling Act's directive combine to create a powerful preemptive force. In keeping with its historically key role as an expert and advisory body, the FTC has guided the industry and maintained uniformity and consistency through a variety of means. The state law claims pressed here would have a significant and adverse impact upon this federal regulatory regime.

Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007), is instructive.[20] In *Billing*, the Court dismissed a private lawsuit in deference to a regulatory regime and agency—the SEC—vested with the authority and expertise to "distinguish what is forbidden from what is allowed . . . with confidence." 127 S. Ct. at 2395. The Court explained that a history of continuously exercised agency authority within the "heartland" of its mission displaces conflicting laws of general application where there is (i) a need for regulatory expertise to draw complex lines separating permitted from forbidden conduct, and (ii) a serious risk that generalist courts will produce inconsistent results, deterring practices allowed by expert regulators. *Id.* at 2396. Such is the case here.

Assessing and ensuring the propriety of the descriptors at issue is no mean feat and, as

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[20] Although *Billing* was an implied repeal case, it is nevertheless apt, for "[t]he question whether an Act of Congress has repealed an earlier federal statute is similar to the question whether it has pre-empted a state statute." *Branch v. Smith*, 538 U.S. 254, 285 (2003).

envisioned by Congress, is rightfully left to the discretion of the Commission—with respect to both substance and manner. By allowing the FTC to police the industry, Congress has asked the FTC to bring its "specialized experience to bear on the subtle questions in this case." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). The FTC recognizes that when it comes to product labeling and advertising, too much information many times can be worse than too little. The Court has endorsed the FTC's considered view that the provision of certain truthful information may have the "paradoxical effect of stifling the information that consumers receive." *Morales*, 504 U.S. at 389-90. Regulating the use of the descriptors thus requires "the exercise of an informed, expert judgment." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613-14 (1946).

Through its guidance and oversight in this industry, the FTC has embraced the virtues of consistency and national uniformity, in keeping with the purposes and objectives of the Labeling Act. It has selected a variety of means by which to further its regulation of this industry; its judgment as to the manner in which it seeks to further federal policy can no more be second-guessed by the application of state law than can the substance of that policy. To place Congress' and the Commission's "regulatory regime in the shadow of 50 states' tort regimes," *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001), would frustrate the federal objective in achieving national uniformity and consistency, serving to deter practices accepted by the FTC. Successful enforcement of Maine's Little FTC Act,

MUTPA, surely would lead to the enforcement of CUTPA (Connecticut's Little FTC Act), and so on, and so on, across the entire nation. A deluge of such contrary requirements would have a "'significant' and adverse 'impact'" by undoubtedly producing a "state regulatory patchwork." *Rowe*, 128 S. Ct. at 995-96 (quoting *Morales*, 504 U.S. at 390); *see Billing*, 127 S. Ct. at 2395; *Riegel*, 128 S. Ct. at 1015; *Wolens*, 513 U.S. at 228. This would impermissibly encroach upon the FTC's "responsibility to police fraud consistently with [its] judgment and objectives." *Buckman*, 531 U.S. at 350. As with other such state laws in analogous contexts, the enforcement of MUTPA must yield to contrary federal policy. The application of state law here not only frustrates the federal objective in achieving uniformity and consistency, but also strikes at the heart of the FTC's ability to regulate deception in the marketplace.[21]

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[21] The savings clause contained within the FTC Act, 15 U.S.C. § 57(e), does not blunt the preemptive force of the FTC's guidance. While a clause such as this may preclude field preemption, it "does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869; *see also Dowhal*, 88 P.3d at 23; *compare American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 984 (D.C. Cir. 1985) (acknowledging FTC conflict preemption), *with Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 663 (2d Cir. 1979) (considering FTC field-preemption).

C. Preemption Would Not Intrude Upon Important State Interests

While the national interests at stake are substantial, the parochial interests advanced are modest. No "field which the States have traditionally occupied," *Rice*, 331 U.S. at 230, is implicated by the private enforcement of MUTPA. The Maine law, like other such state laws, is derivative of the FTC Act—it would not exist without it. It tracks the language of the FTC Act and it purports to be "guided by the interpretations given by the Federal Trade Commission." 5 ME. REV. STAT., § 207. It thus does not represent any "historic police power." Indeed, the Commission has been regulating this industry far longer than MUTPA has been regulating anything; it was not enacted until 1969.

Nor is the MUTPA claim pressed here one that would supplement an otherwise consistent federal enforcement regime. If it were, it might be able to coexist with federal law. *See, e.g.*, *California v. ARC America Corp.*, 490 U.S. 93, 104-05 (1989); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). In considering the relative importance of a state's interest, at issue is the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Rath Packing*, 430 U.S. at 526. And although it mimics the FTC Act in form, MUTPA sharply conflicts with federal law in substance. The claim, as it has been articulated, would call for an interpretation of substantive law that is wholly at odds with the interpretation and application of federal law by the FTC. Therefore, despite its facial similarity, the

statute, as applied, is far "less deserving of preservation," *Riegel*, 128 S. Ct. at 1008, than it would be if it were attempting to remedy conduct that actually violated FTC guidance. *Accord Bates*, 544 U.S. at 452-54.

Any concern that preemption might leave a remedial void is for Congress or the Commission to address. *See, e.g., Bates*, 544 U.S. at 458. That a private remedy might be extinguished is neither surprising nor relevant, for preemption "will almost always leave the [alleged] state-law violation unredressed." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981). Preemption, however, would by no means provide the industry with "*carte blanche* to lie to and deceive consumers," *Morales*, 504 U.S. at 391; the FTC is empowered to police and punish practices that would violate its guidance. As with other federal agencies, it has enforcement mechanisms at its disposal that are by no means "toothless," *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008), making private enforcement neither warranted, nor needed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 07-562

FILED
APR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,
PETITIONERS,
v.
STEPHANIE GOOD, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF PETITIONERS

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This brief is filed on behalf of the Product Liability Advisory Counsel ("PLAC") as *amicus curiae* in support of Petitioner, with the consent of the parties.[1]

STATEMENT OF INTEREST

PLAC is a nonprofit association with more than 120 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 800 briefs as amicus curiae in both state and federal courts, including at least 69 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. The corporate members of PLAC are listed in the Appendix.

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[1] Blanket letters of consent from the parties have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its members (through regular dues payments) made a monetary contribution to this brief.

PLAC is well situated to address the issues in this case because its members often have confronted the interplay between the duties imposed by federal regulatory authorities and the standards applied in product liability cases and cases alleging statutory consumer fraud. Further, many PLAC members belong to heavily-regulated industries, and PLAC has a compelling interest in ensuring that express preemption provisions are interpreted in a way that does not frustrate the purposes of federal regulations and subject its members to conflicting requirements set by individual juries applying the laws of 50 states.

STATEMENT OF THE CASE

PLAC joins in the statement of the case provided by the Petitioners (referred to as Defendants in the remainder of this brief). For purposes of this brief, however, it will be helpful to provide additional details concerning the Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5, §205-A et seq., ("MUTPA"), and Plaintiffs' Complaint, which purports to assert a claim under MUTPA. The First Circuit recognized that some claims relating to smoking and health brought under MUTPA would be preempted, but it held that the claim brought in this case is not. As PLAC will demonstrate, the distinctions drawn by the First Circuit, based on the plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), are arbitrary and cannot reflect the intent of Congress as expressed in 15 U.S.C. §1334(b)(hereinafter "§1334(b)").

1. Under §207 of MUTPA, "deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." Me. Rev. Stat. tit. 5 §207. The statute itself does not define "deceptive act," but the Supreme Judicial Court of Maine has defined it to mean "a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." *State v. Weinschenk*, 2005 ME 28, 868 A.2d 200, 206 (2005).

The statute permits the state Attorney General to "make rules and regulations interpreting" §207. Me. Rev. Stat. Ann. tit. 5 §207(2). Under §209 of MUTPA, the Attorney General may also bring an action to restrain by injunction the use of any deceptive act or practice and to seek restitution on behalf of any person who has suffered an ascertainable loss as a result of such an act or practice. Me. Rev. Stat. Ann. tit. 5 §209. Under §213, a private person who purchases or leases goods and who suffers loss of money or property as the result of a deceptive practice may also enforce the statute by bringing an action to recover actual damages or restitution. Me. Rev. Stat. Ann. tit. 5 §213.

2. This is a putative class action brought by private persons seeking billions of dollars under §213 of MUTPA. According to the Complaint, Defendants engaged in "deceptive" practices "to induce cigarette smokers to continue smoking *in spite of growing public awareness of a connection between cigarette smoking and serious health problems.*" (JA 8a, ¶ 2 [emphasis added].) Defendants allegedly sought to "reduce [smokers'] concerns about the negative health implications of smoking" by "introduc[ing] Marlboro Lights and Cambridge Lights into the

market" and selling them "as having decreased tar and nicotine." (JA 11a, ¶¶ 18, 19.)

The Complaint acknowledges that the design of these cigarettes did "provide for a lower measurement of tar and nicotine" as compared to standard cigarettes in "standardized testing by the Federal Trade Commission apparatus." (JA 12a, ¶ 23.) Nevertheless, according to the Complaint, consumers would compensate for the lower tar and nicotine levels in various ways, with the result that Marlboro Lights and Cambridge Lights "did not reduce the delivery of tar or nicotine to the consumer." (JA 13a, ¶ 29.) Plaintiffs allege that Defendants violated MUTPA "through one or more of the following deceptive acts and practices," including "[f]alsely and/or misleadingly represent[ing] that their product is 'light' and/or delivers 'lowered tar and nicotine' in comparison to regular cigarettes." (JA 19a-20a, ¶¶ 54, 54(a).)

3. The trial court in this case held that this claim under MUTPA was preempted by the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Chapter." 15 U.S.C. §1334(b). The First Circuit reversed. *Good v. Altria Group, Inc.*, 501 F.3d 29 (1st Cir. 2007).

Attempting to apply the plurality opinion in *Cipollone*, the First Circuit recognized that Plaintiffs' MUTPA claim would be preempted if it explic-

itly alleged that it was deceptive to describe the cigarettes as "light" or as having "lower tar and nicotine" without a warning or disclosure concerning smoker compensation. *Id.* at 42. The First Circuit also recognized that Plaintiffs' MUTPA claim would be preempted if Plaintiffs were claiming that it was deceptive to describe the cigarettes as "light" or as having "lower tar and nicotine" because those words suggested the cigarettes "did not pose the same grave threats to health announced in the accompanying [federally-mandated] warning label." *Id.* at 43-44.

Nevertheless, the First Circuit held that Plaintiffs' MUTPA claim in this case was not preempted because Plaintiffs were not making either a "failure to warn" claim or a "warning neutralization" claim. Instead, as the First Circuit viewed it, Plaintiffs were simply alleging that Defendants made statements in their advertising that were false. Such claims were not preempted under the plurality opinion in *Cipollone*, the First Circuit opined, because they are not "based on smoking and health" but on "'a more general obligation—the duty not to deceive.'" 501 F.3d at 42, quoting *Cipollone*, 505 U.S. at 528-29.

SUMMARY OF ARGUMENT

If it were not for confusion caused by the plurality opinion in *Cipollone*, the analysis of the express preemption issue in this case would be straightforward and the result of that analysis plain.

Under 15 U.S.C. §1334(b), claims are preempted if they impose "requirement[s] or prohibition[s]," if

those requirements or prohibitions are "with respect to the advertising or promotion of any cigarettes" the packages of which are properly labeled, and if those requirements or prohibitions are "based on smoking and health." 15 U.S.C. §1334(b). Through the mechanism of a liability award, Plaintiffs in this case seek to impose "requirements or prohibitions" on Defendants' "advertising or promotion" of cigarettes. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S.Ct. 999, 1008 (2008)(liability awards generally constitute "requirements" for purposes of express preemption provisions). The requirements or prohibitions that Plaintiffs seek to impose are "based on smoking and health" because they are "intertwined with" and "motivated by" concerns about the effects of smoking on health. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001). Therefore, Plaintiffs' claims are expressly preempted, a result consistent with Congressional intent as expressed in the plain language of the statute.

In contrast, the plurality opinion in *Cipollone*, as evidenced by the First Circuit and other decisions, requires a convoluted analysis that is completely untethered to the language of the statute. Not surprisingly, that analysis leaves the application of Congress's preemption provision to each court's subjective characterization of the plaintiffs' claims and yields results that cannot have been intended by Congress. The plurality opinion in *Cipollone* is not binding on this Court, it is inconsistent with this Court's decision in *Reilly*, and it should be expressly rejected in this case.

ARGUMENT

I.

PLAINTIFFS' MUTPA CLAIM IS EXPRESSLY PREEMPTED BECAUSE IT WOULD IMPOSE A REQUIREMENT WITH RESPECT TO PROMOTION AND ADVERTISING BASED ON SMOKING AND HEALTH

1. With respect to cigarettes labeled in conformity with the Labeling Act, states may not impose any "requirement or prohibition" with respect to "advertising or promotion" that is "based on smoking and health." §1334(b). But for the plurality decision in *Cippolone,* there could be no question that all of these statutory requirements for preemption are met in this case.

First, there is no claim that the cigarettes at issue were not labeled as required by the Labeling Act. Second, Plaintiffs are seeking to obtain a liability award against Defendants for their conduct with respect to the "advertising and promotion" of those cigarettes. Third, a liability award is a "requirement or prohibition" for purposes of express preemption clauses because it "can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Riegel,* 128 S.Ct. at 1008 (internal quotation marks omitted), quoting *Cipollone,* 505 U.S. at 521. Finally, the requirements or prohibitions that Plaintiffs seek to impose on Defendants' advertising and promotion through a liability award are "based on smoking and health" because they are "intertwined with" and "motivated by concerns about smoking and health." *Reilly,* 533 U.S. at 548.

2. But for the confusion created by the plurality opinion in *Cipollone,* it would be obvious that this Court's decision in *Reilly* is controlling on the latter point—the only one at issue in this case. Like MUTPA, the statute at issue in *Reilly* declared "deceptive acts and practices" to be unlawful and authorized enforcement both by the state Attorney General and by private persons injured by deceptive acts or practices. In fact, the relevant provisions of the Massachusetts statute in *Reilly* are identical in substance to the relevant provisions of the Maine statute. *Compare* Mass. Gen. Laws, ch. 93A, §§2, 4 and 9 *with* Me. Rev. Stat. Ann. tit. 5 §§207, 209 and 213. In *Reilly*, the state Attorney General acting under the Massachusetts statute sought to impose requirements or prohibitions on the promotion and advertising of cigarettes; Plaintiffs in this case—private persons acting under the Maine version of the same statute—also seek to impose requirements or prohibitions on the promotion and advertising of cigarettes.

Moreover, the Attorney General in *Reilly,* like Plaintiffs in this case, argued that the requirements or prohibitions imposed under the statute were not preempted because they were not "based on smoking and health" but were instead based on the broader, more general duties created by the statute:

> The plurality [in *Cipollone*] stated that laws based on a "general duty"—such as the duty not to deceive—are not "based on smoking and health" within the meaning of §[1334(b)]. [505 U.S.] at 528-529 (holding fraud claim not preempted). Similarly, the locational restrictions in the Massachusetts regulations, which are based on the general

> proscription on unfair practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws. ch. 93A, §2(a), are not "based on smoking and health" as that phrase in §[1334(b)] was construed in *Cipollone*.

Brief of Respondent Thomas F. Reilly, Attorney General of Massachusetts, at 25, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Nos. 00-596, 00-597), 2001 WL 303038, at *25 (U.S. March 26, 2001).

This Court in *Reilly* rejected this argument, finding that the "context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health." 533 U.S. at 548. This Court recognized that there is a "critical distinction . . . between generally applicable zoning regulations and regulations targeting cigarette advertising." *Id.* at 549-550 (citation omitted). "The latter type of regulation, which is inevitably motivated by concerns about smoking and health, squarely contradicts the [Labeling Act]." *Id.*

Absent the plurality opinion in *Cipollone*, there would be no basis for distinguishing the facts and circumstances of this case from those in *Reilly*. Both this case and *Reilly* involve requirements or prohibitions that "target [] cigarette advertising," that are "intertwined with the concern about cigarette smoking and health," and that are "motivated by concerns about smoking and health." *Reilly*, 552 U.S. at 548, 550. In *Reilly*, the state Attorney General sought to impose the requirements through regulations, while in this case private persons seek to impose the

requirements through a liability award. But just this term this Court reaffirmed the *Cipollone* majority's conclusion that both regulations and liability awards constitute "requirements" within the meaning of a preemption provision like the one involved in this case. *Riegel*, 128 S.Ct. at 1008.

3. This Court in *Riegel* pointed out why it is unlikely that Congress would intend to grant greater power to single state juries to set state standards that differ from or supplement federal standards than it did to state officials. 128 S.Ct. at 1008. State officials, unlike lay jurors, can at least be expected to apply standards similar to those that would be applied by the responsible federal agency. *Id.* As this Court observed in *Riegel,* for example, a state agency adopting a medical device regulation, unlike a jury, "could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA." *Id.*

The same analysis applies with equal force here. MUTPA, like the Massachusetts statute in *Reilly,* expressly requires that regulations adopted by the state Attorney General be consistent with the rules, regulations, and decisions of the Federal Trade Commission. Me. Rev. Stat. tit. 5, §207(2); Mass. Gen. Laws. Ch. 93A, §2(c). Thus, state Attorneys General, like the FTC, might at least be expected to regulate with the purposes of the Labeling Act in mind. These purposes include (1) adequately informing the public of the hazards of smoking, (2) protecting "commerce and the national economy," and (3) avoiding "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. §1331.

But while a state attorney general might regulate with *all* of these purposes in mind, a jury deciding Plaintiffs' MUTPA claim would likely hear ample evidence relating to the hazards of smoking but virtually nothing about the potential adverse effects that its decision (and decisions of other juries) could have on commerce or the national economy, or about the importance of avoiding diverse and nonuniform cigarette labeling requirements. *See Riegel,* 128 S.Ct. at 1008 (a jury "sees only the cost of a more dangerous design, and is not concerned with its benefits"); *cf. Cipollone v. Liggett Group, Inc.*, 644 F.Supp. 283 (D.N.J. 1986)(benefits to national economy of producing and marketing cigarettes held irrelevant to the strict liability risk/utility analysis). Thus, the risk of disrupting federal policy is far greater with liability awards than with regulations adopted by state regulators.

Because of concerns like these, this Court in *Riegel* refused to "turn somersaults" to create a "perverse" distinction for purposes of federal preemption that would permit juries but not state regulators to impose requirements in addition to those imposed by federal law. 128 S.Ct. at 1008 . A distinction between this case and *Reilly* would be equally perverse and—but for the plurality decision in *Cipollone*—there would be no reason to even consider creating one.

II.

THE PLURALITY DECISION IN *CIPOLLONE* WAS WRONG TO THE EXTENT THAT IT HELD THAT SOME OF THE FRAUD CLAIMS WERE NOT PREEMPTED.

The analysis set forth above is consistent with the plain language of §1334(b); with the decisions of this Court, including *Reilly* and *Riegel;* and with common sense. The plurality's opinion in *Cipollone* is not consistent with any of these, particularly as that opinion was interpreted and applied by the First Circuit in this case. Defendants' brief demonstrates why the claims in this case would be preempted even if the plurality opinion in *Cipollone* were correct, but experience—and this very case—show that the plurality's vague and strained interpretation of the "based on smoking and health" language of §1334(b) leads to arbitrary results that find no support in the language of the statute and that cannot accurately reflect the intention of Congress.

1. The *Cipollone* plurality concluded that two tort claims asserted against the defendant tobacco manufacturers were preempted, but one was not. First, the plurality found that the plaintiffs' "failure-to-warn" claim was preempted insofar as it required a showing that the defendants should have included additional or more clearly stated warnings in its advertising or promotions. 505 U.S. at 524. Second, the plurality found that the plaintiffs' fraudulent misrepresentation theory was preempted to the extent that plaintiffs alleged that the defendants, "through their advertising, neutralized the effect of

federally mandated warnings." *Id.* at 527-28. According to the plurality, this claim was preempted because it was "inextricably related" to the preempted failure-to-warn claim and because it was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id* at 528. Finally, the plurality found that plaintiffs' fraudulent misrepresentation claim was *not* preempted to the extent it was based on "allegedly false statements of material fact made in advertising." According to the plurality, this claim, unlike the others, escaped preemption because it was "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528-29.

2. As both Justices Blackmun and Scalia pointed out at the time (*id.* at 542-43, 552-53), there is a fundamental problem with this analysis: if the claim based on "false statements of material fact in advertising" was not "based on smoking and health" because it was based on a more general obligation, the same is true for the failure-to-warn claim. Under state law, the obligation to warn arises from generally-applicable principles of strict liability and negligence under which all product manufacturers are obligated to give those warnings of foreseeable risks that are necessary to make the product reasonably safe. *See generally* Restatement (Third) of Torts: Products Liability § 2(c), comments i-l (1998).

Moreover, *both* of the fraudulent misrepresentation claims made in *Cipollone* were based on New Jersey's common law of fraud. To be actionable as "actual legal fraud" under New Jersey law, any

representation made in the defendants' advertising would have to be a "material representation of a presently existing or past fact, made with knowledge of its falsity." *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 624, 432 A.2d 521, 524 (1981); *accord, e.g., Banco Popular North America v. Gandi*, 184 N.J. 161, 173, 876 A.2d 253, 260 (2005). Further, under the common law of fraud, recovery may be awarded both for a representation that is actually false and for a representation that "is truthful so far as it goes but which is materially misleading." *Medivox Productions, Inc. v. Hoffmann-LaRoche, Inc.*, 107 N.J. Super. 47, 69, 256 A.2d 803, 815 (1969); *see generally* Restatement (Second) of Torts §529, comment a (1977) ("[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.").

Thus, plaintiffs' claims in *Cipollone* were necessarily based on the general duty "not to deceive," regardless of whether they were claiming that the advertising was false or that it was misleading because of its tendency to "neutralize" the federally mandated warnings. There was no basis at all for the plurality's conclusion that one of these claims was based on the general "duty not to deceive" imposed by the common law of fraud, but that the other claim was not.

3. The First Circuit's opinion in this case illustrates the flaw in the plurality's analysis even more starkly. Consistent with the plurality's decision in *Cipollone*, the First Circuit recognized that §1334(b) would preempt a MUTPA claim alleging that Defendants committed a deceptive act or practice by

failing to warn of the dangers of smoking—*i.e.*, by failing to provide additional or more clearly stated warnings in its advertising. *Good*, 501 F.3d at 42. Equally consistent with the plurality decision in *Cipollone*, the First Circuit also recognized that §1334(b) would preempt a MUTPA claim alleging that Defendants committed a deceptive act or practice by making representations that "neutralized" the required government warnings, *i.e.*, that suggested that the cigarettes at issue "do not pose the same grave threats to health announced in the accompanying warning." *Id.* at 44. *But both of these theories would be based on the same "duty not to deceive" created by §207 of MUTPA, just like the "false representation" theory that the First Circuit held was not preempted.*

Thus, the decision in this case makes it abundantly clear that the distinction drawn by the *Cipollone* plurality between preempted claims and non-preempted claims cannot in reality depend on whether the claim is based on a "general duty" like the "duty not to deceive." Rather, as the First Circuit tellingly observed, it depends simply on "how best to categorize them by analogy to the various causes of action considered in *Cipollone.*" *Good*, 501 F.3d at 36. The hundreds of pages that other courts have devoted to convoluted attempts to determine which of the claims in *Cipollone* most closely resembles the claims being asserted amply confirms that the analysis in these cases has become increasingly divorced from the language of §1334(b)—and from the intent of Congress. *See, e.g.*, *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 393-94 (5th Cir. 2007); *Good*, 501 F.3d at 36-40; *In re Tobacco Cases II*,

41 Cal. 4th 1257, 1271-72, 63 Cal.Rptr.3d 418, 429, 163 P.3d 106, 115 (2007); *Est. of Schwarz v. Philip Morris Inc.*, 206 Or. App. 20, 36, 135 P.3d 409, 421 (2006) (en banc); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 439-40 (Tex. 1997); *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996); Beverly L. Jacklin, Annotation, *Federal Pre-emption of State Common-Law Products Liability Claims Pertaining to Tobacco Products*, 97 A.L.R. Fed. 890 (1990 & 2008 Supp.)(compiling the many confusing and conflicting decisions attempting to apply the *Cipollone* plurality's analysis).

4. In fact, as the First Circuit interpreted the plurality decision, whether a claim is preempted depends simply on the label that the court decides should be attached to the claim: if Plaintiffs have alleged a "fraudulent misrepresentation claim," it is not preempted, but if Plaintiffs "have in reality alleged failure-to-warn or warning neutralization claims, the claims are preempted." *Good*, 501 F.3d at 37. But this case also illustrates starkly the arbitrariness by which such labels can be assigned, providing further evidence that the results cannot be what Congress intended.

First, Plaintiffs allege that describing the cigarettes at issue as "light" is "deceptive and misleading" *because* the cigarettes registered "lower tar and nicotine levels under machine testing conditions while actually delivering higher levels of these compounds when smoked by consumers." (JA 20a, ¶ 54(b).) According to the First Circuit, this is not a preempted "failure to warn" claim. *See Good*, 501 F.3d at 42. But a claim phrased just slightly differ-

ently—alleging, for example, that it is deceptive and misleading to describe cigarettes as "light" *without disclosing* the basis for the description —would be a preempted "failure to warn" claim. *Id.*

Alleging that the descriptor is deceptive because consumers do not know the basis for it is substantially identical to alleging that the descriptor is deceptive unless consumers are told the basis for it. Assuming that some subtle but significant difference exists between the two claims, it would be impossible to maintain that distinction during the course of a trial, even if the plaintiffs were incredibly careful in the questions they asked and the arguments they made. More importantly, nothing in the language of §1334(b) even remotely suggests these two claims should be treated differently. In fact, any difference between the two claims is so minuscule that Congress almost certainly did not intend to permit one while completely disallowing the other, particularly since the disallowed claim could be saved with only a minor, largely non-substantive change of words.

5. Further, the allegations in this case establish that Plaintiffs are in fact making a "warnings neutralization" claim that is only thinly disguised (if it is disguised at all). Plaintiffs specifically allege that the Defendants' deceptive practices were designed to "induce cigarette smokers to continue smoking in spite of the growing public awareness of a connection between cigarette smoking and serious health problems," and that Defendants' intention was to "provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking." (JA 8a, 11a, ¶¶ 2, 18.) Of course, the "growing

public awareness" of health problems and the "concern" of smokers were necessarily based on the various warnings from various sources that were available to the public concerning the dangers of smoking. Thus, the Complaint all but expressly alleges that Defendants, by advertising and promoting cigarettes as "light," were attempting to neutralize the impact of all of the warnings that were available to consumers, *including but not limited to the federally mandated warning labels.*

Accordingly, the difference between the preempted claim made in *Cipollone* and the claim made in this case—if any difference actually exists—is simply that the plaintiff in *Cipollone* claimed that the defendants attempted to neutralize *only* the federally mandated warnings, while Plaintiffs in this case claim that Defendants attempted to neutralize *all* of the available warnings, including the federally mandated warnings. Nothing in the language of §1334(b) suggests that Congress intended to allow the former claim and disallow the latter.

6. In short, the straightforward analysis required by §1334(b) as interpreted by this Court in *Reilly* produces logical results consistent with the purposes of the Labeling Act and with the apparent intent of Congress. The convoluted analysis required by the plurality opinion in *Cipollone,* particularly as that opinion was interpreted by the First Circuit in this case, leads to arbitrary results that could not have been intended by Congress. Under either analysis, the claims alleged in this case are preempted, but this Court should take this opportunity to eliminate a source of uncertainty and confu-

sion that will otherwise continue to confuse the lower courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: April 7, 2008

APPENDIX

Corporate Members of the Product Liability Advisory Council

as of 3/6/2008

3M
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company

Coors Brewing Company
Crown Equipment Corporation
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Eaton Corporation
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Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
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Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.

Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company

Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

AMICUS CURIAE BRIEF

File Date:
June 17 2008

No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS, USA INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE TOBACCO CONTROL LEGAL CONSORTIUM, AARP, AND PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief in support of respondents is filed on behalf of amici curiae Tobacco Control Legal Consortium, AARP, and Public Justice.

The Tobacco Control Legal Consortium (TCLC) is a national network of legal centers providing technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC is supported by national advocacy organizations, voluntary health organizations and others, and it files legal briefs as amicus curiae in cases in which its experience and expertise may assist courts in resolving tobacco-related issues of national significance, including *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007), and *Rowe v. N.H. Motor. Transp. Ass'n*, 128 S. Ct. 989 (2008).

AARP is a nonpartisan, nonprofit organization with nearly forty million members. AARP works to foster the health and economic security of individuals as they age by improving the health care system and promoting healthy behaviors. Tobacco use is

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

recognized by most as one of the top health indicators related to disease prevention and health promotion. As the largest membership organization representing the interests of people 50 and over, AARP has also long supported laws and public policies designed to protect and preserve the availability of legal redress when people are harmed in the marketplace.

Public Justice is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that tort law fully serves its dual purposes — compensating those injured by wrongful conduct and deterring similar conduct in the future. Public Justice is gravely concerned that, if the tort system is closed to innocent victims of petitioners' fraudulent misrepresentations through application of the preemption doctrine in this case, neither of these purposes will be served.

Amici have a significant interest in this case. More than 45 million Americans smoke cigarettes, and the vast majority of them — over 80 percent — smoke "light" or "ultra light" cigarettes. *United States v. Philip Morris*, 449 F. Supp. 2d 1, 508 (D.D.C. 2006), *appeal pending*, No. 06-5267 *et al.* (D.C. Cir.). More than half of these smokers believe, because Philip Morris and other tobacco companies repeatedly told them so, that "light" cigarettes are less dangerous than regular cigarettes and that switching to "light" cigarettes is an alternative to quitting. *Id.* at 467-68,

488-92, 513-29, 860. They are wrong. The scientific evidence — long concealed by petitioner Philip Morris — is unequivocal: "light" cigarettes are no less deadly than regular cigarettes and offer no health benefit whatsoever.

This case is important because it presents two questions that will determine whether consumers victimized by the deliberate misrepresentations, concealment and fraud committed by Philip Morris and other cigarette companies may seek redress. The first is whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* ("Labeling Act"), preempts state law claims challenging Philip Morris' use of false and deceptive means to persuade smokers that "light" cigarettes are less dangerous than other cigarettes. As amici demonstrate below, and as this Court held in *Cipollone v. Liggett Group*, 505 U.S. 504, 529 (1992) (plurality), there is no indication in the Labeling Act that Congress intended it to shield cigarette companies from fraud claims based on violation of state law duties not to deceive.

Equally insubstantial is Philip Morris' implied preemption argument, which claims that the Federal Trade Commission (FTC) "authorized" the use of health descriptors like "light" and that the FTC has a "low tar" policy that would be undermined were Philip Morris to be held liable for its fraud under state law. The short answer is that Philip Morris' arguments are pure smoke: The FTC never authorized Philip Morris' use of "light" or "low tar" as descriptors and does not have and never has had a "low tar" policy. There is

thus no federal "policy" placed at risk by state law claims and no basis for a finding of preemption.

Philip Morris' argument is wrong for another reason important to amici. The FTC has sweeping, nation-wide jurisdiction over unfair and deceptive trade practices, but ordinarily the FTC's exercise of authority does not preempt state consumer protection claims. Consumer protection is one area in which federal and state law have long and successfully co-existed. To ensure that state authority in consumer protection matters is not displaced without notice to the states and careful deliberation, Congress has directed the FTC to follow certain procedures to exercise its preemptive power — procedures the FTC did not employ here. A finding of FTC preemption in this case would not only be at odds with the FTC's denial that it authorized the use of health descriptors or has a "low tar" policy, but also could seriously undermine the ability of states to enforce their own consumer protection and anti-fraud statutes concurrently with FTC enforcement efforts.

STATEMENT

1. The Introduction of "Light" and "Low Tar" Cigarettes.

By the early 1950s, evidence began to mount linking cigarette smoking with lung cancer. In 1964, the United States Surgeon General issued his Report on Smoking and Health, announcing that a scientific consensus had been reached that cigarette smoking

causes diseases and death. *See Cipollone*, 505 U.S. at 513. Even before the public began to understand the link between smoking and disease, Philip Morris and other cigarette companies "knowingly and intentionally engaged in a scheme to defraud smokers, for the purpose of financial gain, by making false and fraudulent statements, representations and promises" to counteract that understanding. *United States v. Philip Morris,* 449 F. Supp. 2d at 852.

To capitalize on the public's growing apprehension about the link between cigarettes and lung cancer, Philip Morris and other companies developed "light" cigarettes, including Marlboro Lights. Philip Morris knew that, notwithstanding the descriptor "light," Marlboro Lights provided no safety benefit for smokers. Philip Morris' own research showed that smokers receive comparable quantities of tar and nicotine regardless of the kind of cigarette they smoke. Nonetheless, Marlboro Lights were branded "Light" and marketed to foster the illusion that they represent an acceptable alternative to quitting, or at least a step towards decreasing smokers' health-risks and dependence on cigarettes. *Id.* at 477-81; 504-06.

The introduction and marketing of Marlboro Lights was integral to Philip Morris' scheme to dissuade smokers from quitting. The district court in *United States v. Philip Morris* found:

> As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional

> campaigns to portray their light brands as less harmful than regular cigarettes, and thus an alternative to quitting, while at the same time carefully avoiding any admission that their full-flavor cigarettes were harmful to smokers' health. Defendants knew that by providing worried smokers with health reassurance, they could keep them buying and smoking cigarettes.

449 F. Supp. 2d at 860. Philip Morris' internal documents reflect this strategy. One company memorandum explains that the company's goal was to introduce a "socially acceptable cigarette" that would be "a welcomed alternative to quitting, and might attract new smokers who would not otherwise choose to become product users." *Id.* at 490.[2]

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[2] In mid-1966, the FTC decided to standardize tar and nicotine content measurements and informed the cigarette companies that factual representations about tar and nicotine content would not be deemed deceptive so long as they (1) were based on the "Cambridge Filter Method" (a testing method that used a smoking machine to determine tar and nicotine content); and (2) made no claims that the levels of tar and nicotine reduced health hazards. *See FTC v. Brown & Williamson Tobacco Co.*, 778 F.2d 35, 37 (D.C. Cir. 1985).

Philip Morris engineered Marlboro Lights to deliver to smokers the same tar and nicotine as other cigarettes, while delivering lower levels when measured by a smoking machine. The evidence on this point is overwhelming. *United States v. Philip Morris*, 449 F. Supp. 2d at 461-68;

(continued...)

These marketing efforts have been remarkably successful. A majority of "light" cigarette smokers believe that "light" cigarettes are "better for your health" than regular cigarettes. *Id.* at 524-25, 860. Not surprisingly, the market share for "light" cigarettes rose from 2% in 1967 to 81% of cigarette sales in 1998. *Id.* at 508; *see also id.* at 475-561.

2. Proceedings Below.

This action was brought by Stephanie Good and other long-time Marlboro Light smokers on their own behalf and on behalf of a class of similarly-situated

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[2](...continued)
see also id. at 462 (quoting a 1967 memorandum by a Philip Morris scientist saying "the smoker, is, thus, apparently defeating the purpose of dilution to give him less smoke per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appears to be erroneous and misleading."); *see also id.* at 465-66 (discussing a 1975 Philip Morris study showing that smokers took "larger puffs" on Marlboro Lights than conventional Marlboro cigarettes and thus "did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery"). Despite this, Philip Morris complained to the FTC that the Cambridge Filter Method "may be deceptive because a smoker may assume his cigarette is delivering the amount of 'tar' and nicotine reported by the FTC when in fact it will be delivering much less, the way he smokes."). *Id.* at 501.

smokers in Maine.[3] Ms. Good and her co-plaintiffs alleged that they had smoked Marlboro Lights for at least fifteen years and that Philip Morris had engaged in unfair and deceptive practices in the design, manufacture, promotion and marketing of Marlboro Lights. The plaintiffs claimed that Philip Morris called and promoted Marlboro Lights as "light" and "low tar and nicotine" cigarettes to persuade consumers — especially those worried about the health risks of smoking — that Marlboro Lights are less dangerous than regular, or "full flavor," cigarettes. Philip Morris engaged in these efforts even though it knew, but concealed, evidence showing that Marlboro Lights deliver the same levels of tar and nicotine to smokers as do the company's regular cigarettes and thus pose no less risk to health.

Ms. Good and her co-plaintiffs contended that Philip Morris' misrepresentations violated the Maine Unfair Trade Practices Act, which "declare[s] unlawful" any "unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. Ann. tit. 5, § 208(1). The essence of plaintiffs' claim is that by portraying Marlboro Lights as less harmful than other cigarettes, while at the same time concealing evidence that Marlboro Lights are *not* less harmful, Philip Morris breached its state law duty to not knowingly deceive consumers about a material fact. The Maine

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[3] This discussion is drawn from the lower courts' opinions in these cases. *See Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132, 133-39, 144-45 & n.21 (D. Me. 2006), *rev'd*, 501 F. 3d 29, 30-36 (1st Cir. 2007).

statute does not purport to regulate smoking and health; to the contrary, it is a general anti-fraud, consumer protection statute, just like the Federal Trade Commission Act, on which it is modeled. *Id.* (citing 15 U.S.C. § 45(a)(1)).

Nonetheless, the district court found plaintiffs' claims expressly preempted by Section 1334(b) of the Labeling Act, which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The district court concluded that, under its reading of *Cipollone*, plaintiffs' claims should be characterized as failure to warn or "warning neutralization" claims, which are preempted by the Labeling Act. *See* 436 F. Supp. 2d at 151. The court did not reach Philip Morris' implied preemption argument.

The First Circuit reversed. The court first rejected Philip Morris' express preemption argument. Under *Cipollone*, the question is whether "the legal duty" that gives rise to the claim is "based on smoking and health." 501 F.3d at 38 (quoting 504 U.S. at 524 (plurality)). The court held that, because the fraudulent misrepresentation and concealment claims at issue in this case are based on a general duty not to deceive imposed by Maine law, and not a law targeting the marketing of cigarettes, they are not preempted by the Labeling Act. *Id.* at 38-39.

The court next rejected Philip Morris' implied preemption defense, which rested on what the company characterized as the FTC's "authorization" of its use of "Light" as a descriptor and the "FTC's low-tar policy" favoring the promotion of light cigarettes. After an exhaustive review of the FTC's statements, the court held that it could not "discern a coherent federal policy on low-tar claims," let alone a policy that would be threatened by respondents' state law claims. 501 F.3d at 55.

SUMMARY OF ARGUMENT

Amici file this brief to emphasize a point that may not stand out in respondents' more comprehensive treatment of the issues before the Court — namely, that there is no hint in either the Labeling Act or in the FTC's on-again, off-again actions regarding disclosure of cigarettes' tar and nicotine content that Congress or the FTC intended to "insulate [cigarette] manufacturers from longstanding rules governing fraud." *Cipollone*, 505 U.S. at 528-29.

Make no mistake, this case is about fraud. As the United States argued in its civil racketeering action against Philip Morris and other cigarette companies, "marketing of 'light' cigarettes is a principal weapon in their attempts to mislead the public regarding the health risks of smoking." Brief for the United States in *United States v. Philip Morris, et al.*, No. 06-5267, *et al.*, at 146 (D.C. Cir. filed Nov. 19, 2007). The question in this case is whether petitioners are shielded from state anti-fraud litigation because Congress or the FTC

preempted fraud claims arising from statements made to deceive smokers that "light" cigarettes are less deadly than regular cigarettes. The answer to that question is "no."

To be sure, this Court in *Cipollone* held that the Labeling Act preempts state law claims that would require cigarette companies to add or modify the warnings prescribed by Congress. But *Cipollone* also held that the Labeling Act does *not* preempt claims arising from false statements made in advertising, press statements, government submissions and other channels of communication, where the claim is based on the duty not to deceive. 505 U.S. at 528, 529 (plurality). Thus, allegations that a cigarette company deliberately misrepresented and concealed material facts in violation of a state anti-fraud statute — the precise allegations at issue here — are not preempted. *Id.* As the plurality saw it, Congress did not intend the Labeling Act "to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* Such claims are not predicated on a duty "based on smoking and health," but on a general duty imposed by state law — *i.e.*, the duty not to deceive. *Id.* at 528-89. Petitioners' theory should be rejected because it would, contrary to Congress' intent, effectively insulate cigarette manufacturers from rules governing fraud, no matter how egregious the manufacturers' false statements or fraudulent concealment.

Equally insubstantial is petitioners' argument that the FTC "authorized" tobacco companies to use "Light" as a product descriptor (Marlboro Lights), and that

permitting respondents' claims to go forward "would impede the FTC's low-tar policy." Br. at 46. The signal defect in petitioners' argument is that the FTC itself disclaims the existence of any authorization or policy, let alone a policy that justifies ousting longstanding state anti-fraud laws. Even Philip Morris has acknowledged elsewhere that there is no such policy. In 2002, Philip Morris filed a petition with the FTC urging the agency "to promulgate rules governing . . . the use of descriptors such as 'light' and 'ultra light.'" *See Good*, 501 F.3d at 56 n.29. Philip Morris' petition, of course, would have been superfluous had the FTC previously "authorized" the use of these descriptors.

Just as fundamentally, the hodge-podge of FTC actions cited by the Philip Morris as evidence of a federal policy on light cigarettes could not have the sweeping preemptive effect it claims. Because the FTC's mission of protecting consumers against unfair and deceptive advertising practice overlaps with state law, Congress established regulatory procedures for the FTC to follow when it intends to take preemptive action. *See, e.g., American Financial Servs. Ass'n v. FTC*, 767 F.2d 957, 989-90 (D.C. Cir. 1985). The FTC did not avail itself of those procedures here, which further confirms the FTC's position that it did not act to preempt state law. For these reasons as well, petitioners' implied preemption argument should be rejected.

ARGUMENT

I. The Labeling Act Does Not Preempt Respondents' Claims.

Philip Morris' central argument is that plaintiffs' fraud claims are expressly preempted by the Labeling Act. Philip Morris thus asks this Court to engage in legal alchemy — *i.e.*, to transform the Labeling Act, a statute designed to inform the public of the health risks of smoking, into an instrument of deception. Philip Morris' argument cannot be reconciled with this Court's holding in *Cipollone* or with the plain text of the Labeling Act.[4]

A. Cipollone *Forecloses Petitioners' Express Preemption Claim.*

Dissatisfied with this Court's ruling in *Cipollone*, Philip Morris and its amici urge the Court either to disregard its holding or to abandon it altogether.

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[4] The Labeling Act's preemption provision states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Those provisions require that packages of cigarettes and their advertisements bear one of a rotating series of warnings about the adverse health effects of smoking. *Id.* § 1333(a), (c). The Act also provides that no additional "statement relating to smoking and health . . . shall be required on any cigarette package." *Id.* § 1334(a).

Indeed, Philip Morris does not even begin its discussion of *Cipollone* until page 37 of its brief. Notwithstanding *Cipollone*'s contrary ruling, Philip Morris argues that the phrase "based on smoking and health" should be read at the highest level of generality imaginable — one that renders it virtually limitless — and then contends that the preemptive scope of the Labeling Act should be construed to be equally limitless. Petitioners then argue that the Act bars any state law claim that challenges cigarette companies for making fraudulent claims about cigarettes that have anything to do with health. Br. at 23-25. There is no principle that limits petitioners' argument.[5]

Petitioners' reading of the Labeling Act was rejected by a solid majority of this Court in *Cipollone*. To be sure, the plurality opinion by Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O'Connor, ruled that some, but by no means all, state law claims are preempted by the Act. 505 U.S. at 524-30. The plurality concluded that state law claims that would require cigarette companies to add or

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[5] Nor is Philip Morris' reading of the Labeling Act consistent with the way it, and other cigarette companies, understood it when it was enacted, or even during the first twenty years the Labeling Act was on the books. As the Court observed in *Cipollone*, even though there was a "great deal of litigation relating to cigarette use beginning in the 1950s," it was not until *Cipollone* that the companies "raised [§ 1334(b)] as a pre-emption defense." 505 U.S. at 520 n.17.

modify the warnings prescribed by Congress were preempted. Accordingly, failure to warn claims, and claims alleging that cigarette companies had engaged in advertising to "neutralize" the warnings, were found to be preempted. *Id.* at 524-26.[6]

But on the question presented here — namely, whether the Labeling Act preempts state law fraudulent misrepresentation and concealment claims — seven Justices endorsed the view that these claims are not "based on smoking and health" and are therefore not preempted. Indeed, on this issue, the label "plurality" is something of a misnomer. Justice Blackmun's separate opinion, joined by Justices Kennedy and Souter, maintained that the Labeling Act did not preempt *any* State law damages claims; it would have allowed all of Cipollone's claims to proceed. 505 U.S. at 542. Thus, contrary to Philip Morris' suggestion that the division in *Cipollone* somehow supports its position, Br. at 44, there was in fact a solid, seven Justice *majority* of the *Cipollone* Court taking the view that, at the very least, Congress in the Labeling Act did not intend to preempt fraudulent concealment and advertising claims based on general state law requirements.

The plurality's opinion explains why Congress made that judgment. According to the plurality, the "central inquiry" in determining whether a state law claim is

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[6] On this issue, the opinion was joined by Justices Scalia and Thomas, who otherwise dissented. 505 U.S. at 550.

preempted is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health' . . . giving that clause a fair but narrow reading." 505 U.S. at 523-24. Because the *Cipollone* petitioner alleged that tobacco companies had made false representations of material fact or concealed material facts concerning the health consequences of smoking, *see id.* at 510, 528, his claims of fraudulent misrepresentation could have been viewed as falling within the text of Section 1334(b), at least if as broadly construed as Philip Morris urges. The plurality rejected that reading of Section 1334(b), finding "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." 505 U.S. at 529. Accordingly, the plurality ruled that the fraudulent misrepresentation claims were not preempted because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive." *Id.* at 528-29.

The plurality found that interpretation of Section 1334(b) appropriate for a number of reasons: (1) there was no evidence that Congress intended to insulate cigarette manufacturers from longstanding rules governing fraud; (2) the legislative history showed that Congress intended for the term "based on smoking and health" to be construed narrowly and not to reach traditional exercises of states' police power; (3) state law prohibitions against fraud do not create "diverse, nonuniform, and confusing" standards that would

conflict with the Labeling Act's uniformity goal; and (4) holding the claims preempted would conflict with the background presumption against preemption. *Id.* at 529 & nn.26, 27; *see also id.* at 530.

Applying the teachings of *Cipollone* here, plaintiffs' claims are not preempted. Plaintiffs' claims are not predicated on "a requirement or prohibition *based on* smoking or health." The Maine statute on which plaintiffs' action rests does not operate on the basis of, or even refer to, smoking or health. Nor is there any contention that the Maine legislature enacted its anti-fraud statute based on the health consequences of smoking. *Compare Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 547 (2001) (striking down billboard ordinance because it "expressly target[ed] cigarette advertising"). Plaintiffs' fraud claims are instead based on Maine's general duty not to deceive consumers about material facts. These are precisely the claims that *Cipollone* held were not subject to preemption under the Labeling Act.

Petitioners and their amici have no answer to this argument, other than to take aim at *Cipollone*. They argue for a reading of the phrase "based on smoking and health" that would cut off *all* state fraud claims — even those based on generally applicable legal requirements — so long as there is an arguable nexus between the allegedly fraudulent statements and smoking and health. That argument fails for at least two reasons.

First, it overlooks the fact that Congress did nothing in 1965 or 1970 to regulate the *content* of cigarette advertising; it simply mandated warning labels on cigarette packages and later on advertisements. The Labeling Act did not address anything else about the advertising practices of the cigarette makers. Had Congress wanted to vest the FTC with exclusive jurisdiction to regulate cigarette advertising and promotion, as petitioners appear to contend, it could have done so, but did not. Nonetheless, petitioners would have this Court conclude that Congress, which did not even require warnings on cigarette advertising until 1985, intended to render the states powerless to respond to even the most patently misleading and fraudulent cigarette ads, no matter how little the FTC chose to do under its general powers to police unfair and deceptive advertising. There is simply no basis for inferring that Congress intended to give cigarette companies a license to deceive. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (finding no intent to preempt field that Congress has left unregulated); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 500 (1996) (construing a general preemption provision to apply only "where a particular state requirement threatens to interfere with a specific federal interest").[7]

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[7] This point takes on particular force here, given the long-standing collaboration between the FTC and the states in consumer protection matters. As discussed below, *see* Part II.C., *infra*, at the time Congress enacted the Labeling

(continued...)

Second, the construction of the Labeling Act urged by Philip Morris and its amici leads to palpably absurd results, which they ignore. Under their reading of the Act, Philip Morris is free to place *any* health claim on labels, in advertising, in press releases, in government submissions, and in other public statements, no matter how false, deceptive, misleading, or far-fetched. In their view, so long as there is an arguable nexus between a state law claim and smoking and health, no state can take any action to force cigarette companies to stop deceiving their customers.

To see the breath-taking scope of Philip Morris' argument, assume that Philip Morris were to make the following claims about Marlboro Lights: "Smoking helps you lose weight;" "Smoking fights Parkinson's Disease," and "Smoking wards off depression." Assume as well that each of these claims is false and that many consumers purchased and smoked Marlboro Lights to obtain these illusory benefits. Under Philip Morris' theory, state law claims alleging deliberate misrepresentation and fraud, even if brought by a State Attorney General under a general anti-fraud statute like Maine's, would be preempted because those claims would seek to impose a state law

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[7](...continued)
Act it was well aware of the cooperative relationship between the FTC and the states. Yet petitioners' reading would eliminate any role for the state in policing fraud and deceptive conduct in the advertising and promotion of cigarettes.

requirement or prohibition based on smoking and health relating to the promotion of Marlboro Lights. There is no limiting principle to this argument, and these examples are just the tip of an iceberg. Under Philip Morris' reading, the Labeling Act — a statute designed to ensure that the public is informed of the risks of smoking — becomes an instrument of deception.

It was precisely this concern that led the *Cipollone* plurality to draw the line where it did. As the *Cipollone* plurality recognized, there is no reason, either in the text or history of the Labeling Act, to think that Congress intended to shield cigarette manufacturers from liability when they engage in intentional fraud.

B. *The Case Against Preemption Here is Even More Compelling Than in* Cipollone.

There is one crucial difference between this case and *Cipollone* that makes the case against preemption here even more compelling. In *Cipollone*, the essence of the plaintiff's claim was that the tobacco companies, through advertising and promotion, sought to *minimize* or *neutralize* the health warnings Congress required on cigarette labels and advertising. 505 U.S. at 510. The argument was that the tobacco companies were trying to convey the message that smoking cigarettes is not as hazardous as the government wants you to believe.

But with Marlboro Lights, and other "light" cigarettes, the fraud claim is that "light" cigarettes are

named, designed, and promoted *to take advantage* of the public's response to health warnings. As explained above, light cigarettes like Marlboro Lights were created to capitalize on the fears of smokers and to induce them not to quit by persuading them that "light" cigarettes offer a less dangerous alternative to regular cigarettes. It is no coincidence that Marlboro Lights were introduced in 1971, just when the new warnings were being placed on labels and advertising. *United States v. Philip Morris*, 449 F. Supp. 2d at 338-39, 477-81, 516-17. In designing and promoting Marlboro Lights, Philip Morris' strategy was not to neutralize or minimize the warnings. Instead, it was to tell a public, now informed of the risks of smoking that, whatever health risks *regular* cigarettes may pose, "*light*" cigarettes are different because they pose less of a health risk, reduce dependence on tobacco, are an alternative to quitting, and are socially acceptable. *Id.*

As a result, in this case (as in other "light" cases) plaintiffs argue that Philip Morris engaged in fraudulent and deceptive acts that fall outside the preemptive scope of the Labeling Act. These fraudulent acts include: (a) designing light cigarettes to deliver comparable quantities of nicotine and tar as regular cigarettes, but to deliver lower amounts when machine-tested, (b) using false health descriptors like "Light" to persuade smokers that they receive less tar and nicotine than from other cigarettes, (c) concealing evidence showing Marlboro Lights are just as deadly as other cigarettes, and (d) making statements to the public, to the press, to public health agencies, and to

Congress and other legislative bodies promoting the understanding that "light" cigarettes are safer while concealing evidence that proves that the statements are false. *See Good*, 436 F. Supp. 2d at 144 & n.21 (summarizing complaint). These actions, which amount to intentional fraud on Philip Morris' part, are plainly beyond the preemptive reach of the Labeling Act. *See Cipollone*, 505 U.S. at 529. For this reason too, petitioners' express preemption argument should be rejected.

C. *The Text of the Labeling Act Refutes Petitioners' Open-Ended Reading.*

Even if this Court is inclined to reexamine *Cipollone*, notwithstanding the *stare decisis* force of a sixteen-year-old statutory interpretation decision, the outcome of which was supported by seven Justices, *see, e.g.*, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008), and reaffirmed seven years ago in *Reilly*, *see* 553 U.S. at 549-50, the result should remain the same. The text of Section 1334(b) confirms the correctness of the *Cipollone* plurality's ruling that the phrase "no requirement or prohibition based on smoking and health" is not open-ended, but is a term of limitation. There are two related points, in addition to those detailed above, that demonstrate the error in petitioners' argument.

1. *Petitioners' Motivation-Based Reading of the Act Is Contrary to its Text and Structure.*

Petitioners argue that, in determining whether a state requirement is based on smoking and health, the preemption question should turn on the State's *motive* in imposing the requirements, or even on the plaintiffs' motive in bringing the litigation, rather than on the character of the requirement itself. *See, e.g.*, Br. at 23. Thus, in petitioners' view, if a State's requirement was in any way motivated by the relationship between smoking and health, then it is preempted because the State seeks to "impose" a "requirement" "based on smoking and health." *Id.* at 23-25.

The text and structure of Section 1334(b) refute petitioners' motive-based interpretation. They make clear that the phrase "based on smoking and health" modifies "requirement or prohibition," not "imposed;" that is, the state law *requirement* must be based on smoking and health for the preemption provision to kick in. The phrase is therefore most naturally read as referring to the objective character of the requirement or prohibition itself, not on the subjective reasons underlying the adoption of the State requirement at issue. If Congress had intended to require a motive-based inquiry, as petitioners contend, it would have located the phrase referring to smoking and health so that it modified "imposed" rather than "requirement or prohibition," and would have used words other than "based on" (such as "because of" or "on account of" smoking and health).

The contrast between this case and *Reilly* illustrates this point. In *Reilly*, the Court upheld a preemption challenge to state "regulations governing the advertising and sale of cigarettes." 533 U.S. at 532. The Court so held because regulations that "expressly target cigarette advertising" "squarely contradict[]" the Labeling Act. *Id.* at 547, 550. In contrast, *Reilly* observed, that "States remain free" to enact restrictions "that apply to cigarettes on equal terms with other products" because "[s]uch restrictions are not 'based on smoking and health,'" but are instead based on general requirements that apply equally to all consumer products. *Id.* This is just such a case.

Petitioners' construction also stretches "based on smoking and health" beyond its breaking point, transforming a term of *limitation* into a term of *inclusion*. Under petitioners' reading, almost *any* requirement or prohibition that a State might impose "with respect to the advertising or promotion of . . . cigarettes" would have as its underlying motivation a concern about the health consequences of smoking. Interpreting "based on smoking and health" to refer to the State's underlying motivation for imposing a requirement would deprive that phrase of any significant limiting force. Even a general zoning ordinance forbidding the placement of billboards (including those promoting cigarettes) near elementary schools to protect impressionable school children would likely fail petitioners' motive-based test. *But see Reilly*, 533 U.S. at 550. This Court has cautioned against interpreting a preemption provision in a manner that fails to give significant force to "words of limitation."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995). Petitioners' proposed interpretation suffers from that vice.

2. *Petitioners' Effort to Substitute "Relating To" for "Based On" Should Also be Rejected.*

Petitioners' interpretation suffers from a second vice. Although petitioners do not say so directly, they seek to substitute the expansive term "relating to" for the narrower "based on." One tell-tale sign of this interpretive move is petitioners' repeated reliance on *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995). *Wolens* involved preemption questions under the Airline Deregulation Act, which, at the time, had a preemption provision that said that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to* rates, routes, or services of any air carrier." *Id.* at 222 (quoting 49 U.S.C. App. § 1305(a)(1)) (emphasis added).[8] The Court construed the operative phrase "relating to" to mean "having a connection with, or reference to, airline 'rates, routes, or services.'" *Id.* at 223 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 348 (1992)); *see also Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316, 324 (1997) (giving similar reading to "relates to" under Employee Retirement Income Security Act).

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[8] The provision now appears at 49 U.S.C. § 41713(b)(1).

There is a vast difference between that broad test of relatedness and the far more focused "based on" language at issue here. The term "based on" or "based upon" is generally used by Congress and this Court to refer to the *legal grounds* for a claim. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 74, 82 (2006) (reviewing provision of the Securities Litigation Uniform Standards Act of 1998 and stating that "[n]o covered class action *based upon* the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party," subject to certain exemptions) (emphasis added); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 447 & n.22 (2005) (referring to claims "based on" fraud); *Wolens*, 513 U.S. at 233 (referring to a claim as one "based on state law"); *Perry v. Thomas*, 482 U.S. 483, 485 (1987) (noting that the "demands for arbitration were based on" agreement between the parties); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 149 (1982) (describing claim as one "based on" contract clause). As is clear, principles of ordinary usage counsel in favor of giving the term "based on" its established meaning — that is, as a reference for the legal basis of a complaint, not the sweeping construction petitioners urge.

For these reasons, and the reasons set forth in respondents' more elaborate presentation of the issues, petitioners' express preemption claim fails.

II. The FTC Has No "Policy" Regarding Health Descriptors or "Low Tar" Claims.

Petitioners' implied preemption argument rests on the assertions that the FTC "authorized" use of health descriptors like "light" and "low tar," and that the FTC established a policy favoring "low tar" cigarettes that would be impaired by permitting respondents' claim to proceed. The fatal defect in this argument is that it is built on wishful thinking, not history. The simple fact is that the FTC neither authorized Philip Morris to use "light" as a product descriptor nor established the "low tar" policy on which Philip Morris' argument hinges. That is not just our view; it is also the position of the United States. *See* Brief of the United States in *United States v. Philip Morris*, at 149-169. Because permitting respondents' claim to go forward would impair no federal policy, there is no basis for Philip Morris' implied preemption claim.

Amici leave it to respondents to review the history of the FTC's oversight of the cigarette industry to show, point-by-point, why Philip Morris' argument cannot be reconciled with the facts. But there are three points that merit emphasis.

A. *Philip Morris Defrauded the FTC as Well as the Public.*

Philip Morris' fraud extended to the FTC, which is why the United States has focused much of its fire in *U.S. v. Philip Morris* on Philip Morris' fraud relating to "light" cigarettes. *See id.* at 47-55, 130-32, 146-70, 202-04. The record in that case shows that on virtually

every issue relating to the design, testing and marketing of "light" cigarettes, Philip Morris and other companies deceived the FTC, as well as the public.

The record is unequivocal on this point, as just a few illustrations demonstrate.

* Philip Morris and other companies knew all about the behavior "light" cigarette smokers engage in to ensure that they maintain their intake of nicotine. *United States v. Philip Morris*, 449 F. Supp. 2d at 456, 461-67, 477-81, 488. This behavior, known as "compensation," includes taking deeper and more frequent puffs and holding the cigarette in a way that closes air holes that would otherwise dilute the smoke. *Id.* None of Philip Morris' evidence on compensation was furnished to the FTC. *Id.* at 504. Making matters worse, Philip Morris deliberately misrepresented the evidence on compensation in its submissions to the FTC. *Id.* at 500-04. For example, in 1998, Philip Morris and other cigarette companies filed public comments in response to an FTC inquiry about whether changes should be made to the "Cambridge Filter Method" of testing. *Id.* at 503-04. Philip Morris and the other companies sought to dissuade the FTC from taking action, arguing that the evidence on compensatory behavior "is highly equivocal" and so sparse that consumers should not even "be alerted to its existence." *Id.*

* Philip Morris also knew, but concealed, the serious flaws in the Cambridge Filter Method of assessing the tar and nicotine delivered to the smoker. *Id.* at 465-68. Indeed, Philip Morris had determined in

the mid-1960s that the Cambridge Filter Method was so flawed that it developed a "Human Smoker Simulator" that allowed the company to duplicate "exactly the smoking behavior of a given individual with a given cigarette." *Id.* at 464-65. Philip Morris concealed this testing advance from the FTC. *Id.*

* Philip Morris also sought to stave off FTC regulation of the use of descriptors like "light," "ultra light," and "low tar." At the same time the agency sought comments on the Cambridge Method, it asked whether there was a "need for official guidance" with respect to these descriptors. 62 Fed Reg. 48,158, 48,163 (1997). Philip Morris denied that there was such a need. *United States v. Philip Morris*, 449 F. Supp. 2d at 511-12.

These illustrations drive home that Philip Morris was not trying to deceive just the public, it was also trying to ward off consumer-protective regulation by deceiving the FTC. Under these circumstances, Philip Morris' claim that the FTC "authorized" its fraudulent acts is nothing short of audacious.

2. *Philip Morris' Own Statements Refute the Existence of a FTC "Policy."*

Apart from its efforts to deceive the FTC, Philip Morris has also made public statements that refute its FTC-authorization argument. For instance, as noted above, in 1997 the FTC observed that a presidential panel of experts had concluded that "[b]rand names and brand classifications such as 'light' and 'ultra light' represent health claims and should be regulated and

accompanied, in fair balance, with an appropriate disclaimer." 62 Fed. Reg. at 48,163. The FTC then asked whether "there [is] a need for official guidance with respect to the terms used in marketing lower rated cigarettes? If yes, why? If no, why not?" *Id.* In response, Philip Morris and other companies *rejected* the FTC's suggestion, contending that they "were not convinced that there is a need for official guidance with respect to the terms used in marketing" "light" cigarettes. *United States v. Philip Morris*, 449 F. Supp. 2d at 511-12. Not only does the FTC's query demonstrate that, in its view, it had never authorized descriptors, but Philip Morris' response shows that it sought to dissuade the FTC from even giving *guidance* on the marketing of "light" and "low tar" cigarettes.

Philip Morris confirmed its understanding that the FTC had *not* authorized use of health descriptors just a few years later. In 2002, it filed a petition with the FTC asking the agency "to promulgate rules governing . . . the use of descriptors, such as 'light' and 'ultra light.'" *See Good*, 501 F.3d at 56 n.29. Of course, had the FTC already authorized the use of descriptors, Philip Morris' petition would not have been necessary.

3. *The FTC's Jurisdiction over Fraud in the Marketing of Cigarettes is not Exclusive.*

Not only is Philip Morris' FTC-authorization argument belied by its own actions, but it also overlooks a key point: the FTC does not have exclusive jurisdiction to police fraud in the marketing and promotion of cigarettes. Congress did not intend for the FTC to "occupy the field" of consumer protection,

and state law unfair and deceptive practices claims are not preempted unless they conflict with FTC regulations. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d at 989-90; *see also Holloway v. Bristol-Myers Corp.*, 485 F.2d 957, 999 (D.C. Cir. 1973). Indeed, because of the overlap between the FTC's authority and state and local consumer protection laws, Congress amended the FTC Act in 1975 to require the FTC to engage in rulemaking in order to preempt state law. These procedures, which go beyond those required by the APA, *compare* 5 U.S.C. § 553 *with* 15 U.S.C. §§ 57a(a)(2)-(b)(1), were designed to provide notice to the states and "to ensure the preemption decision will be carefully made." Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 243.

The amendments are quite explicit that the FTC must use its rulemaking authority to preempt state law. Section 57(a)(2) of the Act now provides that "[t]he Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))." As a result of these amendments, there is general agreement that, for the FTC to preempt state law, it must engage in rulemaking following the procedures set forth in the 1975 amendments. *See, e.g., Am. Fin. Servs. Ass'n*, 767 F.2d at 989-90 & n.41; *Katharine Gibbs Sch. v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979).

Petitioners' implied preemption argument fails for this reason as well. Even if, as Philip Morris claims,

the FTC's actions here amount to a "policy" — and they do not — that would not be sufficient to find preemption. Congress has required the FTC to engage in rulemaking in order to preempt State law. The FTC has not done so here. In the face of an unmistakable congressional mandate about how an agency must exercise its preemptive authority, the agency's failure to do so necessarily drains its actions of preemptive effect.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(9)

No. 07-562

FILED

APR 7 - 2008

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC. and PHILIP MORRIS USA INC.,

Petitioners,

v.

STEPHANIE GOOD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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611075 C 30P

QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

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Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 207 (2002) 2, 3

Miscellaneous:

Black's Law Dictionary (4th ed. 1968) 11

The Federalist No. 78 14

The Records of the Federal Convention of 1797 (M. Ferrant ed, rev. ed. 1937) 12, 13, 14

Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) 21

Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175 (2000) 21

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Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) 19

Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 101 (2008) 4, 21

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases involving preemption issues, to point out the economic inefficiencies created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008); *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of federal regulatory programs. Such programs include the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), which is intended to promote

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief; WLF has lodged letters of consent with the clerk.

uniformity in cigarette labeling/advertising regulation and to reinforce First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict commercial speech.

WLF agrees with Petitioners that the state-law causes of action raised by Respondents Stephanie Good, *et al.* (collectively, "Good") are both expressly and impliedly preempted by federal law. WLF files separately in order to address whether the Court, in attempting to discern congressional intent, ought to begin with a presumption that Congress did not intend to preempt Good's causes of action. Good argued in support of such a presumption in the courts below and can be expected to renew that argument before the Court.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in the important preemption issues raised by this case.

STATEMENT OF THE CASE

Petitioners are residents of Maine and long-time smokers of Marlboro Lights cigarettes. They allege that Petitioner Philip Morris USA, Inc. (the manufacturer of Marlboro Lights) advertised and promoted its products in a manner that deliberately deceived them regarding the health consequences of smoking light cigarettes. Alleging that Petitioners' conduct amounted to unfair or deceptive acts or practices, in violation of the Maine Unfair Trade Practices Act (MUTPA), Me. Rev. Stat. Ann. tit. 5, § 207 (2002), Good seeks a return of sums paid to purchase Petitioners' cigarettes, as well as

punitive damages and attorney fees.

On May 26, 2006, the district court granted Philip Morris's motion for summary judgment on the grounds that Good's claims were expressly preempted by the Labeling Act. Pet. App. 63a-106a. In light of that holding, the court declined to reach other grounds for dismissal asserted by Philip Morris, including implied preemption. *Id.*.64a n.1.

On appeal, Good asserted *inter alia* that the district court had erred in failing to give sufficient weight to a presumption against federal preemption of state law. *See, e.g.*, Respondents' First Circuit Brief, 2006 WL 4015606 at *18 (2007) ("This presumption against preemption applies in the instant case, because preemption here would displace the historic power of the states to protect the health and safety of their citizens.").

The First Circuit vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-62a. The appeals court concluded, without commenting on the presumption against preemption, that Good's claims were: (1) not expressly preempted by the Labeling Act; (2) not implicitly preempted, either by the Labeling Act or by the Federal Trade Commission's (FTC) oversight of tar and nicotine claims in cigarette advertising; and (3) not barred by a MUTPA exemption for "transactions or actions otherwise permitted." *Id.* 61a. The Court granted review to consider the first and second rulings.

SUMMARY OF ARGUMENT

In deciding whether Congress has intended to preempt state or local law, the Court for the past 60 years has *on occasion* invoked an "assumption" or a "presumption" against preemption. When doing so, the Court has explained that when Congress has legislated "in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the [federal legislation] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The use of that assumption/presumption has been subject to substantial criticism in the legal community because it lacks any grounding in constitutional history, because it has led to widespread confusion in the lower courts and to inconsistent judicial decisions, because there is no empirical evidence to support the Court's principal justification for the assumption/presumption (*i.e.*, a supposed congressional reluctance to displace state and local law), and because the Court itself has cited the assumption/presumption only sporadically in its preemption decisions. *See generally,* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 101 (2008).

WLF respectfully suggests that the presumption ought to be laid to rest. A principal purpose of a well-considered rule of statutory construction is that it supplies helpful guidance to courts when attempting to discern legislative intent. Among its many shortcomings, the presumption against preemption badly flunks this "helpful guidance" test. There is

simply no meaningful way to gauge how much weight to accord to the presumption in the face of contrary evidence of a preemptive intent. The presumption has led many lower courts to attach overriding significance to the presumption in the face of substantial evidence of preemptive intent, while other lower courts have applied the presumption only as a tie-breaker. This case is an appropriate vehicle for the Court to weigh in on the continued viability of the presumption against preemption, because the interpretation of the Labeling Act's express preemption provision adopted by a plurality of this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), was informed to a significant degree by the plurality's invocation of the presumption against preemption. In deciding whether to confirm the *Cipollone* plurality's interpretation of the Labeling Act's preemptive sweep, the Court ought to consider whether the plurality invoked the presumption in an appropriate manner.[2]

Alternatively, the Court ought to make clear that, whatever the continued viability of the presumption against preemption, it is wholly inapplicable to cases of this sort. The case for a presumption is strongest in disputes involving field preemption claims, the category of claims in which the presumption first developed. In such cases, the presumption can serve as a useful reminder that there is little reason to draw an inference of an intent to preempt state regulation based solely on the extensive nature of federal regulation in a particular

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[2] WLF agrees with Petitioners that even in the absence of any such reconsideration, Good's causes of action are preempted under the interpretation of the Labeling Act set out in *Cipollone* and *Lorillard v. Reilly*, 533 U.S. 525 (2001).

field. That rationale has no application in conflict preemption cases; there is indeed good reason to assume that Congress would seek to preempt state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Nor is the rationale of much relevance in express preemption cases; when Congress has included an express preemption provision in a statute, the actual language, purpose, and context of the statute are much better guides to Congress's intended meaning than any presumptions about that intent.

The presumption against preemption is inapplicable here for the additional reason that cigarette advertising and labeling have long been subject to extensive federal regulation. Given that history, there is no reason to assume that Congress would be reluctant to displace state regulation of the identical subject matter, particularly when there is substantial reason to fear that state regulation would frustrate Congress's goal of a regulatory framework that applies uniformly nationwide. Moreover, there is far less reason to presume a congressional reluctance to displace state common law (which is established on a case-by-case basis by factfinders not required, when deciding whether to impose liability in a particular case, to weigh the costs and benefits of its actions to society as a whole) than to displace state law established by state officials acting through state administrative or legislative lawmaking processes.

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION HAS PROVEN TO BE UNWORKABLE AND OUGHT TO BE ELIMINATED

The presumption against preemption is a rule of statutory interpretation of relatively recent origin. Designed to assist courts in discerning congressional intent, it lacks any constitutional underpinnings and played no role in the many preemption cases heard by the Court for its first 150 years. Moreover, the presumption has led to widespread confusion among the lower courts, and there is no empirical evidence to support the Court's rationale for employing the presumption as an indicator of congressional intent. Indeed, the Court has cited the presumption only sporadically in its recent preemption decisions. WLF respectfully suggests that the presumption ought to be eliminated.

A. Preemption of State Tort Law Is Ultimately an Issue of Congressional Intent

Whether the federal government has preempted an assertion of regulatory authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause. As the Court has repeatedly emphasized, "Pre-emption fundamentally is a question of congressional intent . . ." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). *Cipollone*, 505 U.S. at

516 ("'the purpose of Congress is the ultimate touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) ("any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of *congressional purpose*'") (emphasis in original) (quoting *Cipollone*, 505 U.S. at 530 n.27 (plurality opinion).

In other words, it is the role of Congress, not a court, to define how broad or narrow should be the preemptive reach of a federal statute or regulatory framework. Of course, the courts look to a variety of sources and employ a variety of interpretive techniques in attempting to discern what Congress intended.[3] But once Congress's preemptive intent has been identified, it is not the role of the courts to construe the scope of preemption broadly or narrowly based on some unrelated factors. A court's "task in all pre-emption cases is to enforce the 'clear and manifest purpose of Congress.'" *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rice*, 331 U.S. at 230).

In cases raising *express* preemption issues, the courts look primarily to a federal statute's express preemption provision, as well as the entire statutory framework in discerning congressional intent. *See, e.g.*,

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[3] "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S. at 486 (quoting *Gade v. Nat'l Solid Waste Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

Bates, 544 U.S. at 449 (Court looks initially to statutory language in determining express preemption claims; only if statutorily-based arguments opposing preemption are "just as plausible" as those supporting preemption does Court ever turn to presumptions disfavoring preemption). In cases raising *implied conflict* preemption issues, the courts look to statutory language (and steps taken by federal agencies to implement their statutory authority) to determine the full purposes and objectives of Congress -- and then determine whether the challenged state law stands as an obstacle to the accomplishment and execution of those purposes and objectives. *See, e.g., Geier*, 529 U.S. at 871-72.[4]

B. The Presumption Against Preemption Is of Relatively Recent Origin and Lacks Any Constitutional Underpinnings

That Congress possesses unbridled authority to preempt state laws of which it disapproves – provided only that it is acting pursuant to its Article I powers – is made plain by the Supremacy Clause, which provides in relevant part:

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[4] While *Geier* did not absolutely rule out the possibility that Congress in a specific instance might not intend to preempt a state law that stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives, it held that Congress should generally be deemed to have intended to preempt such state laws in the absence of specific evidence to the contrary – even when (as in *Geier* but unlike in this case) the relevant federal statute includes a "savings" clause that explicitly preserves common law liability claims. *Id.*

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

Nothing in the language of the Supremacy Clause suggests any federalism-based limitations on the power of Congress (when operating within its Article I sphere) to displace state-law regulation, even when the displaced law concerns a field which the States have traditionally occupied. The Court decided numerous preemption cases throughout its first 150 years – often involving fields that had previously been occupied only by the States – without once suggesting that federal statutes should be presumed not to preempt state law in the absence of a clear statement to that effect. *See, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Virginia law preempted by conflicting provisions of 1783 peace treaty between the United States and Great Britain; no suggestion that terms of treaty should be narrowly construed to avoid preemption); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 343-344 (1816) (efforts by Virginia courts to resist enforcement of U.S. Supreme Court orders – regarding title to Virginia real estate – preempted under Supremacy Clause). In an 1824 decision striking down a New York law adopted in the exercise of its police powers on the grounds that the New York law conflicted with congressional legislation, the Court said, "It will be immaterial whether those laws were passed . . . in virtue of a power to regulate [the several States'] domestic trade and police. . . .

[T]he acts of [New York] must yield to the law of Congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210 (1824). By virtue of the Supremacy Clause, state law is preempted under such circumstances, regardless that it was "enacted in the execution of acknowledged state power." *Id.* at 211.

Indeed, the final phrase in the Supremacy Clause ("any Thing in the Constitution or Laws of any State to the Contrary notwithstanding") strongly suggests that the Framers sought affirmatively to avoid any presumption against preemption. Such clauses, often referred to as "*non obstante* clauses,"[5] were regularly inserted into 18th Century legal documents. Under a legal doctrine familiar to 18th century practitioners – the presumption against implied repeals – courts might have been reluctant to declare a state law preempted even when it was in direct conflict with a statute adopted by Congress. "Applying the normal presumption against implied repeals, they might strain the federal law's meaning in order to harmonize it with state law" and thereby avoid a finding that the state law was preempted. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 255 (2000). The *non obstante* clause was added to the end of the Supremacy Clause to make clear that the presumption against implied repeals should not protect state laws from being struck down on federal preemption grounds. As Prof. Nelson explained:

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[5] "*Non obstante*" is a Latin phrase meaning "notwithstanding." Black's Law Dictionary (4th ed. 1968) defines the phrase as encompassing "Words anciently used in public and private instruments, intended to preclude in advance, any interpretation contrary to certain declared objects or purposes."

> [T]he final part of the Supremacy Clause is a global *non obstante* provision. This provision established a rule of construction telling courts not to apply the traditional presumption against implied repeals in determining whether federal law contradicts state law. Thus, even if a federal statute or treaty did not itself contain a *non obstante* provision, the Supremacy Clause told courts not to strain its meaning in order to harmonize it with state law. As Daniel Webster asserted in his argument in *Gibbons v. Ogden*, "the presence or absence of a *non obstante* clause[] cannot affect the extent or operation of the act of Congress," because "the laws of Congress need no *non obstante* clause."

Id.

The proceedings of the Constitutional Convention provide further support for a conclusion that the Framers sought affirmatively to avoid any presumption against preemption. Early in the Convention, Governor Edmund Randolph proposed fifteen resolutions, primarily drafted by James Madison, which became known as the Virginia Plan. The sixth resolution dealt generally with the affirmative powers of Congress – the functional equivalent under the Virginia Plan of the Constitution's Art. I, § 8. 1 *The Records of the Federal Convention of 1787*, at 21 (M. Farrand ed., rev. ed. 1937). Among the powers allocated to Congress under this resolution was the authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." *See id.* In other words, under this proposal, Congress would be required to declare whether

conflicting state law would be preempted.

In response to the Virginia Plan, William Patterson proposed nine alternative resolutions which became known as the New Jersey Plan or the Small State Plan. The sixth of Patterson's resolutions was in substance and concept, if not in form, similar to the current language of the Supremacy Clause. *See id.* at 245. Patterson's sixth resolution differed from Randolph's power to negative state laws in that the former was not proposed as one of Congress's affirmative powers. All such powers under the Small State Plan were proposed in Patterson's second resolution. *See id.* at 243. The supremacy concept was instead offered as a separate resolution, distinct from legislative powers and listed after the fifth resolution establishing the federal judiciary. *See id.* at 244. That is, a judicial determination that a State's laws were preempted by federal law would not need to await adoption of a congressional resolution to that effect.

Resolution of the competing proposals came when the Convention debated the report of the Committee of the Whole. As he had done throughout the debates, *see id.* at 169 (June 8, 1787), 317 (June 19, 1787), James Madison warned against the "propensity of the States to pursue their particular interests in opposition to the general interest" and advocated "the negative on the laws of the States as essential to the efficacy & security of the Genl. Govt." 2 *The Records of the Federal Constitutional Convention of 1787*, at 27 (M. Farrand ed., rev. ed. 1937). Roger Sherman responded, "Such a power involves a wrong principle, to wit, that a law of a State contrary to the articles of the Union, would if not negatived, be valid & operative." *Id.* Randolph's

proposal for a legislative power to negative state laws was thereafter defeated by a vote of three to seven. *See id.*

The Convention then immediately adopted by unanimous consent an alternative proposal by Luther Martin, a proposal in substance similar to Patterson's sixth resolution and in form almost identical to the current Supremacy Clause. *See id.* at 28-29. Consistent with the structure of Patterson's plan, the adopted text that became the Supremacy Clause does not mention any affirmative authority of Congress to repeal state law, but rather made federal law supreme over conflicting state law in all instances. *See* U.S. Const., art. VI, cl. 2; *see also* The Federalist No. 78. In sum, the drafting history of the Supremacy Clause indicates that the Framers rejected the notion that Congress should be presumed not to have intended to preempt state law in the absence of a clear statement to that effect.

Not until 1947 did the Court first suggest that courts should employ an "assumption" that Congress did not intend to preempt the States' exercise of their police powers "unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. Not until the late 1970s was that "assumption" elevated to the status of a "presumption," a term first used in two cases in which the Court invoked the presumption against preemption to reject field preemption claims – claims that preemptive intent should be inferred based solely on the extensive nature of the federal regulation. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-18 (1985).

Over the past 20 years, the Court has invoked the "presumption against preemption" with some frequency, but it has done so on an inconsistent basis. Particularly in recent years, numerous decisions finding that Congress intended to preempt state law have made no reference to the presumption, even when dissenting justices have complained that the presumption should have led the court to rule against preemption. Decisions lacking any discussion of the presumption against preemption include decisions in both implied conflict preemption cases[6] and express preemption cases.[7]

Given the recent origins of the presumption against preemption, its inconsistent application by the

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[6] *See, e.g., Geier*, 529 U.S. 861; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

[7] *See, e.g., Riegel*, 128 S. Ct. 999; *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008). *Rowe* held that a Maine statute was expressly preempted by a provision of the Federal Aviation Administration Act of 1994, 49 U.S.C. § 14501(c)(1), without mentioning a presumption against preemption, despite acknowledging "the importance of [Maine's] public health objective." *Id.* at 996.

The failure to mention the presumption was particularly striking in *Riegel*, which held that the Medical Devices Amendments of 1976 (MDA), 21 U.S.C. § 360c *et seq.*, expressly preempted state-law product liability suits against the manufacturers of medical devices whose design had been approved by FDA pursuant to that agency's PMA approval process. That was in sharp contrast to the Court's opinion 10 years earlier in *Lohr*, in which the presumption against preemption figured prominently in the Court's holding that the MDA did *not* preempt product liability suits involving medical devices that had reached the market under an alternative FDA approval process. *Lohr*, 518 U.S. 470.

Court, the absence of any constitutional underpinnings for the presumption, and the absence of any evidence that Congress has adopted legislation in reliance on the presumption, *stare decisis* concerns should not cause the Court to refrain from re-examining the continued viability of the presumption.

C. The Presumption Against Preemption Is Based on a Faulty Assumption Regarding How Congress Operates and Has Led to Widespread Confusion Among the Lower Courts

Despite the absence of any constitutional underpinnings for the presumption against preemption, it could still be defended as a rule of statutory construction if there were reason to believe that, in cases in which direct evidence of congressional intent is limited, it provided a reasonably accurate appraisal of what Congress is likely to have intended. But there is no reason for such a belief.

The Court has on occasion explained that the presumption is based on the Court's belief that Congress is reluctant to displace the States' regulatory authority in areas traditionally subject to such authority. Thus, for example, in an ERISA case, the Court held that Congress had not intended to preempt longstanding Massachusetts labor laws – based on a presumption that Congress would be reluctant to take such action given that "the States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, health, comfort, and quiet of all persons.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *Slaughter-House*

Cases, 83 U.S. (16 Wall.) 36, 62 (1873)). The Court held that given that likely reluctance, it was reasonable to presume that Congress had not intended to preempt the laws in question in the absence of an explicit statement to that effect in the ERISA statute or its legislative history. *Id.*

The Court's assumption that Congress is reluctant to preempt state laws touching on the "protection of the lives, health, comfort, and quiet of all persons" has not been borne out by recent history. The history of the modern administrative state has been marked by a steady expansion of federal regulatory authority into areas previously reserved to the States. The long list of recent federal laws that not only have expanded federal regulatory authority but also have included provisions explicitly preempting state regulation include, to name just a few, the Medical Devices Amendments of 1976, 21 U.S.C. § 360c *et seq.*; the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*; the Federal Boat Safety Act, 46 U.S.C. § 4301 *et seq.*; and the Labeling Act, 15 U.S.C. § 1331 *et seq.*[8]

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[8] Other federal statutes expressly preempting areas of state and local law include 2 U.S.C. § 453 (Federal Election Campaign Act); 7 U.S.C. § 136v (Federal Insecticide, Fungicide, and Rodenticide Act); 7 U.S.C. § 228c (Packers and Stockyard Act); 7 U.S.C. § 1626h (Agricultural Marketing Act); 7 U.S.C. § 7756 (Plant Protection Act); 12 U.S.C. § 484a (National Bank Act); 15 U.S.C. § 1261 note (Federal Hazardous Substances Act); 15 U.S.C. § 1278 note (Child Safety Protection Act); 15 U.S.C. § 1461 (Fair Packaging and Labeling Act); 15 U.S.C. § 2075(a) (Consumer Products Safety Act); 15 U.S.C. § 2311(c) (Magnuson-Moss Warranty Act); 15 U.S.C. § 6701 note (Terrorism Risk Insurance Act of 2002); 21 U.S.C. § 467e (Poultry Products Inspection Act); 21 U.S.C. § 678 (Federal Meat Inspection Act); 21 U.S.C. § 1052

In light of Congress's demonstrated willingness to expand its exclusive regulatory authority into areas traditionally the province of regulation by the States, the presumption against preemption cannot be justified as an accurate predictor of congressional intent. As Justice Scalia has argued, "Under the Supremacy Clause, our job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part). That meaning is best determined by examining the language and context of the federal statute, not by resorting to presumptions based on guesses regarding congressional willingness to supersede the historic police powers of the States.

Moreover, the Court's use of the presumption against preemption has not provided helpful guidance to the lower courts, nor served to promote uniformity in decision-making. The principal difficulty is that the presumption is inherently vague. The *Cipollone* plurality directed lower courts, "in light of the strong presumption against preemption," to "fairly but . . . narrowly construe the precise language" of federal

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(Egg Products Inspection Act); 29 U.S.C. § 667 (Occupational Safety and Health Act); 29 U.S.C. § 1144(a) (Employee Retirement Income Security Act ("ERISA")); 42 U.S.C. §§ 221(n)(2), 2014(hh) (Price-Anderson Act); 42 U.S.C. §§ 7543(a), 7573 (Clean Air Act); 42 U.S.C. § 14502 (Volunteer Protection Act of 1997); 49 U.S.C. § 5125 (Hazardous Materials Transportation Uniform Safety Act); 49 U.S.C. § 14501(c) (Federal Aviation Administration Authorization Act); 49 U.S.C. §§ 20301-20306 (Safety Appliance Acts); 49 U.S.C. § 3114(a) (Surface Transportation Assistance Act); 49 U.S.C. § 40101 note (General Aviation Revitalization Act); and 49 U.S.C. App. § 1305(a)(1) (Airline Deregulation Act of 1978).

preemption statutes. *Cipollone*, 505 U.S. at 524 (plurality opinion). But what exactly is a "narrow" construction of a federal preemption statute if it is not based solely on the statutory language? The Court has not specified, leaving lower courts in wild disarray regarding the strength to be afforded the presumption. Some courts have viewed the presumption as little more than a tie-breaker, to be employed only in those rare instances where the evidence of congressional intent is truly in equipoise. Other courts have afforded the presumption almost dispositive weight, presuming that the challenged state law is not preempted if there is any ambiguity whatsoever regarding congressional intent.[9]

The disarray among the lower courts is well illustrated by the implied conflict preemption issue raised by a case scheduled for argument before the Court this coming fall, *Wyeth v. Levine*, No. 06-1294. The case raises the issue of whether state-law failure-to-

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[9] Indeed, Justice Scalia has questioned the wisdom of ever using "preferential rules and presumptions" in statutory construction cases, explaining:

> It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. . . . [W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.

Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28-29 (1997).

warn claims against a drug manufacturer are impliedly preempted by federal law because the Food and Drug Administration has mandated the precise warnings that must appear on FDA-approved pharmaceutical products. The scores of lower courts that have already addressed that issue are evenly divided between those finding for preemption and those finding against preemption. Interestingly, in virtually every decision finding against preemption, the court relied heavily on the presumption against preemption, while the presumption is barely discussed in decisions finding in favor of preemption. *Compare, e.g., Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006) (failure-to-warn claims against pharmaceutical manufacturer are impliedly preempted; little mention is made of the presumption against preemption), with *McNellis v. Pfizer, Inc.*, 2006 U.S. LEXIS 70844 (D.N.J. 2006) (failure-to-warn claims against pharmaceutical manufacturer are not impliedly preempted, based largely on the presumption against preemption).

Perhaps the starkest example of the presumption against preemption being granted dispositive significance is the Second Circuit's recent decision in *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), *aff'd by equally divided court sub nom., Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008). In 2001, this Court ruled that state-law fraud-on-the-FDA claims are impliedly preempted by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq. Buckman*, 531 U.S. 341. *Desiano* raised a virtually indistinguishable fraud-on-the-FDA claim. The Second Circuit nonetheless rejected the defendants' preemption claim, finding that *Buckman* was distinguishable based primarily on the presumption against preemption. While this Court had

deemed the presumption inapplicable in *Buckman*, the Second Circuit held that the presumption *was* applicable in *Desiano*. Thus, even though both cases imposed similar obstacles to the accomplishment of the full purposes and objectives of Congress, the cases reached diametrically opposite results based almost exclusively on the fact that the presumption against preemption was deemed applicable in one case but not the other.

The inability of the lower courts to apply the presumption against preemption in a consistent manner has been a principal reason that the presumption has been subjected to substantial criticism within the legal community. *See, e.g.*, Sharkey, *supra* at 4; Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175 (2000). A variety of tort reform organizations in recent years have filed *amicus* briefs with the Court, calling into question the legitimacy of the presumption. In addition to WLF (which filed such briefs both in this case and *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008)), the Chamber of Commerce of the United States (in *Warner-Lambert, Geier*, and *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007)), and the Products Liability Advisory Council, Inc. (in *Locke*) have both vigorously challenged the presumption. The failure of the presumption to provide any meaningful guidance to the lower courts, combined with its sporadic application in this Court and its inability to improve courts' ability to discern congressional intent, all suggest that the time has come for the Court to abandon the presumption and instead promote reliance on more traditional rules of statutory construction when attempting to discern congressional intent.

II. THE PRESUMPTION AGAINST PREEMPTION IS WHOLLY INAPPLICABLE TO CASES OF THIS SORT

The Court ought to make clear that, whatever the continued viability of the presumption against preemption under other circumstances, it is wholly inapplicable to cases of this sort. Petitioners allege that the Labeling Act's preemption provision, 15 U.S.C. § 1334(b), expressly preempts Good's claims. They further allege that those claims are impliedly preempted by federal law because they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Petitioners deserve to have their preemption arguments decided based on the best available evidence of congressional intent, not based on a presumption that bears no apparent relation to congressional intent.

It is noteworthy that the Court first articulated the presumption against preemption in cases involving field preemption claims. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Field preemption is said to occur:

> [I]f a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. *Rice v. Santa Fe*

Elevator Corp., 331 U.S. 218, 230 (1947).

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

The Court has cautioned, however, that state law should not be deemed preempted simply because the federal regulation is extensive. There are numerous fields in which federal regulation is extensive yet it is well understood that the federal regulatory scheme merely establishes a floor and that States are free to build an additional layer of regulation on top of the federal regulation. Field preemption can be inferred only when the federal regulation becomes "so pervasive" or "so dominant" that there simply is no room for supplemental regulation by the States.

Many businesses subject to extensive federal regulation are, not surprisingly, eager to avoid supplemental regulation by the States; they not infrequently raise field preemption claims in any effort to avoid such supplemental regulation. The earliest decisions articulating a "presumption against preemption" – such as *Jones v. Rath Packing* – all involved field preemption claims. They cautioned that evidence of extensive federal regulation, without more, is insufficient to establish a field preemption claim. Accordingly, the presumption against preemption can perhaps best be understood as requiring plaintiffs to produce some affirmative evidence that Congress consciously sought to preempt state regulation – evidence above and beyond the weak inference of intent that can be drawn from evidence of extensive regulation. In such cases, the presumption can serve as a useful reminder that there is little reason to draw an inference

of an intent to preempt state regulation based solely on the extensive nature of federal regulation in a particular field.

That rationale has no application in conflict preemption cases; there is indeed good reason to assume that Congress would seek to preempt state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. As the Court explained in *Geier*, except for the very rare case in which there is evidence that Congress intended to permit state regulation that tends to undermine Congress's purposes and objectives, the Court will assume that Congress does not so intend:

> Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates. . . . Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary preemption principles, seeks to protect.

Geier, 529 U.S. at 871-72.

Geier thus indicates that "ordinary preemption principles," not the presumption against preemption, should apply to Petitioners' implied conflict preemption

claims. If Petitioners can demonstrate that Good's state-law claim stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress with respect to statements regarding tar and nicotine yields in cigarette advertising, then Petitioners are entitled to dismissal based on implied conflict preemption and without resort to any presumptions.

For similar reasons, the rationale outlined above for applying a presumption in field preemption cases is also of little or no relevance to Petitioners' express preemption claims. When Congress has included an express preemption provision in a statute, the actual language of the statute is a much better guide to Congress's intended meaning than any presumptions about that intent.

The presumption against preemption is inapplicable here for the additional reason that cigarette advertising and labeling – as well as efforts to develop low-tar and nicotine cigarettes that pose a reduced health risk to smokers – have long been subject to extensive federal regulation. As Petitioners' brief makes clear, that history of federal regulation long preceded the adoption of the Labeling Act's current preemption provision in 1969. Pet. Br. 2-12. Given that history, there is no reason to assume that Congress, when it adopted the express preemption provision in 1969, would have been reluctant to displace state regulation of a field in which for some time federal regulation had been dominant. The Court recognized in *Buckman* that invocation of a presumption against preemption is inappropriate in a field already subject to extensive regulation by the federal government. *Buckman*, 531

U.S. at 347-48. Moreover, the FTC's extensive oversight of this field means that a finding of preemption will not leave the cigarette industry unpoliced.

Furthermore, Congress has made abundantly clear – as set forth in 15 U.S.C. § 1331 – that a principal reason for adopting the Labeling Act was to ensure uniform regulation of the cigarette industry throughout the nation. A finding that Good's claims are not preempted would threaten to undermine that goal of uniformity. Accordingly, application of a presumption against preemption makes little sense when, through its adoption of the Labeling Act, Congress has made clear a strong desire to ensure uniform regulation.

Finally, a presumption against preemption is inappropriate when, as here, the state laws at issue are duties imposed under the common law. There is far less reason to presume a congressional reluctance to displace state common law (which is established on a case-by-case basis by factfinders not required, when deciding whether to impose liability in a particular case, to weigh the costs and benefits of its actions to society as a whole) than to displace state law established by state officials acting through state administrative or legislative lawmaking processes. As the Court explained in *Riegel*:

> One would think that tort law, applied by juries under a negligence or strict liability standard, is less deserving of preservation [than is state regulatory law]. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which,

> along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

Riegel, 128 S. Ct. at 1008.

In sum, even if the Court determines that the presumption against preemption should be preserved under some circumstances, it has no applicability here in light of the facts of this case.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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Dated: April 7, 2008